*State v. Tolias**

I. INTRODUCTION

There are few issues in the field of alternative dispute resolution (ADR) as pressing and controversial as conflicts of interest and the use of ADR in criminal cases. These two distinct issues converged in a recent Washington state court case, *State v. Tolias*. *Tolias* raises difficult ethical questions that must be addressed not only by those in the ADR community, but by the legal profession more generally, as the formal distinction between traditional legal practice and quasi-legal alternative dispute resolution erodes.

II. FACTS, PROCEDURAL HISTORY, AND HOLDINGS

In October 1990, defendant Manuel Tolias and Sylvia Strang moved into a home located in an agricultural community near Tieton, Washington in Yakima County.[1] Their neighbors, Ben and Earlene Barnes, asked the defendant for permission to use an easement over his property so that the Barneses could load and unload bins during the apple harvest.[2] The defendant granted the Barneses permission to use the easement.[3]

In their use of the easement, the Barneses caused damage to defendant's property.[4] Accordingly, the defendant revoked permission to use the easement.[5] The relationship between the defendant and his neighbors steadily deteriorated. In the months that followed defendant's revocation of the easement, the defendant and the Barneses were involved in numerous verbal confrontations.[6] The record indicates that most, if not all, of these confrontations were instigated by the Barneses.[7] The Barneses' acts of aggression included their continued use of the easement without permission, vandalization of the defendant's property, and verbal threats directed at the defendant and Ms. Strang.[8]

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* 954 P.2d 907 (Wash. 1998).

[1] *See* State v. Tolias, 954 P.2d 907, 908 (Wash. 1998).

[2] *See id.*

[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] *See id.*

[7] *See id.*

[8] *See id.*

In May 1993, the defendant filed a report with the local sheriff and also made an appointment to speak with Deputy Prosecuting Attorney James Swanner.[9] Defendant met with Mr. Swanner on June 11, at which time Mr. Swanner informed the defendant that his case would be difficult to prosecute but that he would look into the situation and get back to the defendant.[10] A few weeks later, the defendant contacted Mr. Swanner and learned that Mr. Swanner had spoken with another set of neighbors, the Ferneliuses, who were also being harassed by the Barneses.[11] Mr. Swanner gave the defendant's name to the Ferneliuses, who later contacted the defendant and shared their story of harassment with the defendant.[12]

On July 26, 1993, while the Barneses were once again crossing the defendant's property without permission, the defendant assaulted both Mr. and Mrs. Barnes.[13] Three months before trial, the defendant moved to recuse the Yakima County Prosecutor's office because Deputy Prosecutor Swanner was named as a witness.[14] The trial court denied this motion.[15]

While the purpose of the motion was to disqualify the Yakima County Prosecutor's office due to Mr. Swanner's involvement, the motion also stated in passing that, following the filing of criminal charges and a related civil action, Jeffrey Sullivan, the elected prosecutor, acted as a "mediator."[16] The defendant stated that several times Mr. Sullivan "met with all of the parties at their homes . . . [to discuss] the case and the wider dispute."[17] At the hearing on the defendant's motion to recuse, there was no argument as to the nature or propriety of the alleged efforts at mediation.[18] Indeed, the only mention of Mr. Sullivan's "mediation" efforts, other than that in defendant's written motion, was a passing comment from defense counsel thanking Mr. Sullivan for his unsuccessful

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[9] *See id.*

[10] *See id.*

[11] *See id.*

[12] *See id.* at 909.

[13] *See id.*

[14] *See id.*

[15] *See id.*

[16] *See id.*

[17] *Id.*

[18] *See id.*

mediation efforts.[19] Mr. Sullivan tried the case against the defendant, who was found guilty of second degree assault on Mr. Barnes.[20]

A Washington court of appeals reversed the defendant's conviction, holding that the trial court should have granted defendant's motion to recuse the Yakima County Prosecutor's office because Mr. Sullivan's prosecution of the defendant violated the appearance of fairness doctrine.[21] The court of appeals concluded that Mr. Sullivan did in fact act as a mediator of a neighborhood dispute between the defendant, the Barneses, and the Ferneliuses.[22]

In the court of appeals' view, Mr. Sullivan should have been precluded from prosecuting the case after attempting to resolve it by mediation.[23] Pointing to Washington's Rule of Professional Conduct 1.12(a),[24] which governs the conduct of lawyers who act as mediators, the court of appeals stressed that the crux of the problem with a lawyer's prior mediation role is the confidential nature of the mediator's activities.[25]

The court of appeals' holding was broad. According to the court, "[w]hen a prosecuting attorney engages in mediation . . . his or her entire office should be disqualified from participating in subsequent prosecution unless 'that prosecuting attorney separates himself or herself from all

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[19] *See id.*

[20] *See id.*

[21] *See id.* (citing State v. Tolias, 929 P.2d 1178 (Wash. Ct. App. 1997)).

