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Mediation 2004: The Art and the Artist

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I. Introduction

A. Experience

This Article is a reflection of my views on the state of the art of mediation and the commercial mediator. The focus of my practice, and the audience for my thoughts, is the mediator who works his or her own craft to resolve economic disputes. These disputes almost always involve claims or cases in the civil litigation system. Disputants are almost always represented by counsel in processing their claim in court or in mediation. Many of my perspectives and experience, however, are applicable or adaptable to other mediation forums.

By way of background, my experience as a neutral began in 1979 as a labor arbitrator. This is a profession that still constitutes a significant amount of my practice. My formal classroom training as a mediator was primarily in the late 1980s, first with Professor Len Riskin, then with United States Arbitration and Mediation, and then a few days with Linda Singer and Michael Lewis for the Johns Manville Trust project. My mediation practice consists almost exclusively of commercial,

construction, employment, and tort claims where all parties are represented by counsel. I have done very little family, community, and/or public policy matters in my caseload (over 2500). I have trained commercial mediators at the basic and advanced level for many years.

The key prompt for this Article and its format is a 2003 publication of the *Penn State Law Review*, which published articles by participants in an April 2003 Symposium at the Dickinson School of Law of the Pennsylvania State University.[1] I attended portions of the symposium, which was entitled "Dispute Resolution and Capitulation to the Routine: Is There a Way Out?" It was an excellent event calling upon luminaries in disciplines other than law and mediation. I strongly urge every mediator to read the published articles. Although there were many excellent presentations and subsequent articles, for purposes of this piece I will focus mostly on the perspectives articulated by Louise Phipps Senft and Cynthia A. Savage,[2] Deborah R. Hensler,[3] and David Sally.[4] Although many of these ideas have been floating around the dispute resolution community for years, these articles contain some new perspectives, insights, and/or articulations.

The second prompt is the excellent book *Bringing Peace into the Room*, edited by Daniel Bowling and David A. Hoffman.[5] Another prompt is the upcoming 2004 joint conference of the American College of Civil Trial Mediators[6] and the International Academy of Mediators.[7] The unifying theme addresses the issues facing the professional commercial mediator. A Symposium on Issues Affecting the Professional Mediator is being held April 29 through May 1, 2004 at the Crowne Plaza Hotel in New Orleans, Louisiana.

Like most experienced mediators, I have been active in numerous professional organizations and presented at conferences hundreds of times over the last twenty-five years. There are many others, including

1. Symposium, *Dispute Resolution and Capitulation to the Routine: Is There a Way Out?*, 108 PENN ST. L. REV. 1 (2003).

2. Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN ST. L. REV. 327 (2003).

3. Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165 (2003); *see also* Lisa Bingham, *Why Suppose? Let's Find Out: A Public Policy Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101 (2002); Susan S. Silbey, *The Emperor's New Clothes: Mediation Mythologies and Markets*, 2002 J. DISP. RESOL. 171 (2002).

4. David Sally, *Yearn for Paradise, Live in Limbo: Optimal Frustration for ADR*, 108 PENN ST. L. REV. 89 (2003).

5. BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION (Daniel Bowling & David A. Hoffman eds., 2003).

6. *See* http://www.acctm.org (last visited Feb. 1, 2004).

7. *See* http://www.iamed.org (last visited Feb. 1, 2004).

colleagues and friends of mine, who have presented or written on many of these same themes. I want to thank my International Academy of Mediators Colleagues, especially Tracy Allen, Robert Jenks, and Keith Seat, for helpful review and comment on the first draft of this Article. For purposes of my Article, the April 2003 Dickinson Symposium provides a framework to consider the state of the art and the artist.

B. Abstract and Conclusions

Creeping, if not galloping, legalism and institutionalism is inevitable. Free market principles, however, not external regulation or mediation orthodoxy, should be the guiding force in any movement toward formal professionalism. There are many challenges facing professional mediators generated by uniform standards of conduct, mediator liability, the relationship with the legal profession, globalization, and transnational political, legal, and economic trends. Mediators should resist trends toward consistency and uniformity of rules or practice. There are many illustrations of regulatory intrusion into the conduct of the mediation session. Restricting mediation to narrow channels of styles or tactics inhibits self-determination by disputants; mandating a facilitative model (by definition or through ethical standards), which forces mediators into indirect communication modalities, clashes with transparency and other dynamics that are utilized to build credibility and trust in the process. Best practice guidelines, when postulated as ethical codes or standards of conduct, inhibit mediator discretion and flexibility. Tolerance and diversity of practice is a core value of the mediation community.

Functioning as the agent of the Rule of Law, court litigation serves different purposes than mediation. Mediated settlements of what essentially are private, economic disputes of commercial litigation provide benefits to the litigants and society without undermining the ability of the courts to serve the Rule of Law. If mediation reduces the court docket or makes case management more efficient, this enhances, not diminishes, access to justice. To the extent that judges have become discovery masters and referees for courthouse step settlements, transformation of the courts back to the traditional functions as forums for trials is a healthy symbiotic relationship between courts and mediators. Mediation should be integrated into the Rule of Law in such a manner that any clashes between core values of courts/litigation versus mediators/mediation are accommodated. The legal professional and/or courts should not co-opt mediation by annexation or regulation. Regulation of lawyer representational and other activities should be within existing attorney disciplinary systems and not addressed by

standards or codes of conduct for mediators. Courts should be true to their core adjudicatory values by focusing on the key tasks of marshaling evidence for fact finding, defining due process in litigation, and providing the interpretations central to the Rule of Law. Many "equitable" and other non-economic remedies are given a voice in mediation that has been lost in the civil justice system. Disputants can choose court adjudication for many reasons, including the need for a public answer on truth and justice; other disputants may self-determine that acceptability of outcome, privacy, avoidance of risk, healing, and closure are more likely to happen in mediation than adjudication. The legal system can accommodate both by offering choice and promoting voluntary contracts on mediator selection, models, and procedures. This is the heart of the original concept of the multi-door courthouse; having mediation as a preliminary requirement to access trials is consistent with this model provided that it is a distinct and separate process involving minimal regulation by legislation, rule, or common law and that respect for party self-determination is implemented contractually.

Processes are looking more and more akin. The blurring of the two separate and distinct processes of mediation and arbitration is harmful; mediation is negotiation, and arbitration is adjudication. There should not be transient standards applicable to both arbitrators and mediators. The more mandatory and rigid mediation becomes, the more restrictive it becomes for practitioners and the participants. Institutionalization of mediation stifles the voice of the mediator.

Mediation is an art and not a science. Despite the trend towards formalism and legalism in mediation, the mediation community has been adept at accommodating tension between core values. We must encourage creative juices while avoiding any capitulation to the routine. Mediators should continue to talk our own talk in a range of voices. We walk our walk by providing effective value-added services in a multitude of ways and means. A voluntary certification or mediator credential coming from an organization representative of the diversity of the mediation and legal communities is both timely and appropriate. Civil claims mediators must continue to seek additional process and professional gains, both within and without the court system, by promoting mediation as both an *alternative* and *complementary* process, which supports the Rule of Law. Mediators have adapted and evolved while furthering the best ethical and business practices that respect core values of mediation. Mediators have successfully consolidated gains while avoiding major loss to autonomy and capitulation to the routine. Nevertheless, conformity of mediation theory, rule, or practice still must be vigorously challenged to avoid the angst of mediation orthodoxy.

II. The State of the Artist

A. Two Types of Civil Litigation Impasse

My experience as a mediator of civil claims is that there are two types of cases that come voluntarily to the mediator. The first group of cases is where the impasse is dominated by communication failure, tension between agent and principal, lack of creativity, and other process issues. Professor Robert Mnookin and others have generally referred to these issues as strategic barriers.[8] The other group of cases may involve many of these same dynamics, but ultimately the impasse is a result of a good faith difference in evaluation, risk analysis, principles, or goals of the disputants. In a simple view, in one type of impasse mediation uncovers existing value, while in the other types of cases successful mediators break impasse by helping the parties create value. One legitimate perspective may be that for the latter cases to be resolved some transformation of at least one, if not both, of the parties must occur.

Mediators uncover value by removing strategic barriers, mostly involving trust and communication, and by reconciling interests in an environment supportive of cooperation. A facilitative, minimalist approach can be very effective for these impasses. These are the easier disputes. In other conflicts, mediators create new value by resolving good faith impasse on fair market value of a claim or by having parties reassess goals, values, standards, risks, options, or consequences. Both mediators are value-added for the parties.

Traditional mediation methodologies have focused on the former to the detriment of the mediator's role in creating new value. Initial mediation training teaches a facilitative approach; this is excellent in uncovering value but is more problematic in breaking good faith impasse. As an acknowledgment to Professor Hensler and other commentators, the uncovering value cases do generally involve educating lawyers how to become better partners in negotiation with their adversaries. The other cases may not, and there mediators serve an invaluable role in resolving intractable conflict.[9]

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8. ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000).

9. For more details on these views and my own, see Robert A. Creo, *Emerging from No Man's Land To Establish a Bargaining Model*, 19 ALTERNATIVES TO THE HIGH COSTS OF LITIG. 191 (2001); Robert A. Creo, *A Pie Chart Tool To Resolve Multiparty, Multi-Issue Conflicts*, 18 ALTERNATIVES TO THE HIGH COST OF LITIG. 5 (2000); Robert A. Creo, *An Essay on Professionalism: The Portrayal of Lawyers in Popular Fiction*, 146 Pitt. L.J. 7 (1998); Robert A. Creo, *How a "Blind-Trust Method" Resolves Multi-Defendant Cases*, 17 ALTERNATIVES TO THE HIGH COST OF LITIG. 8 (1999).

B. *The State of My Mediation Art*

Over the last fifteen years, I have seen a significant amount of growth and development in both the use and practice of mediation. Yet significant issues that were raised in my initial mediator training are still being addressed and debated. No definition of mediation or the role of the mediator has been universally accepted. Mediation models and styles have evolved and been implemented by institutions and practitioners with varying degrees of success. A mediation business prospers for some and languishes for others. Mediators are struggling to develop or transition into a recognized profession. Dispute resolution organizations proliferate in an incomprehensible alphabetical mish-mash barely digestible by the marketplace. For some, mediation has become routine, and there are commentators who wonder if this is a form of capitulation.[10]

C. *My Common Mediation Modalities*

I view mediation as a trilateral negotiation process. Although the mediator may default to certain approaches, or insist on specific actions, all mediators negotiate process with the parties at some level. As a mediator, I am an activist in managing the process, while respecting participant self-determination. I attempt to assess the expectations of all the participants, including counsel and stakeholders like insurance carriers. I do this often in advance of the mediation but more often at the mediation session itself. I customarily start out with a long orientation statement and foreshadowing of the approaches that will most likely be utilized that day.

I am also attentive to building rapport and credibility at every step of the process. Deborah Kolb and Judith Williams talk in terms of creating "spaces for mutual engagement and connection" in the context of what they call a "shadow negotiation."[11] They state:

> Negotiations, it turns out are not purely rational exercises in the pursuit of self-interest or the development of creative trades. They are more akin to conversations that are carried out simultaneously on two levels. First there is the discussion of substance—what the bargainers have to say about the issues. But then there is the interpersonal communication that takes place—what the talk encodes about their relationship. Yes, people bargain over issues; but they also negotiate how they are going to negotiate. All the time they are

10. *See* Symposium, *supra* note 1.

11. DEBORAH M. KOLB & JUDITH WILLIAMS, EVERYDAY NEGOTIATION: NAVIGATING THE HIDDEN AGENDAS IN BARGAINING 13 (2003).

> bargaining over issues, they are conducting a parallel negotiation in which they work out the terms of their relationship and their expectations.[12]

I agree with the formulation that negotiation occurs simultaneously on multiple levels. I am not sure it should be compartmentalized into only two levels, i.e, substance and relationship. This may be likely in bilateral negotiations where each principal is bargaining in their own self-interest. It may hold truer in transactional bargaining than in dispute resolution. There is the issue of agency (surrogates, representatives) and the natural tensions that exist between advocate and principal(s). There may also be other stakeholders or a public interest in the matter or outcome.

My approach is to acknowledge the shadow negotiation with the participants. I am as transparent as possible without risking offending participants. I move slowly, especially at the beginning of the process. I attempt to note the human elements. If people have suffered personal injury or loss, I express appropriate empathy, usually during the opening statement and at other critical times. I do this in a manner that recognizes the adversarial nature of the dispute.

After my opening statement, I am passive in the joint session. I allow the participants free reign to make any presentations or monologues they deem appropriate. I add consensus of recognition and empowerment. I ask few questions and seldom make a narrative statement about the substance of the dispute in any joint session. When faced with human tragedy, I am authentic. Although I attempt to be stoic, if I am affected emotionally, I acknowledge it. Tort claims involve serious injury or death. Parents have described holding their child or spouse while they died or otherwise watching a horrendous accident. That fact that I cry or want to cry does not mean I lose my impartiality. I have seen hardened defense counsel well-up in joint sessions. I weave any of my reactions into the risk analysis ("reality testing") phase of the mediation. My own humanity is often challenged, and ultimately expanded, by the substance and dynamics of disputes. If that happens in the joint session, then I deal with it in a transparent manner. Following conclusion of the joint session, I usually caucus with the party bringing the claim unless otherwise negotiated by all participants.

I do not get bogged down in mediation considerations of a "philosophical" or "religious" nature. I believe that any duality between facilitative and evaluative mediation models is artificial and false.[13] I

12. *Id.*

13. *See also* Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 309 (2000); Roselle

actively engage in approaches across any facilitative-directive-evaluative spectrum. It varies from context to context and especially from case-to-case. For example, I have mediated numerous medical malpractice claims in Pennsylvania this past year. In some of those cases my dominant approach has been facilitative, while in others evaluative, and multiple styles are utilized for some aspect of almost every case. I do not decide the night before what I am going to do by a review of Professor Riskin's grid or any of the other literature. During the mediation, I assess and re-assess the expectations of the parties and my own belief about what will be appropriate and effective in the unfolding dynamics of the mediation process. Michael D. Lang and Allison Taylor note the following:

> As mediators reflect on and examine the inner logic of the ideas and models they embrace and become aware of inconsistencies between and among them, they identify gaps in their constellations. Mediators often have (but may not be aware of) conflicting or disparate beliefs; they may believe that disputants know best how to resolve the conflict, yet they may use an evaluative mediation approach that implies that the mediator rather than the disputants is the expert. Mediators may not have complete consistency among all of the rings of their constellation, and when they experience internal conflicts they should examine those conflicts and determine which theory or belief will govern in the given situation. Such choice is a sign of ethical, reflective mediation practice and leads to artistry.[14]

I believe current practice and the better frame of this issue is as noted above. Diversity of practice requires art and not science. Mediation is neither linear nor monolithic.[15]

D. My Mediation Day Funnel

When I train mediators, I describe the party participatory portion of the mediation process as a funnel. My funnel is usually viewed in stages, or phases, as follows:

1. *The Lip*: Pre-mediation communications; written submissions; determining participants; mediator opening statement.

Wissler, *To Evaluate or Facilitate*, 7 DISP. RESOL. MAG. 35 (2001).

14. MICHAEL D. LANG & ALLISON TAYLOR, THE MAKING OF A MEDIATOR: DEVELOPING ARTISTRY IN PRACTICE 106 (2000); *see also* KENNTH CLOKE, MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION (2001).

15. *See* Tina Monberg, *It's Not an Either/Or Choice: Practitioners Should Remove the Conflict Between Mediation Models*, 22 ALTERNATIVES TO THE HIGH COSTS OF LITIG. (2004); *see also* PAT K. CHEW, THE CULTURE AND CONFLICT READER (2001).

2. *Wide Upper Portion*: Information Gathering; Initial Trust, Credibility and Rapport Building.
3. *Narrow Middle Portion*: Risk Analysis; Case Review or Evaluation.
4. *Bottom Tip*: Bargaining; Exchange of Proposals; Impasse Breaking Techniques.

I teach people that it is a funnel, which should flow in only one direction. The mediator should manage the flow in the above steps and avoid a counter-productive back-flow. Although mediation is a forgiving process, following the funnel's natural flow will rarely get a mediator into a posture where recovery is not possible.

Each step, joint session, or caucus may also be viewed as a funnel. Independent of my own views, my colleagues at Mediation and Professional Systems, Inc. ("MAPS") in Louisiana developed for their own basic training the concept that mediation is a series of funnels within funnels. Each caucus may start out broadly, but the mediator should continuously be narrowing the focus of the interaction and should stop at an appropriate time to move onto the next step or aspect of the case. Likewise, issues can be treated in a "funnel" approach. Analogies, especially non-linear and multi-dimensional ones, are useful heuristics for mediation education. Questioning, narratives, and storytelling are all appropriate communication methods.

E. My Mediator Values and Tools

Mediators must consider the following at all times in the process.

1. Engagement;
2. Expectation of Participants, especially Procedural Due Process;
3. Initial Validation of Positions and Participant Values;
4. Participant Voice and Values, Recognition, Empowerment;
5. Construction, De-construction, and Re-construction of Narratives and Alternative Perspectives;
6. Transparency, Translucency, Explanation of Process Imbalances or Asymmetry;
7. Risk Tolerances;
8. Cognitive and Emotive Processes, Decision making and Choice;
9. Building and Maintaining Trust and Credibility;
10. Macro Strategies and Micro Implementation Moves;
11. Validation of Outcome or Impasse; and
12. Respect for Mediation Process.

This is not an exhaustive list, but is illustrative of many core values, competencies, or approaches. A mediator must remain aware and mindful of what is happening in the process. Most of the above must not only be considered from the mediator's perspective but also from that of each participant.

In some ways, a mediator is an arbitrager. Arbitraging involves taking disparate pieces of information, usually known only to one party, and using that to effect a simultaneous transaction at a profit to the broker. It is buying one market to sell in another. Mediators who rely primarily upon a caucus model often use the cat bird's seat of superior information to educate, and then transform, the perceptions and choices of the parties. Mediators may arbitrage information.

The Basque people of Spain use the following folklore as a guide:

1. Show-up
2. Pay Attention
3. Tell the Truth
4. Be open, but not attached, to outcome

My experience leads me to this same heuristic for mediators.

F. The Integration of Mediation and the Expanded Role of Mediators

1. ADR in Education

Since I began mediating, I have been pleased with the expansion of dispute resolution and conflict management offerings in law school, graduate, and undergraduate curriculums. About fifteen years ago, I proposed adding an ADR course to the offerings of the two law schools here in Pittsburgh. I was pleased when both accepted the proposals, and I was retained as an adjunct to teach the course at Duquesne Law School. Recently, I added a course on international ADR to the University of Pittsburgh School of Law curriculum. I am pleased to be a part of the early crowd of practitioners and academicians teaching mediation to law students.

The growth of mediation courses in law schools has been phenomenal over the last ten years. There are numerous graduate offerings for those seeking an advanced degree at the Master's level in mediation and conflict resolution. There are numerous mediator training programs for lawyers and judges. There are seminars and CLE programs conducted on mediation on an almost daily basis. The concept of mediation as an integral aspect of a legal education has been accepted and institutionalized.

My view is that this is good. In contrast to some commentators, I believe this has been more than just teaching law students and lawyers to become better negotiators. I do believe it has resulted in a paradigm shift among younger lawyers. I speculate that this has been one of the factors in the decline of the number of civil trials over the last decade. As Professor Carrie Menkel-Meadow has noted in many of her numerous publications on this subject, there has been a shift in attitude that litigation is the prime, if not only tool, of lawyers. She notes:

> Seeking to define a universal human propensity for procedural fairness, Hampshire reduces conflict resolution to the single principle, audi alteram partem, ("hear the other side"), a universal principle of "the adversary argument" in which thinking is identified with the use of reason to weigh alternatives . . . . Furthermore, despite what law professors teach in civil procedure or constitutional law, "due" or "just" process does not necessarily require litigation, a "day in court," or a lawsuit.[16]

2. Transactional Application and Integration

Mediators have applied their process skills to the creation or improvement of relationships. Mediators act as facilitators to identify potential areas of conflict and to build ADR into the relationship as a fundamental core value. This type of intervention may occur at any stage of the acquisition, merger, or creation of a strategic alliance or other business relationship. In the public policy context, there has been fruitful utilization of "neg-reg" and other participatory processes guided by a neutral intervention at an early stage in the process. The construction industry has integrated mediation by mandating "partnering" and other collaborative methods in the design stages of projects. For many years, win-win bargaining concepts have been the platform for "early-bird" and other interventions into collective bargaining relationships in the public sector, especially between school districts and their unions. The core focus of mediation as a communication process has been successfully integrated into a range of applications to avoid or manage conflict.

3. Settlement Counsel: Collaborative Law

About five years ago, I was approached by a small law firm to be their negotiator on two complex cases arising from death claims. One

16. Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL'Y 37 (2002).

involved bad faith against a carrier and the other a medical malpractice claim. The firm became aware of me via advertisements for negotiation and mediation CLE programs. Research found a number of articles advocating the concept of settlement or resolution counsel. It was clear that my experience as a mediator fit this role. I accepted the assignment and contacted the defense firms to advise them of my special role. I described it to them as acting in a formal, representative capacity but that they should consider me as a "partisan mediator" whose goal was to resolve the case. Although hesitant at first, in the bad faith case, the defense ultimately embraced my involvement and the matter was resolved on terms deemed favorable by all parties. One of the interesting aspects of the practice issues was that while I was serving as settlement counsel, I was active as a mediator in a number of other cases where defense counsel represented clients. After full disclosures, no one had any issues with my dual roles and all claims settled. I also served as settlement counsel in a number of complex claims, often negotiating with a counterpart whose function was resolution counsel. Mediation skills made it possible for me to easily integrate this into my practice.

A welcome recent trend is lawyers devoting their practice to what has become know as collaborative law.[17] Stuart G. Webb, a Minnesota family law attorney, is credited with originating the model in the early 1990s.[18] Collaborative lawyers decline to litigate and advance a system of negotiation first and foremost for their clients. Each side is represented by a collaborative lawyer and if an impasse is reached, then different sets of lawyers are retained to represent the parties in litigation. One non-profit organization, which trains lawyers in collaborative law, explains this approach on its website:

> Collaborative Law provides clients and their lawyers with a new, formal and strictly non-adversarial approach to resolving legal disputes. It encourages mature, cooperative and non-combative behavior, as the parties contract to eliminate litigation as an option.
>
> . . .
>
> Also, if one party changes its mind and chooses to initiate court action, the collaborative lawyers all must withdraw from the case and the clients will have to start over with new litigation lawyers.[19]

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17. *See* James K.L. Lawrence, *Retooling the Practice of Law Through "Collaborative Law,"* 8 DISP. RESOL. MAG. 27 (2002).