[22] *See Tolias*, 929 P.2d at 1180.

[23] *See id.* at 1181.

[24] Rule 1.12(a) provides in pertinent part: "[A] lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator or law clerk to such a person, unless all parties to the proceeding consent after disclosure." WASHINGTON RULES OF PROFESSIONAL CONDUCT Rule 1.12(a) (1998).

[25] *See Tolias*, 929 P.2d at 1180 (citing Poly Software Int'l, Inc. v. Su, 880 F. Supp. 1487, 1494 (D. Utah 1995)).

> The mediator is not merely charged with being impartial, but with receiving and preserving confidences in much the same manner as the client's attorney. In fact, the success of mediation depends largely on the willingness of the parties to freely disclose their intentions, desires, and the strengths and weaknesses of their case; and upon the ability of the mediator to maintain a neutral position while carefully preserving the confidences that have been revealed.

Id.

connection with the case and delegates full authority and control over the case to a deputy prosecuting attorney.'"[26]

The Supreme Court of Washington reversed the court of appeals without addressing the merits of the case. There were two related bases for the supreme court's decision. The first was the fact that, in the supreme court's view, Mr. Sullivan's alleged mediation efforts, or the appearance of unfairness created thereby, were not issues raised at trial and accordingly were not cognizable on appeal.[27] The second basis for the supreme court's reversal was the dearth of substantive information in the record about the nature or context of Mr. Sullivan's alleged mediation efforts.[28] According to the supreme court, it was impossible to determine from the record "whether Mr. Sullivan truly acted as a 'mediator' or was engaging in discovery or plea negotiations in his capacity as a prosecuting attorney."[29]

III. DISCUSSION

The *Tolias* decisions involve two important ethical issues—conflicts of interest in ADR and the use of ADR to resolve criminal cases. These issues are of considerable contemporary relevance. As Robert McKay notes, "the expanding scope and use of [ADR has made] the standards of ethics applicable to ADR a matter of ever-growing concern."[30]

A. *Conflicts of Interest in ADR*

The Washington Supreme Court's decision in *Tolias* said little with respect to the critical issues presented. The supreme court's reversal of the

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[26] *Tolias*, 929 P.2d at 1181–1182 (quoting State v. Stenger, 760 P.2d 357, 360 (Wash. 1988)).

[27] *See* State v. Tolias, 954 P.2d 907, 910 (Wash. 1998).

[28] *See id.* at 910–911. Defense counsel's passing reference to Mr. Sullivan's mediation efforts, which were made by defense counsel during the pretrial hearing on defendant's motion to recuse, could not form the basis for upholding the court of appeals' decision. In its opinion, the supreme court noted that even if this passing mention of mediation were sufficient to raise the issue at the trial court level, because the statement nevertheless concerned matters outside the record, it could not be considered on appeal. *See id.* at 911. The supreme court stressed that it has to be able to determine the merits from the record before it. *See id.*

[29] *Id.* at 911.

[30] Robert B. McKay, *Ethical Considerations in Alternative Dispute Resolution*, ARB. J., Mar. 1990, at 15, 15.

court of appeals was based exclusively on procedural grounds. It remains an open question, then, whether the court of appeals is correct that ethical considerations preclude a prosecutor who engages in mediation from subsequently representing the state in a criminal action brought against a party to that mediation, at least as to matters relating to the subject matter of the mediation. Attention must therefore be directed at the decision of the court of appeals.

The court of appeals' decision was grounded in that court's equating the practice of ADR with legal practice.[31] The court of appeals' decision is one of several cases in recent years that have applied the legal profession's conflicts of interest rules to ADR.[32] Applying conflicts rules adapted for traditional legal practice, the court held that Mr. Sullivan's role as a mediator created an attorney-client-like relationship between the prosecutor and the accused.[33] The court of appeals' adoption of the legal profession's conflicts rules led to that court's application of a kind of firm-taint rule to the prosecutor's office, disqualifying the entire office in the absence of adequate conflicts screening.[34]

How one defines the roles of participants in ADR will govern the ethical rules applied to these individuals.[35] If, as the court of appeals in *Tolias* believed, the practice of ADR is properly equated with legal practice, it makes sense to apply, by analogy, the Model Rules of Professional Conduct or Judicial Code of Professional Responsibility. Some, however, have expressed concern about this simplistic application of the lawyer's conflicts rules to ADR, disagreeing first and foremost with the underlying assumption that the practice of ADR constitutes the practice of

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[31] The court of appeals' equation of ADR with legal practice garners some scholarly support. *See, e.g.*, Geoffrey C. Hazard, Jr., *When ADR Is Ancillary to a Legal Practice, Law Firms Must Confront Conflicts Issues*, 12 ALTERNATIVES TO HIGH COSTS LITIG. 147 (1994).