18. Pauline H. Tesler, *Collaborative Law Neutrals Produce Better Results*, 21 ALTERNATIVES TO THE HIGH COSTS OF LITIG. 1, 8 (2003).

19. *See Collaborative Law Center*, *at* http://www.collaborativelaw.com (last visited

Collaborative law should appropriately be viewed as an evolutionary branch of mediation.

4. Special Master; Expert Witness

Especially during the implementation phase of class action settlements, many of my colleagues often serve as a Special Master. Class actions involve specialized rules and a complex body of law that has developed in this area. Fairness hearings are mandatory; the judge has broad discretion in approving settlements, relief to the named plaintiffs, and attorney fees. Recently I was retained to mediate a Fair Labor Standards Act case where the final result was a settlement where 99% of the claimants opted-in, and the oral recommendation I made to the court on individual relief and attorney fees was accepted. One key challenge in the mediation was on these two points because defendants would not agree to settlement without an exact calculation of all liabilities, including plaintiff's counsel's fee, and the other side was equally reluctant to settle without knowing the relief and attorney fee amounts. After months of mediation, the parties agreed upon a fixed amount for the Common Fund and a maximum sum for individual relief and attorney fees. The court was petitioned in a joint motion to appoint me as Special Master with specific, limited duties. At the Fairness Hearing, where there were no objectors and a 99% opt-in participation, the federal judge praised the parties for cooperation and professionalism.

From time to time, I am asked to serve as an expert witness in a federal or state court action. Usually this involves some aspect of negotiation or ADR processes. It seems like the lawyers are attracted to my practice as a neutral and my teaching experience. They like the blend of theory and everyday practice. If after review of the file I am comfortable with the scope of my involvement, then I accept the assignment. Although I have written reports, so far I have not testified in a deposition or at trial. Again, my ADR experience makes this a natural extension of my traditional practice.

5. Jury Focus Groups

Occasionally I am asked to facilitate a jury focus group by one or more parties involved in litigation. Colleagues of mine have engaged in similar functions. It is a natural annex to the practice of a neutral. Experiences as a neutral, especially by those who have been judges, are valuable in this context. Mediators should feel free to accept

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Feb. 1, 2004); *see also Boston Law Collaborative*, *at* http://www.bostonlawcollaborative.com (last visited Feb. 1, 2004).

assignments of this nature if they believe they add value to the parties and are comfortable there are no conflicts of interest.

III. The State of the Art: Mediation as a Complex Adaptive System

A. Does Mediation Deliver?

Some commentators, such as Professors Deborah R. Hensler, Susan S. Silby, and other academicians, opine that mediation has failed on many of its promises. The key contentions are that mediation does not deliver better procedural or substantive results to the litigants and that the public nature of courts, especially the evolution of the law, is being negatively impacted by utilization of mediation primarily as a docket-clearing tool. Professor Hensler notes that the "notion that courts might *order* parties—as a condition for seeking access to the courtroom—to use a private process, run by private providers, in circumstances that impede public scrutiny *is* new."[20] She contends that the evidence so far indicates "little in the way of time or cost savings" and that "there is no evidence that mediation has changed the distribution of power between haves and have nots" and "what impact it has had on access to the courts."[21] Although she concedes that there appears to be general satisfaction with mediation by litigants, there is no proof that there is a general preference for mediation over litigation by clients.[22] Professor Hensler asserts that the "public spectacle of civil litigation gives life to the 'rule of law'" and that "dispute resolution behind closed doors precludes such observation."[23] She concludes that the "visible presence of institutionalized and legitimized conflict, channeled productively, teaches citizens that it is not always better to compromise and accept the status quo because, sometimes, great gains are to be had by peaceful contest."[24] Use of the justice system to achieve change will diminish the harm to society.

B. Core Values

At the Dickinson Symposium, much talk occurred about the core values of the mediation process. This is a good launching point. A traditional, or historical, articulation of the differences between the core values of mediation and the judicial system will now be summarized.

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20. Hensler, *supra* note 3, at 187 (emphasis added).
21. *Id.* at 188.
22. *Id.* at 189.
23. *Id.* at 196.
24. *Id.* at 197.

The article written by Louise Phipps-Senft and Cynthia Savage postulates that the three essential core values to mediation are connection, voice, and choice.[25] The authors note that a core value of mediation is not settlement. The core values can be realized even if parties elect to resolve their dispute via litigation or some other means.

I expand upon these three by noting some of the sub-values under these main themes. My expansion articulates the usual themes of recognition, empowerment, validation, acknowledgment, apology, opportunity to be heard, facilitated dialogue, engagement with a non-partisan mediator, balance, absence of formal procedures, exploration of risk and consequences, and creation of alternative solutions outside those available within the judicial system.

Despite some overlap, the core values of a judicial system are very different. The core values of courts, in no particular order, are: (1) openness and transparency; presumption against privacy; (2) procedural fairness; due process; opportunity to be heard; (3) equality of treatment to its consumers; (4) impartiality; objectivity; rationality of outcomes; (5) predictability of process; precedent, consistency, and uniformity; (6) easy access; (7) maintaining authority and public confidence in the institution itself; (8) efficiency; best use of limited public resources; and (9) citizen participation via jury system, based upon community norms.

Courts reflect and articulate societal norms and are the foundation of a society based upon the Rule of Law. The Rule of Law is essential to promote capitalism and liberal democracy. There are no property or individual rights without law and order; the state, via its knighted officials, is King.

Many of my colleagues and I contend that the over-riding mythology at the core of any independent judiciary is truth and justice. Although reasonable minds may disagree, I reduce and combine these to several core values and goals: (1) Truth and Justice, derived from rationality and predictability; (2) Due Process; opportunity to be heard by impartial decider of fact and/or law; and (3) Public nature of institution and norms; openness.

These are different core values than mediation. The key elements of each system contrast in orientation, implementation, and substantive outcomes.[26] The main area of overlap is in the "voice" or "opportunity"

25. Senft & Savage, *supra* note 2.

26. Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 663 (2004). "The interviews analyzed here affirm that procedural justice and resolution represent the dual cornerstones of mediation's value to disputants—and thus should become the cornerstones for mediator selection, training,

to be heard, with each system protecting and promoting the ability of each disputant to articulate a story. These may be viewed as an inverse listing and comparison of core values:

Mediation Core Value	Court Core Value
1. Connection	1. Public nature of institution and norms; openness
2. Voice	2. Due Process; opportunity to be head by impartial decider of fact and/or law
3. Choice	3. Trust and Justice, derived from rationality and predictability

Although there are commonalities, the differences are greater than the similarities. For example, the nature of the opportunity to be heard is different on both a qualitative and quantitative basis. The court restricts the format and extent of the narrative story that each disputant puts forth. Information is framed by the rules of procedure and evidence. Witnesses are controlled by the lawyers and the judge. Choice is greatly restricted and controlled. The decision maker is a third party, i.e., the judge or jury, with a focus on fact finding. Answers are generally limited to restorative justice in the form of monetary compensation. If the trial process does not get it right the first time, there is allowance for appeal and review within the system.[27] As we know from the Mediation 101 course, what we do is neither litigation nor arbitration. Mediation is an alternative process and forum of dispute resolution.

One common thesis is that mediators and the mediation process are being overrun or co-opted by the legal community and courts. The Senft/Savage team frames it as follows:

> Capitulating to the courts' routine means that mediation has lost sight of the core values of mediation and simply become absorbed into the courts' traditional methods of adversarial dispute resolution without providing a genuine alternative.[28]

The contention is that the following are evident signs of capitulation: time limits; advocates appearing without clients; attorneys dominating discussion or excluding clients; separating lawyers from clients; and lawyers, judges, and former judges who lack sufficient training regularly serving as mediators. Instead of mediation serving as a

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and evaluation." *Id.*

27. For an excellent analysis of the trial process, see ROBERT P. BURNS, A THEORY OF THE TRIAL (1999).

28. Senft & Savage, *supra* note 2, at 336.

clear alternative to litigation, the core values are being blurred as each process looks more like the other. Some of the factors causing or contributing to the weakening of boundaries between mediation and court settlement activities are:

1. Pro bono or volunteer mediators; fees regulated;
2. Limited time for process;
3. Rostering all who complete minimum training;
4. Holding mediation in courts or as an annex;
5. Judges retiring into mediation without massive re-orientation of thinking and philosophy;
6. Wholesale transference of concepts of neutrality and impartiality;
7. Expectations of parties that mediation is a substitute forum rather than alternative process;
8. Mediation resembling judicial settlement models based in an adversary process.

Instead of being on different parts of a long ADR continuum, both processes are migrating towards each other. Courts are increasingly focusing on social harmony, rather than assessing factual and legal claims and articulating public norms. The two are becoming more alike as institutionalization continues. Professor Hensler notes that "ironically, the ADR movement ultimately may be more successful at transforming courts than transforming lawyers or disputants."[29] Perhaps courts fear the competition and the prospect of becoming less important and less powerful.

C. Mission Possible

Almost all of my work is voluntary mediation; some cases are directed to me by a court in a referral but a few of these may be agreed to by the parties under perceived pressure. Thus, I have been fortunate that my self-determination allows the parties to have reasonable expectations of me and the process. Parties come to me to settle civil litigation, to exit court. Occasionally, I have a relationship-based dispute where transformation is paramount to settlement, but that is rare. My role as a mediator is to close cases. A secondary goal is to do it in a manner that transforms the parties. As mentioned above, in some cases settlement is not feasible without transformation. I view the "connection" core value as related to the means of transformation of the disputants. I do attempt to fully honor the other two core values, especially that of choice. I

29. Hensler, *supra* note 3, at 193.

relate recognition to voice and empowerment to choice. I do view the process, and my role, as holistic and integrative. I do not encourage an analysis of mediation that separates connection, voice, and choice; but for purposes of the discussion, we may at times consider them as separate core values.

Unfortunately, as lawyers have become the gate keepers and high priests of mediation, the voice of the disputants themselves has become increasingly difficult to fully engage. It is becoming more common now for mediators to negotiate over voice with the lawyers; mediators may use process skills (e.g., caucusing, narration, storytelling, and deception) to give voice to the actual disputants. Although I agree with the traditional mediation core values and methodologies, I know I must continue to recognize the voice of lawyers as not only legitimate, but often as the prime source of engagement. Lawyers in some jurisdictions, such as California, even have created listserves and private internet databases to network on mediators and to improve their mediation advocacy.[30]

Mediation of civil litigation can become a process of voice-overs. The agency relationship between lawyer and client often blurs in a mediation. Lawyers face some of the same choice points as the clients; they have their own agenda and interest in the outcomes. It is an issue of control over whose voice will be heard and when. Lawyers only reluctantly cede control over voice to the mediator and the process. Lawyers are loath to cede control over the voice of their client in joint sessions. Hence, the caucus method is dominant in cases involving represented parties. Mediation gives voice to choice factors in decision making by the participants, including being represented by lawyers and following their advice.

D. Civil Litigation

1. Erosion of Equitable Remedies

Civil litigation involves a jury or sometimes a judge examining a past event to determine how much money some disputants should pay the other disputants for what is most often, and essentially, private conduct or a private wrong. Most civil cases sound in contract or tort; only a small percentage of the civil docket involves public policy, constitutional rights, or other issues affecting the community at large.

30. The counsel comment on the mediators and describe tactics and approaches utilized in specific cases. Mediators must continually adapt to the reality of a civil trial alternative dominated by lawyers.

Most civil cases are about the allocation of money. Even when civil claims may seek more than a monetary allocation, there is tremendous systemic pressure to reframe and channel the dispute into a purely economic one. In the past year, I have mediated numerous medical malpractice claims. Common themes emerge during the course of these cases. Claimants view themselves as powerless victims and often seek both restorative and retributive justice. Some claimants seek retribution based upon negative publicity and/or elimination or restriction of the license to practice in the health care arena. One experienced plaintiff's counsel told me that when clients first come to him, they usually have a list of things they want to see happen. These other things are often about retributive justice. He politely listens and then tells them that what he can do for them is to file a lawsuit to get them money. He believes it is best to be candid in the beginning about the limitations of the legal system and his own role in it.

Although med-mal client expectations are often blunted by plaintiff's counsel by the time they reach the mediation session, what is still often articulated is the following:

1. The need for acknowledgment and acceptance of responsibility by the health care provider.
2. The expression that this should not happen to any other innocent patient in the future.
3. A review and change of policy or practice.
4. Education of the providers in the system.
5. Economic security for the harm suffered.

There is much empirical evidence that an intervention, especially an early one, addresses many of these issues and reduces or eliminates legal claims. These themes are also common in product liability and other tort claims. Experiences by the Toro Company and other organizations that have implemented early resolution programs based upon mediation support this contention.[31]

Historically, and now mostly in name only, courts were divided into law and equity. Equitable courts could do justice and order remedies beyond compensation for losses. As society has gotten larger and more complex, courts have eroded, if not eliminated, the role of equity as a separate and distinct function of the justice system. Even the evidentiary

31. Miguel A. Olivella, *Toro's Early Intervention Program*, 17 ALTERNATIVES TO THE HIGH COSTS OF LITIG. 65 (2002); *Toro's Approach to Conflict Management: A Case Study in Mediation Advocacy*, 20 ALTERNATIVES TO THE HIGH COSTS OF LITIG. 137 (2002).

rules give little effect to equity. For example, rules limiting evidence of subsequent remedial repair not only avoid prejudice and encourage repairs, but also confirm that juries are unable to order modification of behavior of the disputants. Courts do not redesign products in tort cases. Civil courts do not order apology or change in policies and practices. Courts, even if they still have the technical power, rarely exercise it in claims where monetary relief is deemed available and adequate.

Even when injunctive relief is available, courts will tend to focus on the compensatory aspects of a potential verdict. One striking example is in employment discrimination claims. Even though reinstatement to the former position is an express statutory remedy, courts rarely order it over the employer's objection and instead calculate front pay as a substitute remedy. Another includes the simple matter of a client obtaining a structured settlement (annuity) to provide economic security as part of a personal injury settlement. The law provides it is available only as part of a voluntary settlement, and it may not be awarded by the courts even upon consent of all parties.

2. Arbitration as Court

Arbitration was created as a true alternative to the judicial system. Aristotle viewed arbitration as a source of equity where arbitrators had broad discretion to fashion remedies. This perspective on arbitration continued for many years, but I doubt it is the current viewpoint in the legal community. The trend has been in the past few decades to view arbitration as a choice of forum rather than as an alternative process. Arbitration has become "legalized," and arbitrators are asked to act as trial judges to apply the statutory and common law to the claim. The prominent ADR organizations, such as the American Arbitration Association ("AAA"), CPR Institute for Dispute Resolution, Judicial Arbitration Mediation Services ("JAMS"), and National Arbitration Forum, promote arbitration in this manner. Some observers believe this is one of the reasons the number of civil trials have dropped to less than 2% of cases filed from an historical average of a little less than 5%. Obviously, the impact of mediation and other judicial, legislative, and corporate initiatives have contributed to this trend.

The effective elimination of courts of equity and equitable remedies in arbitration are contributing factors to mediation serving as an alternative process with multiple remedies available. Choosing mediation should include a variety of remedies that are not available at law or from a jury system.

E. Core Values of Attorneys and the Legal Profession

1. Thesis: Courts Operate in the Shadow of Lawyers

My thesis is based upon the proposition that courts are primarily operated by and for the lawyers. At a minimum, they operate in the long shadow of the legal profession. Judges are almost always lawyers appointed or recommended by other lawyers. In jurisdictions where judges are elected, the support and campaign contributions come predominantly from the legal community. A significant number of politicians are lawyers. When changes are proposed in the courts, even when community representatives are on the task force or committees, a significant percentage of the representatives are lawyers. Court rules and legislation are usually drafted by lawyers. This is not surprising because courts are a place of the law and lawyering. The courts are part of the legal culture, which is dominated by lawyers.

To consider mediation and its interplay with the judicial system, it is necessary to consider the core values of lawyers. I contend that the core values of lawyers are more in harmony with the core values of courts. Therefore, core values of lawyer advocates in mediation are in tension, if not conflict, with the core values of mediation as an alternative process. One of the dynamics in the recent evolution of mediation is the influence the attitudes and behavior the lawyers and their core values have on the mediators, and hence the mediation process.

2. Thesis: Core Values of Lawyers Align Closer to Adjudicatory Procedures than to the Mediation Process

Lawyer roles and ethics (and by extension, the courts and judges) are not in alignment with the traditional view of mediation core values. Core values of lawyers involve:

1. Linear thinking and linear systems: Procedure, Rules, and Ethical Codes;
2. Adversarial orientation;
3. Competition before cooperation;
4. Zealous representation;
5. Consistency, Predictability, and Precedent;
6. Uniformity: Procedures, Rules, and Ethical Codes;
7. Compartmentalization: The ability to research, label, and fit issues within the law;
8. Impartiality: Neutrality of decision makers and the myth of rationality;

9. Credentials, based primarily upon education rather than performance.

Legal education and testing for exams propels this mind-set with a focus on issue recognition, and a mythic "scientific" application of the law to the facts without emotion or regard to culture, politics values, and other things involving "connection." Lawyers are trained very early in their education that emotion plays little or no part in the law. The dualism of mind and heart predominates Western thinking and is evident in the law and the legal community.

Lawyers see via the prism of their legal training and practice. Benjamin Sells describes it as such:

> The process of "becoming a lawyer" includes more than learning strange language and a set of basic legal principles. At a deeper level it has to do with becoming acculturated to the legal mind, with learning how the legal perspective views things and mind, with learning how the legal perspective views things and how it prefers things to be. Somewhere along the line, law students go through a subtle, though radical, change. They begin to see things in the first instance through this legal mind set. Their very perceptions begin to be structured by assumptions provided by legal education. It is similar to becoming fluent in a foreign language. It is more than vocabulary, it has to do with instinctively feeling the rhythm of the language, entering it and hearing it talk. One friend told me he knew he was finally getting the hang of Spanish when he started dreaming in it. So too with becoming a lawyer—the entire world becomes a field where the legal mind is at play. The very nature of the mundane changes as everything is filtered through the perspectives of the legal mind. Everything becomes colored by law-tinted glasses.
>
> A useful way of talking about these perspectives comes not from a psychologist but from Judge Learned Hand, who once referred to the "mental habits" that "indirectly determine" the legal profession. I take these mental habits to be the unexamined assumptions, myths, attitudes, ideas, and beliefs shaping both lawyer and profession; they compromise the legal profession's intellectual community and embody the legal mind's distinctive quality. Lawyers simply see things differently from other people, that's why they're lawyers.[32]

Lawyers do not stop being lawyers at the edge of the mediation table.

32. BENJAMIN SELLS, THE SOUL OF THE LAW 35-36 (1994).

3. Thesis: Rules of Evidence Are Misaligned with Mediation; Lawyers' Values Reflect These Procedural Rules

Rules of evidence work against "voice" for disputants and create a system where only the elite, those legally trained, can navigate to tell their story. These rules, especially admission against interest as an exception to the hearsay rule, creates and/or propels the role of advocates as the sole voice of disputants.[33]

4. Thesis: Attorney Ethical Codes Promote Adversarial Roles and Undermine Cooperation

The ethical code of conduct of lawyers, which are primarily designed for a juridical dispute resolution system, contributes to the unhealthy tension inherent in institutionalization of mediation. The obvious example is that lawyers represent clients "zealously" and not competently, accurately, fairly, or based on any normative paradigm. Actual practice and the philosophical map of most advocates have ignored the lawyer's role as provider of advice, counsel, and values outside of the strict application of the law. Although several recent initiatives in collaborative law now exist, collaborative law is still on the fringe and its future impact is unknown.

F. Choice in Mediation

Mediation gives voice to choice factors in decision making by the participants, including lawyers. The agency relationship between lawyer and client often blurs in a mediation. Lawyers face some of the same choice points as the clients and have their own agenda and interest in the outcomes.

Some of the elements of choice (Choice Continua) involve the following:

1. Justice and fairness;
2. Empowerment;
3. Security; Economics;
4. Emotional components;
5. Risk assessments;
6. Individual risk tolerances;
7. Victimization roles;
8. Recognition; Acknowledgment; Self-esteem;
9. Self-actualization;

33. *Id.*; *see also* BURNS, *supra* note 27.

10. Personal values, morals, spirituality;
11. Social values, issues; social capital;
12. Opportunity to be heard by non-partisan mediator (venting; legitimization; ratification);
13. Closure; Certainty; Uncertainty.

My experience in the mediation of civil litigation is that most, if not all, of these elements of choice are present in every mediation. It is usually a quantitative, and not qualitative, assessment by the mediator to determine which of these factors are critical and are actual tipping points for the decision makers.

G. Choice and Interests

One frame can be the Hierarchy of Needs articulated by Professor Abraham Maslow based upon his research of human behavior between 1939 and 1943.[34] Maslow's Model is based on a pyramid with the following needs listed from top to bottom: self-actualization; esteem; love (social); safety; physiological.[35] Human behavior clusters more on the bottom of the pyramid.[36] The theory is that most people focus more on satisfaction of the needs on the bottom portions and move upward when those lower needs are fully or partially satisfied.[37] The dominant needs are those on the bottom, but people will occupy portions of the pyramid simultaneously but proportionally.[38] There are of course those, like monks, who eschew the bottom two or three levels to live for the mental and spiritual self.

My view is that the Maslow approach forms the intellectual basis and underpinning for the modern articulation of interest-based negotiation models, including mediation. Disputants think about their rights and needs in a hierarchical context. The Rule of Law reflects the Maslow hierarchy. Dispute Resolution is an element of the Rule of Law that addresses the hierarchy. As any experienced negotiator or mediator knows, actual thinking and decision making is not very neat and rational. As a practical matter, decisions are made by people and organizations in an integrated fashion and a holistic manner. The tension between these "Maslow" elements, or interests, results in a process of choice. Decisions are not made in a linear fashion with a mathematical weighing

34. *See* http://www.accel-team.com/human_relations/hrels_02_maslow.html (last visited Feb. 1, 2004) (providing an explanation of ABRAHAM MASLOW, TOWARD A PSYCHOLOGY OF BEING (1968)).
35. *See id.*
36. *See id.*
37. *See id.*
38. *See id.*

or other transparent calculation of factors in an objective manner. All decision making is a subjective process with each decider balancing needs (including emotions, values, etc.) and formulating which action to initiate or forego. Many negotiation and mediator trainers have based their geometry of pyramids, circles, triangles, fulcrums, and other symbols directly or indirectly on Maslow's work.