[32] *See, e.g.*, Poly Software Int'l, Inc. v. Su, 880 F. Supp. 1487, 1494 (D. Utah 1995) (holding that an attorney who serves as a mediator cannot subsequently represent anyone in a "substantially factually related" matter without the consent of the original parties); Cho v. Superior Court, 45 Cal. Rptr. 2d 863, 863–864 (Cal. Ct. App. 1995) (disqualifying an entire law firm when a judge, upon retirement, joined the law firm which represented a party in a matter in which the judge attempted settlement using mediation-like techniques).

[33] *See supra* notes 24–26 and accompanying text.

[34] *See supra* note 26 and accompanying text.

[35] *See* Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 421 (1997).

law.[36] However, as of today, alternatives to the lawyer's rules of professional responsibility have not been offered and the secondary literature is largely limited to calls for the development of some code of ethics drafted exclusively for ADR.

Professor Carrie Menkel-Meadow, for instance, notes that the precise solution to ethical dilemmas in ADR is not clear. However, she does suggest that while early cases beginning to deal with conflicts in the practice of ADR reveal that analogies to the legal profession's rules may aid decisionmaking, eventually courts will have to grapple with the fact that the underlying principles of lawyer-representation conflicts rules do not necessarily match those of third-party neutrals involved in ADR, especially where, as in *Tolias*, particular individuals switch roles.[37] Similarly, Michael Moffitt urges that "[t]he legal profession's standards of conduct, which are based primarily on an attorney-client relationship in an adversarial or adjudicative setting, do not specifically address many of the issues faced by attorney-mediators who do not have 'clients' in the traditional sense."[38]

To some extent, Menkel-Meadow and Moffitt are correct in their suggestion that courts like *Tolias* are remiss in applying the legal profession's conflicts rules to ADR. There are fundamental differences between legal practice and ADR that cannot be ignored. The lawyer-representation conflicts rules are grounded in certain values, namely, client loyalty and confidentiality. As Menkel-Meadow suggests, these values may have little place in ADR. There is a fundamental difference in the roles played by neutrals and lawyer-advocates that courts are remiss in ignoring. A lawyer is an advocate who must zealously advance his client's interests within the bounds of the law. A neutral, on the other hand, is just that; he is, by definition, "untainted by interest or bias in behalf of or against any party."[39]

Given the very different roles performed by neutrals and lawyers, it is perhaps unreasonable to impose upon neutrals the ethical rules of the legal profession and to attribute to parties involved in ADR the same

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[36] *See, e.g., id.*

[37] *See id.* at 339-340.

[38] Michael Moffitt, *Loyalty, Confidentiality and Attorney-Mediators: Professional Responsibility in Cross-Profession Practice*, 1 HARV. NEGOTIATION L. REV. 203, 204 (1996); *see also* Alison Smiley, *Professional Codes and Neutral Lawyering: An Emerging Standard Governing Nonrepresentational Attorney Mediation*, 7 GEO. J. LEGAL ETHICS 213, 217-222 (1993).

[39] McKay, *supra* note 30, at 23.

expectations held by lawyers' clients. Do participants in ADR, for example, really expect their neutrals to exhibit to them the same kind of loyalty that characterizes the attorney-client relationship when the neutral-participant relationship exhibits few of the trappings of an attorney-client relationship?

Therefore, on one level it is certainly true that the analogy between the conflicts problems arising in ADR and those arising in legal practice is anything but perfect. Nevertheless, there is a good reason why courts like *Tolias* are so attracted to the lawyer conflicts rules; it has to do with the issue of confidentiality. Confidentiality is an important, indeed critical, ingredient of ADR, especially mediation.[40] Although the lawyer and the mediator have distinct roles, neither can effectively perform their respective roles without guaranteeing that what is said in their presence will remain confidential. That confidentiality is, of course, destroyed, or at least put at risk, when the mediator or lawyer proceeds to represent interests adverse to the client or ADR participant. In the context of confidentiality, the analogy between the lawyer and neutral is nearly perfect and it becomes clear why courts like *Tolias* are so attracted to the legal profession's conflicts rules.

If, at some point, ethical rules are crafted exclusively for attorney-neutrals, these rules will have to address the issue of confidentiality. Unless the importance of confidentiality is to be discounted in the context of ADR, reliance on the legal profession's strict disqualification rules may well be unavoidable.

At first blush, the solution to fact patterns like that arising in *Tolias* is simple: to prohibit prosecutors from engaging in mediation or, alternatively, to institute the complicated and potentially disruptive screening mechanisms suggested by the court of appeals. The latter solution is fairly straight-forward and many law firms in the private sector have successfully instituted screening mechanisms to avoid conflicts problems. The obvious drawback with such an approach is that the prosecutor most familiar with the case is prohibited from prosecuting it. In the criminal law context, this may be particularly undesirable as the implications for the general public of an unsuccessful criminal prosecution are always higher than when private litigation is involved. The stakes, however, can be kept

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[40] The importance of confidentiality to the success of ADR is widely accepted. *See* 2 EDWARD A. DAUER, MANUAL OF DISPUTE RESOLUTION: ADR LAW AND PRACTICE § 22.01 (1994) (noting that confidentiality is both an advantage and a requisite of the use of ADR); JOHN H. WILKINSON ET AL., DONOVAN LEISURE NEWTON & IRVIN ADR PRACTICE BOOK § 26A.2, at 304 (Supp. 1999) (noting that "[c]onfidentiality is one of the most attractive qualities of ADR"); McKay, *supra* note 30, at 23.

at a reasonable level by keeping the most egregious criminal offenders out of ADR.

As for simply barring prosecutors from engaging in ADR, this solution may be easier said than done. "Defining what processes constitute ADR has always been difficult."[41] There is, therefore, a potential slippery slope. Although the precise nature of Mr. Sullivan's "mediation efforts" in *Tolias* was unclear, it appeared to involve some attempt at facilitating an understanding between the defendant, the Barneses, and other neighbors.[42] This probably comes close to mediation in its purest sense. But ADR, of which mediation is a form, is a fluid concept, and who is to say that, with the assistance of clever defense attorneys, ADR could not come to embrace, for example, plea bargains with nontraditional sanctions like restitution?

While it may not be *likely* that cases like *Tolias* foreshadow a trip down a slippery slope of prosecutorial disqualification, it is at least a *possibility*. Where, as here, the consequences are so grave—disqualification of an entire prosecutor's office—a little hypersensitivity is a good thing. What is needed most is not independent conflicts rules for ADR, although these would be helpful, but rather a clear definition of what is and what is not mediation, and this definition must be clear to everyone involved in the legal process—prosecutors, courts, defendants, and defense counsel. Each must be on the same page so to speak. Once this definition is in place, we can at least learn to live with and control, through screening devices or otherwise, the consequences of employing ADR in the criminal justice process.

B. *The Use of ADR in Criminal Cases*

The *Tolias* decisions give tacit approval to the use of mediation in criminal cases. The use of ADR in the criminal law context is among the most controversial uses of ADR. Although the use of ADR within the criminal justice system has received little attention, its use is widespread.[43]

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[41] Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Resolution Professionals*, 44 UCLA L. REV. 1871, 1885 (1997).

[42] *See* State v. Tolias, 954 P.2d 907, 907–908 (Wash. 1998).

[43] *See* Terenia Urban Guill, *A Framework for Understanding and Using ADR*, 71 TUL. L. REV. 1313, 1327 (1997). In 1993 alone, victim-offender mediation programs dealt with 16,500 criminal cases. *See* PACT INST. OF JUSTICE, VICTIM-OFFENDER RECONCILIATION PROGRAM DIRECTORY 1 (Harriet Fagan & John Gehm eds., 1993). In

Criminal law has attempted to use mediation in two ways.[44] First, victim-offender mediation (VOM) programs attempt to bring the parties most directly affected by a crime together in order to provide each party with a perspective of the criminal act they would not otherwise have.[45] Some suggest that VOM offers the possibility of more flexible and adaptive punishments through, for example, restitutionary and compensatory schemes.[46] VOM is also promoted as a channel for remorse, acknowledgment, and reconciliation.[47]

The second way in which ADR has been used in criminal law is in community dispute resolution programs.[48] These programs attempt to remove minor disputes from the court system.[49] Typically, crimes such as simple assault, misdemeanor larceny, and criminal trespass are channeled into community mediation programs where, in lieu of formal prosecution, they are mediated.[50]

Although the use of ADR in criminal cases can potentially alleviate crowded criminal dockets and can have a therapeutic effect upon both victims and offenders, the use of ADR in these cases may be quite problematic.[51] Criminal law ADR, especially VOM, has garnered much criticism. Much of this criticism is grounded in concerns about power

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1994, there were approximately 125 such programs in the United States and Canada combined. *See* Sheila D. Porter & David B. Ells, *Mediation Meets the Criminal Justice System*, 23 COLO. LAW. 2521, 2521 (1994).