H. Choice and Economic Models

Traditional economic theory and models contend that people and organizations act to maximize economic gain and minimize loss or pain. Most mediators are by now familiar with the work of cognitive psychologists, especially Daniel Kahneman and Amos Tversky, on choice, rationality, and decision making. This school of cognitive behaviorists has recently been welcomed by the economists, and efforts at multi-disciplinary integration are accelerating in the academic communities. Recent research in cognition and human biology, especially by Antonio Damasio, rejects the dominant view of Descartes, rationalism, and a duality of functions of "heart" and "mind" in the functioning of the brain.[39] The "mind" and consciousness is not just in the head. The emerging "holistic" view involves analysis of complex interactions and relationships based upon genetics, biology (chemical and electrical), and a greater understanding of neural mapping and functioning of the parts of the brain.[40]

As a layman, what I gained from these works is a further confirmation of my own experiences as a lawyer and mediator that people, organizations, markets, and cases do not act in the predictable and rational manner of classical economic and legal theory. Over a decade ago when I discovered the cognitive behavior theories, I integrated them into my practice and advanced mediator training programs. My focus then was primarily upon utilizing these "cool concepts" as a technique or tactic to influence disputants. I did not operate then on a model based upon transparency. I did not publish any articles on my integration of cognitive behavior principles into my mediation practice because I perceived it gave me greater skills and insight as a mediator and perhaps a competitive advantage in the marketplace. I thought then that I knew most everything there was to know about being a mediator. I viewed myself as an impartial agent of reality intervening as a joint agent of the parties to manipulate them into a settlement for their own good using "magic" known only to mediators.

39. ANTONIO DAMASIO, LOOKING FOR SPINOZA: JOY, SORROW, AND THE FEELING BRAIN (2003).

40. *Id.*

Over the years, I began to question each element and assumption of the preceding sentence. The state of the art by definition changes and so must the state of the artist.

I. Differences Between Core Values of Lawyers, Courts, and Mediators

As more litigators become directly involved, there is more legalism, a default to the lawyer approach of rule writing, and a drift towards core values of consistency and predictability. This affects the nature of the mediation process and the role of mediators. It changes the *alternative* nature of mediation. This feeds on itself and snowballs. Mediators are fighting lawyers for the microphone. Lawyers like, and usually want, to continue their role as exclusive mouthpiece for the parties. Instead of being an *alternative* approach, there is a trend to make each look more like the other. As lawyer dominated organizations, such as the American Bar Association Dispute Resolution Section and state commissions, grow in numbers and prestige, this trend will intensify.

This misalignment of lawyers/courts and mediators impacts mediation practice, especially the concept of mediator impartiality and neutrality. This is partly a result of the force of the Rule of Law and legal education, including mentoring of young lawyers. If mediation is viewed as a dependent process or secondary function within the judicial system, it is easy to understand the appropriation or grafting of the impartiality concept onto mediation. Mediators are third parties. They intervene. Many mediators, including myself, started as arbitrators or judges. Many, including myself, do both. Because mediators look like, walk like, and quack like the adjudicatory duck, they must be a species of duck. Because all adjudicatory ducks are "neutral" as the key core value, then so are mediators. Because there is a body of law and best practices developed over hundreds of years on this judicial impartiality, it is within easy reach for the legal community.

There has been much written about this subject. I am of the school of thought that there is a gross distortion of the judicial and law concepts of neutrality and impartiality as tacked onto mediation. The mantra of neutrality often overwhelms rational discourse on the subject.

J. Core Values and Neutrality and Impartiality

In almost every basic training or publication on mediation, the phrase "testing reality" or some variation appears as a goal or dynamic of mediation. One cannot test reality unless one has a version of it. Mediators are continuously processing the information via their own reality and engaging the participants from their own experiential base.

There is nothing wrong or sinister about testing reality. My experience echoes that of my colleagues; most parties welcome the assessment and opinions of the mediator. The neutrality, i.e., objectivity, is one of the values of mediation that can be played out in an evaluative manner on the merits of civil litigation. Studies support this proposition.[41] Being an activist as a mediator by probing for facts, interests, risk tolerances, values, and narratives of the participants has little to do with impartiality or neutrality. It has less in common with the impartiality integrated into adjudicatory processes.

As a mediator, my impartiality is constant in that I have not come to direct the parties to any preconceived or assigned outcomes. I am open, but not attached, to any specific outcome, including an impasse. I am not, however, neutral as to the process or my assessment of agendas, ethics, and values of the participants, arguments and positions advanced by counsel, or a host of other dynamics present in any mediation. I attempt to be fully aware of all of these, process them accurately, and respond with a "macro" strategy or goal and a series of "micro" actions or moves to test, revise, and implement my hypothesis. I doubt that any successful mediator accepts what is offered by the participants in a purely impartial manner, which gives equal balance and respect to every idea and voice. Successful mediators are adept at ferrying out the falsehoods, the extreme positions, the impure agendas, and other

41. Tom B. Metzloff et al., *Empirical Perspectives on Mediation and Malpractice*, L. & CONTEMP. PROBS. 144-45 (1997). Nancy Welsh phrases the issue thus:

> Third, these results strongly suggest that special education mediators need to be much more than mere "communication traffic cops." They should be skilled in the facilitative, transformative, and evaluative interventions that are consistent with disputants' perceptions of procedural justice and enable progress toward resolution. Mediators' respectful but active demonstrations of understanding—through restatement, clarification, and translation—certainly enhance procedural justice perceptions. To the extent that both parents and school officials appreciate the need for reciprocal voice and consideration, mediators' demonstrations of understanding also can facilitate a mutual understanding among the disputants that has the potential to "build that bridge" bringing disputants to "the path of agreement." Transformative interventions that focus on making parents' and school officials' "recognition" of each other explicit, may even have the potential to produce a shared vision and more lasting resolution. Evaluative interventions—including focusing the discussion, suggesting solutions, and assessing the merits of disputants' arguments—also can enhance progress toward resolution and perceptions of procedural justice. Based on the interviews analyzed here, the key seems to be ensuring that mediators refrain from making evaluations until after they have provided the parents and school officials with an opportunity for voice and have demonstrated understanding. It appears that mediators also should confine themselves to helping parents and school officials consider the application of norms that the disputants perceive as relevant and legitimate.

Welsh, *supra* note 26, at 660-61.

challenges to traditional concepts of impartiality. Mediators negotiate process and substance with the participants.

As a mediator, I am non-partisan and neutral in that I have no financial or other direct stake in the dispute. I get paid for my time and not for the outcome. Any "favoring" or partisanship assessments I engage in or display based upon my review and assessment of specific aspects of the process or dispute, are done in as transparent a manner as possible. I am conscious of avoiding a vested interest in settlement. I do not keep any statistics of settlement rates or any database of my mediation or arbitration caseloads. When advocates interview me in conference calls and ask about settlement rates, I am transparent, often politely, about the limited utility of that type of information. I am suspect of mediators who maintain settlement rate data and tout it in the marketplace. To me, these people are amateurs and not professionals. I am even more critical of recommendations to parties in the mediator selection process to investigate the settlement statistics because they encourage this behavior by mediators.

Lack of a computer or other database limits my ability to do encompassing conflict of interest checks. Because I have done little representational work, any prior activity has been as a neutral. In the capacity of mediator or arbitrator the fact that I have served in this manner before creates no conflict. I do disclose, however, any prior service with any of the parties or counsel that I remember. I do not, however, disclose case outcomes.

K. Theory and Postulates on Institutionalization

A review of the literature and empirical studies, discussion among colleagues, and my own experience leads me to articulate a number of points about institutionalization of mediation.

Instutionalization:

1. Impacts negatively upon the flexibility and creativity of the mediation process.
2. Effectively means more lawyering. Court annexation tends to shift the focus to mediators with a legal background and results in a dominant view via the lawyer prism.
3. Creates a common law or case law on mediation.
4. Requires standards of mediator competency and continued quality monitoring.
5. Results in the democraticization of mediator qualifications. It moves the competency requirements towards the minimum so that the least number of people desirous of serving as mediators

are excluded.

6. Tends to be antithetical to professionalism and creates a cadre of full time mediators.
7. Causes resistance and push-back by established stakeholders in the system. One example of the fuss regarding mediation is the role of non-lawyers and the unauthorized practice of law. The debate may involve mediators who handle cases in multiple jurisdictions.
8. Contributes to the unhealthy tension inherent between ethical codes of conduct of lawyers designed for a juridical trial system and mediation annexed to the court system to avoid trials.
9. Aggravates the natural tension between confidentiality of mediation and openness of the court system and the rules of evidence designed for fact finding in trials.

Although the focus is on civil litigation and the intersection of the courts and mediation, I utilize the term "institutionalization" as more than court-annexed or sponsored programs and include within its definition governmental sponsorship, legislation, regulation, and development of non-governmental organizations active in the legal and mediation communities.

In the year 2004, however, the government, especially the courts, and the voices of lawyer associations, mediators, and law professors are still the key players. In most parts of the country, when end-users or the consumers of mediation speak, especially from the business community and higher education, it is usually via lawyers. In many jurisdictions, the driving force behind many school or peer based mediation initiatives are lawyers and mediators. For example, the Pennsylvania Bar Association co-sponsors mediation in the schools via its Project P.E.A.C.E. with state government. Historically, commercial mediation has been championed by the mediators acting to convince the disputants to "do it my way" to achieve benefits, while seeking the blessing or active cooperation of the government and courts. In some jurisdictions, mandatory mediation, championed by lawyers turned mediators, has been the method that created the civil litigation mediation caseload.

IV. The Future of the Artist

A. Creation Myth: Golden Era for Mediators?

At the Dickinson Symposium, many participants discussed the "creation myth." As I understand the concept, the pioneers and early practitioners in any emerging profession idealize the past. There is a

view that things were better before. Those involved during the creation stage create a mythology, which may perpetuate itself in subsequent generations. My experience as a young labor arbitrator bears this out. I recall attending my first few meetings of the National Academy of Arbitrators, founded in 1948, and hearing from the "old timers" about the golden era of arbitration. I suppose I am doomed to repeat history by morphing my role from a young third generation arbitrator to a first generation mediator.

My perspective is that in years past lawyers were more deferential to the process and to the mediator. Now lawyers are trained as "advocates in mediation" and have adapted to the alternative nature of the process. This is either a threat or an opportunity, but probably both. There was a "golden era" of mediation in the 1990s where lawyers readily ceded control over voice to their clients and the mediation process as conducted by the mediator. This permitted facilitative mediation. I am certain that it still exists in geographic or substantive pockets of resistance or ignorant bliss, but it is not the dominant environment. Commentators argue it is a golden era that is always mythical. For some of us, however, it was a reality that now looks more and more like a blur in the rear view mirror. Mediators do, however, adapt and more often than not thrive under changing conditions for survival.

B. Mediation Profession, Business, Calling, and Art

In her article arising out of the Dickinson Symposium, Professor Hensler commented on theosophy.[42] She notes a definition of it as the longing for greater meaning in one's personal life based upon a substitution of universal brotherhood and cooperation for competition.[43] She discusses the desire for social harmony and the interplay with a nationalist movement.[44] It is a good launch point for a discussion of the personal and spiritual aspects of being a mediator. My experience is that mediators tend to have personalities and philosophies that focus on collective harmony rather than individual rights. Mediators naturally cooperate and accommodate. They want to get along. Many lawyers have become dissatisfied with the adversarial life and have gravitated to mediation.[45] The Association for Conflict Resolution has a spirituality

42. Hensler, *supra* note 3, at 169.
43. *Id.*
44. *Id.*
45. My longtime colleague, John Van Winkle, has written extensively about this issue. JOHN VAN WINKLE, MEDIATION: A PATH FOR THE LOST LAWYER (2001). *See also* Gary L. Gil-Austern, *Faithful*, 2 J. DISP. RESOL. 343 (2000).

section. Prominent internet sites regularly publish reflections on the personal and spiritual aspects of being a mediator.[46] The concept of leading an integrated life via doing meaningful work as a mediator is increasingly commonplace.