[44] *See* Stephen S. Cook, *Mediation as an Alternative to Probation Revocation Proceedings*, FED. PROBATION, Dec. 1995, at 48, 48.

[45] *See id.* Because the record in the *Tolias* case contained few details about Mr. Sullivan's attempted "mediation," it is difficult to identify the type of criminal law mediation taking place. However, the few details contained in the factual record suggest that some form of VOM had taken place.

[46] *See generally* MARK S. UMBREIT ET AL., VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION (1994).

[47] *See id.* at 5.

[48] *See* Cook, *supra* note 44, at 48.

[49] *See id.*

[50] *See id.*

[51] *See generally* Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994) (arguing that VOM disserves the interests of victims, offenders, and the state and urging the decoupling of mediation from the criminal justice system).

imbalances between victims and offenders,[52] potential constitutional rights violations,[53] and the state's privatization of public justice through ADR.[54]

Some argue that in criminal mediation, the balance of power may be tipped against either party for different reasons.[55] "On the one hand, a prisoner may be coerced into participation through the specter of doing poorly in a jury trial. On the other hand, the victim also may feel coerced into participating in mediation by the uncertainty of a jury trial or pressure from a state official."[56]

In addition to power issues, VOM raises questions regarding constitutional rights. There is the potential that defendant rights, which are scrupulously protected in criminal trials, will be sidestepped in VOM.[57] These rights might include the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel.[58] VOM also raises the additional constitutional question of whether VOM programs, run by prosecutors' offices, can potentially eliminate the judicial branch from the determination of guilt, which, of course, raises separation of powers concerns.[59]

Finally, the use of ADR in criminal cases implicates an important concern that also arises outside of the criminal law context—whether private justice should be permitted in situations implicating the public interest. Jennifer Gerarda Brown argues that certain truisms about the criminal law—namely that criminal actions belong to the state, not the victim—lead inexorably to the conclusion that the criminal law should be enforced publicly rather than through private dispute resolution mechanisms.[60] The major concern expressed with respect to the privatization of criminal law is that resolving criminal cases privately cannot satisfy the public's need for oversight and input.[61]

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[52] *See id.* at 1271–1272.

[53] *See id.* at 1287–1291.

[54] *See* Jennifer Gerarda Brown, *Blackmail as Private Justice*, 141 U. PA. L. REV. 1935, 1968 (1993).

[55] *See* Brown, *supra* note 51, at 1271–1272; Guill, *supra* note 43, at 1329.

[56] Guill, *supra* note 43, at 1329.

[57] *See* Brown, *supra* note 51, at 1287–1291.

[58] *See id.*

[59] *See* Guill, *supra* note 43, at 1330.

[60] *See* Brown, *supra* note 54, at 1968.

[61] *See id.* at 1969.

For some, "justice" is essentially and necessarily public. The quintessential statement of this view was put forth by Owen Fiss in his seminal article, *Against Settlement*.[62] Fiss expressed the role of adjudication in the distribution of justice as follows:

> Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials . . . possess a power that has been defined and conferred by public law, not by private agreement . . . to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.[63]

For those like Fiss who revere the authoritative declaration of public values by public officials, decisions like *Tolias*, which give tacit approval to criminal law mediation, must be particularly distressing. For these individuals, debate about the ethical rules governing ADR simply misses the point, at least when the public interest is involved. In their view, the key question is whether ADR can properly be employed at all. If *Tolias* and the increasing use of ADR in criminal cases is any indication, those opposed to the use of ADR to resolve these cases may be bucking a strong trend in the opposite direction.

IV. CONCLUSION

The *Tolias* case is reflective of several trends in ADR. The first is the tendency among courts to equate legal practice with the practice of ADR and to apply the conflicts of interest rules of the former to the latter. The second trend reflected by *Tolias* is the increasing use of ADR in criminal cases. These are complex and controversial issues with which the legal and ADR communities are only beginning to grapple.

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[62] *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

[63] *Id.* at 1085.