Mediation is an art. Just as in the art world there are different schools and genres and different outlets for expression. Appreciation of art is subjective. Mediators are faced with difficult choices during the course of a conflict and do not act in a mechanical manner. A mediator is not a monolith.

C. *Economic and Other Trends; Rule of Law*[47]

The end of the Cold War, leaps in electronic communications, an internationalization of the capital market, globalization, the outsourcing of labor activities, the proliferation of non-governmental organizations, nuclear proliferation, the attacks of September 11, terrorism, and the Iraq war have created a new international framework in a relatively short time frame. As international, economic, and technological boundaries of all types erode, the resort to self-help, including violence, seems to be increasing. Tribalism and ethnic and religious separatism are on the rise. Failed states multiply. Information, especially electronic, has created a revolution in mass communication. There is now an ability to inform instantly to mass audiences. The internet has made knowledge accessible to everyone with access to a computer and a telephone line. Any viability of American isolationism as a political reality disappeared in the flames of September 11. The economic situation has been a United States as the dominant economic and military power interconnected to the rest of the world for many decades. Political reality has been forced to catch up with economic reality.

There is an awareness of the role of the Rule of Law in liberal democracies and as a foundation of capitalism and free market economies. Law organizes civilization and protects individual and property rights in a liberal democracy. In the last few decades, the Western democracies, especially under the leadership of the American Bar Association and United Nations, have initiated projects to export the Rule of Law. An independent judiciary, supplemented by private dispute resolution that occurs in the "shadow of the law," creates societal

46. One of these is http://www.mediate.com.

47. This section is based on a reading of the following sources. THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION (2000); MICHAEL MANDELBAUM, THE IDEAS THAT CONQUERED THE WORLD: PEACE, DEMOCRACY, AND FREE MARKETS IN THE TWENTY-FIRST CENTURY (2002); THE CULTURE AND CONFLICT READER (Pat Chew ed., 2001)

stability, wealth, and personal security. Negotiation, mediation, and arbitration are three strong pillars of any dispute resolution platform. Globalization trends, fueled in part by information technology, must be supported by the Rule of Law. Domestic and international security, including any concepts of restorative and/or distributive justice and human rights, demands a functioning Rule of Law. The Rule of Law is meaningless without effective dispute resolution methods.

As technology and other factors make us all more connected and interdependent, there seems to me to be an expanded role for mediators as peacemakers. Mediators can make a significant contribution to both international commerce and public policy issues. Because there is no integrated international legal system and no common independent judiciary, it seems obvious that commercial disputes should look to mediation in the first instance. Historically, arbitration and other ADR processes were the dominant, if not only, means of resolving trade disputes. It is a misnomer to think in terms of domestic, national, or international; we are in the age of "transnational" interests, organizations, and activities.

Political and human rights issues, including issues involving the internationalization of the labor market by outsourcing and free trade, cry out for intervention by skilled mediators. Many non-Western cultures are founded on a consensus or harmony model and not on an adversarial system of conflict resolution. Mediators should consider their own individual roles and potential contributions in the international arena.

D. Practice Concerns and Challenges; Mediator Accountability

1. Mediating and Lawyering

There are a number of tensions confronting the mediator. This is especially true for mediators who may be lawyers. There is spill-over between what should be viewed as two different professions. Some mediation practitioners, particularly in Texas, call themselves attorney-mediators. My own view is that this does a disservice to both professions and confuses the users of mediation and the mediation community. The intent is apparently to market the fact that a mediator has an advanced degree in law or otherwise has experience as a lawyer. I suppose the thinking was that a mere "mediator" lacks sufficient professionalism or clout to consumers of mediation services. Perhaps it avoids issues of whether mediation is the practice of law.

In a number of jurisdictions, mediators who were not licensed to practice law, especially in the matrimonial law area, marketed their services as a substitute for lawyers. Some were charged with

unauthorized practice of law. There have been dialogues between the unauthorized practice of law and ADR committees of bar associations, sometimes involving associations of mediators, addressing the issue.[48] There are concerns about mediators practicing across state lines. The American Bar Association, via its Dispute Resolution Section, issued a Resolution on Mediation and the Unauthorized Practice of Law. It states in part:

> Mediation is not the practice of law.
>
> Mediation is a process in which an impartial individual assists the parties in reaching a voluntary settlement. Such assistance does not constitute the practice of law. The parties to the mediation are not represented by the mediator.[49]

The comments to this Resolution cite a number of rules and formal opinions of bar associations as support. There are questions about when lawyer ethic codes apply to lawyers when they serve as mediators. For example, there is a conflict between the mandatory duty of a lawyer to report misconduct by another lawyer and the confidentiality of mediation. Much has been said and written about this and other issues, so I will not detail it here.

A similar identity, credentialing, and marketing issue exists with labor arbitrators but has long ago been resolved without much difficulty. Although the majority of labor arbitrators are lawyers, a significant number are professors or have a human resources or union background. Labor arbitrators are arbitrators and not attorney-arbitrators. Some arbitrators who are lawyers add "J.D." or "Esquire" after their name on letterhead or when executing awards. All are admitted to the National Academy of Arbitrators ("NAA") based upon proven acceptability in the marketplace through service in a number of cases over a five year period. People are admitted based upon experience or activity in the employment area to the rosters of the Federal Mediation and Conciliation Service ("FMCS"), American Arbitration Association, or state public employee board. People practice in multiple venues without licensing or formal credentials. This has been going on since the end of World War II without any federal or state regulation of arbitrators. This is true despite

48. See Natasha Affolder & David Hoffman, *Mediation and UPL: Do Mediators Have a Well-founded Fear of Prosecution?*, 6 DISP. RESOL. MAG 20 (2000); John W. Cooley, *Shifting Paradigms: The Unauthorized Practice of Law or the Authorized Practice of ADR*, ABA DISP. RESOL. J., Aug. 2000, at 72; Bruce E. Myerson, *Mediation Should Not be Considered the Practice of Law*, 18 ALTERNATIVES TO THE HIGH COSTS OF LITIG. (June 2000).

49. The entire resolution can be found at http://www.mediate.com/articles/abaupl.cfm (last visited Feb. 1, 2004).

the fact that arbitrators make final and binding decisions not subject to review. This is true despite the fact that arbitrators have full discretion on the admissibility of evidence. This is true despite the fact that arbitrators have broad authority to fashion remedies. This is true despite the fact that labor awards are not precedent in subsequent cases even between the same parties or by the same arbitrator. This is true despite the limited common law grounds of vacating an arbitral award, which are limited to lack of jurisdiction, fraud, or bias. This is true despite the fact that arbitrators have quasi-judicial immunity. The NAA administers a Code of Professional Responsibility that was drafted in the 1970s and approved by FMCS and AAA; there is a formal complaint procedure administered by the NAA. Labor arbitration has flourished as a self-regulating profession. As a member of the NAA since 1986, I believe that the mediation community can learn much from the labor arbitration experience. As founding President of the International Academy of Mediators, I attempted to take the best practices of the NAA and incorporate them into an organization for commercial mediators.

In my opinion, there is a substantial threat to mediators posed by the blurring of roles between mediators and arbitrators. As noted above, this happens because many of us serve in both capacities and the ADR movement focuses on both processes. One key concern is the disclosure and conflict regulations being imposed on arbitrators, especially in California.[50] In short, my view is that lawyers, arbitrators, and mediators are not the same, that it is all important which hat is being worn, and that the roles should be expressly agreed upon by the disputants. Mediators do not have a physical client in the room, unless you deem the process itself the client. It is inherently improbable to owe a singularly fiduciary duty to disputants with adversarial interests. My practice rarely involves unrepresented individuals; therefore counsel and their clients understand I am not acting in a representative capacity. This is confirmed in my own agreement to mediate.

2. Conflict of Interest; Subsequent Representation

There are legitimate issues and ethical concerns regarding mediators who are active as lawyers representing clients. For arbitrators, FMCS addressed the inherent appearance of conflict issue decades ago and promulgated a rule that prohibits any roster arbitrator from engaging in any representative capacity in the employment law area. The creation of this rule enhanced the professionalism of labor arbitrators. It produced a

50. *Goin Cali: Neutrals, Providers Settle in with New Rules and Laws*, 21 ALTERNATIVES TO THE HIGH COSTS OF LITIG. (2003).

cadre of dedicated professionals who individually made decisions to give up client bases, and/or to leave a law firm, to pursue an active career as a labor arbitrator. It takes years to build a full time caseload in labor arbitration, and it is almost impossible to do so without being on the FMCS roster. This full neutrality requirement also had the effect of creating an economic barrier to entry into the profession. Most successful arbitrators had another source of income before launching their arbitration practice. I worked as a general practice lawyer for about ten years until I was able to devote my practice almost exclusively to neutral work.

Mediators have faced the same barriers because it also takes many years, and a continuous effort, to build and maintain a practice. There are too many mediators for too few cases. We all are challenged to keep our calendars full. Mediators without wealth, a pension, or family support must do something to generate income when making a transition to practice. This creates the opportunity for real conflicts of interest. This is especially so for those working in law firms where all clients and representation activities may be imputed to all lawyers in the firm. Although many of these can be handled by disclosure or waiver, perplexing issues often arise.

The legal and mediation communities have aligned interests in promoting appropriate ethics and standards to address conflicts of interest. Many standards have been issued, but I will quote from New Jersey because this seems to be a common approach.

> III. Conflicts of Interest: A mediator must disclose all actual and potential conflicts of interest reasonably known to the mediator. After disclosure, the mediator may proceed with the mediation only if all parties consent to mediate. Nonetheless, if the mediator believes that the conflict of interest casts doubt on the integrity of the mediation process, the mediator shall decline to proceed.
>
> A. A mediator shall always avoid conflicts of interest when recommending the services of other professional. If requested, a mediator may provide parties with information on professional referral services or associations that maintain rosters of qualified professional.
>
> B. (1) Related Matters: A mediator who has served as a third party neutral, or any professional member of that mediator's firm/office, shall not subsequently represent or provide professional services for any party to the mediation proceeding in the same matter or in any related matter.

> (2) Unrelated Matters: A mediator who has served as a third party neutral, or any professional member of that mediator's firm/office, shall not subsequently represent or provide professional services for any party to the mediation proceeding in any unrelated matter for a period of six months, unless all parties consent after full disclosure.[51]

The New Jersey Supreme Court issued this rule for mediations conducted pursuant to their court program.

I believe the "downstream" potential for conflict is the most troublesome. Because of the nature of the process, the role as an intervener, and confidentiality protections, a mediator often gains inside information and/or special insight into the thinking and conduct of parties to a mediation. The mediator asks the parties to trust him or her; parties usually do. It does not seem appropriate that after the creation of trust currency, the mediator can then become an adversary or advocate against one of the parties or participants. I am doubtful that time alone cures any conflict. If it is inappropriate or there is an appearance of conflict, waiting six months seems to clear it by New Jersey rule. Given the long life cycle of claims and litigation, I am doubtful if the six months has much meaning unless it is coupled with the prohibition against using "confidential" information. The problem is that the value added to a new, downstream client may be merely from having gained insight into the disputants' culture, personalities, and manner of doing business in the role of a mediator.

Also, the New Jersey rule is unclear on what is meant by "all parties" who must consent.[52] Is it all participants in the new, unrelated matter (which is how I read it), or must all the parties to the original mediation consent if it is within the first six months?[53] It is also unclear if a blanket imputation for unrelated matters to the entire firm makes much sense either in light of what appears to be a permanent confidentiality requirement in Standard V(E), which reads, "[A mediator] shall not use confidential information outside of the mediation process."[54] Standard III(B)(2) appears to be a compromise that may not work in many situations. Another uncertainty may involve cases not conducted via the court program. These New Jersey Standards expressly state that they apply to "all mediators acting in state court-connected programs."[55] Are lawyers governed by these Standards for cases

51. NEW JERSEY SUPREME COURT, STANDARDS OF CONDUCT FOR MEDIATORS IN COURT-CONNECTED PROGRAMS, *available at* http://www.judiciary.state.nj.us/notices/n000216a.htm (last visited Feb. 1, 2004).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

conducted entirely outside the court system and perhaps even outside the jurisdiction? If yes, are these Standards then a *sub silento* amendment of any general rules of professional conduct governing all lawyers licensed to practice in New Jersey? If yes, can they be applied to the numerous lawyers who maintain multiple licenses in Delaware, New York, and Pennsylvania when they have served as a mediator only in those states on the "first" case involving one of the disputants? If so, how are the Standards enforced across jurisdictional lines?

Although I support strong ethical positions on downstream conflicts of interest, I am not certain how easy it is to draft and apply rules with any specificity or clarity that address the diversity of mediation practice and business models. The intersection with the existing regulation of lawyers is problematic. I suggest that courts and ethical committees are competent to address specific cases with ascertainable facts in an ad hoc manner when it involves prior service as a mediator. A body of law has developed on conflicts of interest involving lawyers. Amendments to existing attorney rules and disciplinary systems can adequately address this important area. This is not an area where mediation court programs need to legislate because the issue is one of a lawyer being disqualified for acting in a representational capacity in a transaction or civil litigation. It regulates conduct of a lawyer acting as a lawyer. Courts deal with this all the time under the existing framework regulating attorneys.

The ABA Ethics 2000 Commission examined these issues and formulated appropriate rules, which recognize the differences in functions between lawyers and mediators.[56] There are three mentions of lawyers providing non-representational services: the Preamble,[57] Rule 1.12,[58] and Rule 2.4.[59]

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56. Douglas Yarn & Wayne Thorpe, *Ethics 2000: The ABA Proposes New Ethics Rules for Lawyer-Neutrals and Attorneys in ADR*, ABA DISP. RESOL. MAG, Spring 2001, at 3; *see also* Laurel S. Terry, *Pennsylvania Adopts Ancillary Business Rule*, 8 PROF. LAWYER 10 (1996).

57. AM. BAR ASS'N, ETHICS 2000 COMMITTEE, Pmbl., *available at* http://www.abanet.org/cpr/mrpc/preamble.html (last visited Feb. 1, 2004). The Preamble reads in part: "(3) In addition to representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g, Rules 1.12 and 2.4 . . . ." *Id.*

58. *Id.* at 1.12, *available at* http://www.abanet.org/cpr/mrpc/rule_1_12.html (last visited Feb. 1, 2004). Rule 1.12 reads:

> (a) Except as stated in paragraph (d), 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 or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.
>
> (b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is

The ABA Ethics 2000 approach seems sound. I note that I served as an Observer for the IAM and made a presentation to the drafters at one of its meetings so I am not "neutral or impartial" on this matter. The IAM passed a Resolution supportive of these rules.

3. Legislating Mediation

Many court programs or other governmental regulations mandate a specific mediation style or prohibit certain practices. North Carolina and Virginia prohibit "legal advice" but permit "legal information."[60] The New Jersey standards approved by their Supreme Court require "facilitative" mediation:

> Definition of Mediation: Mediation is a process in which an impartial third party neutral (mediator) facilitates communication between disputing parties for the purpose of assisting them in reaching a mutually acceptable agreement. Mediators promote

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participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or a lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which the lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Id.

59. *Id.* at 2.4, *available at* http://www.abanet.org/cpr/mrpc/rule-2-4.html (last visited Feb. 1, 2004). Rule 2.4 reads:

> (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
>
> (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Id.

60. *See* NORTH CAROLINA BAR ASS'N, GUIDELINES FOR THE ETHICAL PRACTICE OF MEDIATION AND TO PREVENT THE UNAUTHORIZED PRACTICE OF LAW (1999), *available at* http://www.acca.com/advocacy/mjp/NCopinion.pdf; JUDICIAL COUNSEL OF VIRGINIA, STANDARDS OF ETHICS AND PROFESSIONAL RESPONSIBILITY FOR CERTIFIED MEDIATORS, *available at* http://www.courts.state.va.us/soe/soe.htm (last visited Feb. 1, 2004).

> understanding, focus the parties on their interests, and assist the parties in developing options to make informed decisions that will promote settlement of the dispute. Mediators do not have authority to make decisions for the parties, or to impose a settlement.
>
> II. Impartiality: A mediator shall always conduct mediation sessions in an impartial manner. The concept of mediator impartiality is central to the mediation process. A mediator shall only mediate a dispute in which there is a reason to believe that impartiality can be maintained. When a mediator is unable to conduct the mediation in an impartial manner, the mediator must withdraw from the process.
>
> > A. When disputing parties have confidence in the impartiality of the mediator, the quality of the mediation process is enhanced. A mediator shall therefore avoid any conduct that gives the appearance of favoring or disfavoring any party.
> >
> > B. A mediator shall guard against prejudice or lack of impartiality because of any party's personal characteristics, background, or behavior during the mediation. A mediator shall advise all parties of any circumstances bearing on the possible bias, prejudice, or lack of impartiality. [61]

This is similar to the formulation in Florida and a number of other jurisdictions. There are, however, standards or other codes that take a contrary view. The California Dispute Resolution Council, a private non-governmental organization of neutrals, developed Standards of Practice for California Mediators.[62] The California guidelines recognize the flexibility and diversity of mediation practice.

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61. NEW JERSEY SUPREME COURT, *supra* note 51.

62. CALIFORNIA DISPUTE RESOL. COUNCIL, MEDIATOR ETHICAL STANDARDS, *available at* http://www.cdrc.net/pg19.cfm (last visited Feb. 1, 2004). Standard number three reads:

> In an attempt to reach an informed, voluntary agreement, appropriate Mediator behavior may include, but is not limited to, providing information about the process, addressing obstacles to communication, assisting participants in defining issues, providing impartial substantive information, exploring alternatives for resolution, and building capacity of the parties to make an informed decision. Subject to duties of nondisclosure of confidential information, a Mediator is obligated to be truthful, and should allow the participants the opportunity to consider all proposed options. Mediation is not the practice of law. A mediator may generally discuss a party's options including a range of possible outcomes in an adjudicative process. At the parties' request, a Mediator may offer a personal evaluation or opinion of a set of facts as presented, which should be clearly identified as such. A Mediator should not give any participant legal or other professional advice.

Id.

Contrary approaches that expressly define mediation as "facilitative" create uncertainty in mediation regarding what methods are condoned. One of my own examples is from a recent medical malpractice mediation. There a key physician would neither consent to settle nor contribute a small percentage of the total dollar amount. The other defendants were adamant that he bore as much responsibility as the others, and that they would not assume 100% of his liability nor contribute enough to bridge the remaining gap. The other defendants had pooled their funds to reach the plaintiff's final number, which everyone deemed to be fair and reasonable. The physician had both private counsel and counsel appointed by the carrier attending the mediation with him. I had read the physician's deposition and interacted with him during the long day of mediation. It was my own opinion that he was probably more liable than the other medical care providers and that the likelihood of him obtaining a verdict 100% in his favor was very small. I also believed his story would not sell to the jury and that he would make a poor witness. I shared these views with both of his counsel in a private caucus among the three of us, which excluded the physician and the insurance adjusters. The three of us agreed that I would directly share my opinion with their full team. The doctor and the carrier representative were invited into the caucus. I sat directly across from the doctor to tell him that I doubted that his story or testimony would carry the day. I explained my "impartial" view on this issue and that I had just reviewed this information in the caucus with counsel only. After some difficult dialogue, including a chorus of accord from his own team, he agreed to consent and have his carrier contribute the remainder of the funds necessary to settle the case. His team was visibly relieved. At the conclusion of the entire mediation, he thanked me for my candor and assistance.

I am not sure how this interaction fits into the various mediation models, definitions, debates, and angst of orthodoxy. Did I "predict the outcome" of litigation? Sure, if you want to characterize my view of a finding of likely liability as an outcome. Did I "lose" any impartiality? I do not think so because my opinion was formulated as a neutral based upon my objective analysis. Technically, it does appear that I did "favor" one party over another within the definition of the New Jersey and other state regulations. Part of my evaluation of the doctor as a witness was based upon my interaction with him during the mediation session. Does this violate New Jersey's II(B) because I based this upon his "behavior" at the mediation?[63] Note that New Jersey prohibits "conduct" by the mediator that gives the "appearance" of favoring one

63. NEW JERSEY SUPREME COURT, *supra* note 51.

party over another.[64] What does the New Jersey Supreme Court mean when it states mediators must "guard against prejudice?"[65] Isn't the logical conclusion of any language regarding "favoring" or "partiality" that no evaluation or challenge of any kind can be made by the mediator?

Now I suspect that some of you reading this have evaluated my evaluative technique as unnecessary because the same result could have been obtained in a facilitative manner by asking a series of questions of the physician and his counsel. My response is that I did utilize a facilitative approach in an early caucus by exploring with each disputant their role as witness, how they thought the jury might react to their testimony, and their role in the respective narratives of the parties. The result of that interaction was an assurance by the doctor that he had testified before, that juries liked him very much, and that he would prevail. I noticed during that question and answer caucus that the doctor's own counsel did not affirmatively agree with him and that they remained silent. I considered their silence as a potential dissonance with their client on this point. The retention of private counsel on the matter also made me think there may have been some conflict on this or other issues. These and other factors ultimately led me to the approach described above.

If I had not directly stated my assessment in a narrative manner to the physician but led him to that conclusion indirectly via a question and answer approach to sow doubts on his own opinion of himself, wouldn't I have still acted in a "partisan" manner, but covertly instead of overtly? An indirect approach that "worked" may have "facilitated" the new conclusion, and "transformed" the physician, based upon an assessment I did not share expressly with the disputants or their counsel. Why is this superior to being transparent? In fact, mediators do manipulate the parties by an indirect approach to further their own evaluation or assessment of reality. One formal ethical opinion in Florida clearly states that this is wrong for "legal advice" depending on how "direct" the question is framed; the choice of words is critical for it to be ethical.[66] The ethical approach in the court program in Florida rests upon fine distinctions of language and form but not really upon the intent of the mediator or the conclusions resulting from the line of questioning.

Is it more ethical or appropriate to secretly lead the horses to the water of the mediator's choosing and expect, or hope, they will drink, or is it appropriate to map out the journey in a narrative format or as a

64. *Id.*

65. *Id.*

66. Florida Mediator Ethics Advisory Comm., Improper for Mediator To Provide Legal Advice Even If Framed as a Question (Oct. 5, 1995).

preamble to mostly rhetorical queries posed by the mediator? Isn't the mere selection of an element of a case to query and sow doubt based ultimately upon some evaluation of a "reality" based upon the experience of the mediator? Why is the mediator as "trickster" or "mystic" better than the mediator who is an honest, upfront broker? If I attempt to reconcile "facilitation" with "transparency," does that lead to something like, "I am going to ask you a series of questions to cast doubt on your credibility as a witness with the goal that you will transform your opinion of your own credibility so that you can accept the advice of your own counsel to consent to settlement?" If I say anything less or say it opaquely, have I been truthful and/or transparent?

I have answered these questions for my practice by concluding that a transparent and direct approach is healthier for both the parties and the process. I have transformed my practice to elevate function over form. Litigation, specifically the rules of evidence, usually stress form over function. Information is compartmentalized to be transmitted in specific manners with significant barriers to protect the jury against "bad" or "prejudicial" information. Mediation is intended to be a true alternative method of communication; therefore, restricting mediators and the participants is self-defeating. Regulations that intrude into the mediation process do not respect the self-determination of the parties.[67]

Did the parties perceive me to have acted improperly in the medical malpractice case? That one is easy. I negotiated what I was going to do and why it was done, and I was transparent about it. I served as the proverbial "agent of reality" and met the expectations of the parties via their own self-determination. I acted fully in accord with core values of mediation. My tactics here did not clash with core values of the legal profession or the courts. All counsel in that case have since retained me numerous times for other claims and publicly tout this case as an illustration of successful mediation. Judges in that area regularly refer medical malpractice cases because they are aware of the results, i.e., settlement and satisfaction by the parties, but not the specific tactics utilized in any case.

4. Liability Claims and Interaction with Courts

Mediator accountability and liability is another issue that is coming to the forefront. Professor Michael Moffitt has recently written

67. *See* Robert D. Benjamin, *Style Wars and Other Little Hypocrisies* (Mar. 2004), *available at* http://www.mediate.com/articles/Benjamin; *see also* Charles Pou, Jr., *Enough Rules Already! Making Ethical Dispute Resolution a Reality*, DISP. RESOL. MAG. 19 (Winter 2004).

extensively on this subject.[68] He encourages development of accountability via recognition of causes of action against mediators.[69] Suits can be based upon an express or implied breach of the mediator's contract to mediate.[70] Affirmative representations in the document may give rise to theories of liability based solely upon these express terms and conditions.[71] Although I do not agree with many of his conclusions, he is a must-read for the professional mediator concerned about personal liability issues.

As more mediators become full time, newer people enter the field and the shear volume of cases being done means that even a minute percentage of problems creates some level of activity and concern. The trend of institutionalization, which results in qualifications and competencies moving towards the absolute minimum, accelerates this trend and spotlights mediator accountability. A mediator who is a trial lawyer who serves in a court program a few times per year is not going to be as effective as a mediator dedicated to building a full time caseload. My view is that problems created by part-timers in a tiny portion of the overall caseload may cause restrictive rules to be adopted, which apply to all mediation caseloads.

I am also suspect of concepts of mediator quasi-judicial immunity. The liability and misconduct issues are best handled now on an ad hoc basis. Although ethical guidelines and advisory standards are appropriate, they tend to be too vague to have much meaning and are often internally inconsistent. Even matters agreed upon by almost everyone, such as the prohibition against contingent or "value" fees for mediators, may impinge upon other core values such as party self-determination. For example, if two sophisticated business entities in litigation with a "bet-the-farm" outcome for the loser decide that it is mutually beneficial to create a financial incentive or bonus for the mediator for value-added in bringing about a settlement, I am not certain that you, me, or anyone else has the right to say this should not happen under any circumstances. I do not believe in contingent fees for mediators. I think they are wrong. Nevertheless, it is inherent in the mediator persona to avoid absolutes and 100% certainties.

I am also leery of grievance and complaint procedures against mediators, especially if conducted under the auspices of state or local bar

68. Michael Moffitt, *Promises, Promises: Mediators Must Exercise Contract Caution*, 22 ALTERNATIVES TO THE HIGH COSTS OF LITIG. (2004); Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147 (2003); Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81 (2003).

69. *See generally* sources cited *supra* note 68.

70. *See generally* sources cited *supra* note 68.

71. *See generally* sources cited *supra* note 68.

associations. It is good practice for courts and administrative agencies to permit complaints by consumers about neutrals on their rosters. It is necessary to provide due process for any neutral threatened with removal from the referral list. This is a byproduct of the institutionalization of mediation. The less voluntary the referral to mediation, the more necessary a complaint procedure. Mandatory mediation leads to formality of administrative process. My reluctance stems from a balancing of the harm protected against versus the benefit of what is ultimately a disciplinary procedure against the neutral. If a case does not settle in mediation, so what? Is anyone harmed by non-settlement? If a case settles as a result of coercive conduct, the court, and not an administrator or complaint review board, has to resolve the issue of the enforcement of the settlement. A judge is perfectly capable of acting to remove offending mediators from the roster or to take other appropriate action in the court program. Procedure and process violations require clearly written and disseminated rules. Obvious misconduct, such as fraud or accepting bribes, requires no rules.

The challenge is to keep complaint procedures from inhibiting the discretionary styles, approaches, and practices that routinely occur in mediation sessions. In addition to the definition issues addressed above, there are numerous other murky areas where consensus does not seem possible. There are numerous examples of tension between the written word and practice. Some guidelines advise mediators to be respectful of power imbalances; some note that mediators should withdraw from the mediation if the settlement outcome is unconscionable. North Carolina and Virginia permit mediators to give "legal information" but not "legal advice."[72] Florida Rule 10.410 requires that mediators "conduct mediation sessions in an even-handed, balanced manner."[73] The Pennsylvania Council of Mediator's guidelines ask mediators to recognize power imbalances between the parties, yet require impartiality.[74] Mediators are often given confidential information exposing a unilateral mistake or asymmetrical information between the parties. These are only some of the thorny issues requiring immediate decisions and actions by mediators in the field. These decisions are extremely context specific; many factors affect a mediator's response. The identity of the parties; the nature of the dispute; professional, business, and personal relationships; the stage of litigation; the interests at stake; the emotions at play; the expectations of the parties; and a host

72. *See supra* note 60.

73. FLORIDA SUPREME COURT, RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.410 (2000).

74. PENNSYLVANIA COUNCIL OF MEDIATORS, ETHICS AND STANDARDS OF CONDUCT (1998), *available at* http://www.pamediation.org/ethics.htm (last visited Feb. 1, 2004).

of other elements must be given appropriate weight in making a process decision.

The state of the art evolves daily. Static rules are not much help nor do they ultimately benefit the consumers of mediation services. A mish-mash of heuristics, which often amount to nothing more than slogans, should not form the basis of a regulation of what happens in mediation nor mandate disciplinary action against practitioners in a field that promotes creativity and diversity.

5. Confidentiality and Privilege

There are numerous issues pertaining to confidentiality and privilege. Most of my practice occurs in Pennsylvania, which has had a short and sweet statute since 1996.[75] It is sweet because it is broad and does not attempt to substantively define mediation or impartiality. It has limited exceptions. There has been little case law interpreting it, so in my opinion it is working very well for mediators, lawyers, and disputants. I expand the Pennsylvania statutory provisions contractually by incorporation of strict confidentiality not limited to legal proceedings. Parties expressly agree not to disseminate information to the general public such as media, other lawyers, databases, or the internet. My obvious goal is to promote candor.[76]

The Uniform Mediation Act ("UMA") was opposed by the International Academy of Mediators ("IAM") and a number of bar associations, including the Pennsylvania Bar Association.[77] Much of the UMA is good, and some aspects of it are exceptionally insightful and well-drafted.[78] I support the minimalist approach taken in some of the definition sections and the omission of impartiality or good faith requirements. Yet, on balance, I believe it is too complicated and has some fatal flaws. Specifically, it is not clear what observation of conduct at the mediation is protected; there is a provision that states that the mediator "loses" the privilege against testifying based upon a failure to disclose a potential conflict of interest.[79] There is some tracking of

75. PA. CONS. STAT. ANN. § 5949 (2002).

76. Some commentators have criticized the confidentiality of settlements arising from mediation as a denial of information to the public. *See, e.g.*, Stephanie Brenowitz, *Deadly Secrecy: The Erosion of Public Information Under Private Justice*, 19 OHIO ST. J. ON DISP. RESOL. 679 (2004).

77. I was an observer representing the IAM at the National Conference of Commissioners on Uniform State Laws. I applaud the hard work and dedication of the drafters.

78. *See* Richard C. Reuben, *The Sound of Dust Setting: A Response to Criticisms of the UMA*, 2003 J. DISP. RESOL. 98 (2003).

79. NAT'L CONFERENCE OF COMMISSIONERS ON UNIF. STATE LAWS, UNIFORM MEDIATION ACT § 9(d) (2002), *available at*

language of the Revised Uniform Arbitration Act, yet the arbitrators who engage in misconduct by failing to disclose potential conflicts do not lose any quasi-judicial immunity and the remedy focuses on the effect of the award.[80]

The UMA drafters intentionally started from scratch instead of modeling the law on existing statutes in jurisdictions with a history of active mediation such as California, Florida, and Texas. Furthermore, many provisions seem to stem from the law of privilege, with analogy primarily to the lawyer-client and other protected relationships. I believe the appropriate platform for mediation confidentiality is the inadmissibility of settlement discussions from common law and/or rules such as Federal Rule 408. Finally, the premise of the need for uniformity across venues and subject areas is suspect. There are tremendous differences and public policy variants stemming from factors such as the nature of the dispute and the identity of the parties themselves; custody, tort, real property, intellectual property, employment, and commercial disputes may require different rules.

Confidentiality, particularly how mediators interact with the court on good faith participation issues, enforcement of settlements obtained in mediation, and malpractice claims against counsel, will continue to develop a body of case law. The dominant approach of a sound-proof barrier between the mediator and the judge seems likely to continue. It is clean, clear, and easy to implement. This is the approach advocated by mediators and often taken by the UMA and most federal and state court programs.

6. Good Faith and Compliance with Mandatory Participation Requirements

There has been substantial discussion and publication on the concept of a good faith requirement to participate in mediation.[81] Some states, like Indiana, require it by rule, stating that "parties and their

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http://www.mediate.com/articles/umafinalstyled.cfm (last visited Feb. 1, 2004). The remainder of this section stemmed from previous readings of the following. Carol L. Izumi & Homer C. LaRue, *Prohibiting "Good Faith" Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel out of the Mediation Tent*, 2003 J. DISP RESOL. 67 (2003); John M. McCabe, *Uniformity in ADR: UMA, Revised UAA Present Different Challenges*, 8 DISP RESOL. MAG. 20 (2002); Brian D. Shannon, *Dancing with the One that "Brung Us"—Why the Texas ADR Community Has Declined To Embrace the UMA*, 2003 J. DISP. RESOL. 197 (2003).

80. *See* NAT'L CONFERENCE OF COMMISSIONERS ON UNIF. STATE LAWS, *supra* note 79; *see also* NAT'L CONFERENCE OF COMMISSIONERS ON UNIF. STATE LAWS, REVISED UNIFORM ARBITRATION ACT (2002).

81. *See, e.g.*, Edward Sherman, *Good Faith Participants in Mediation: Aspirational, Not Mandatory*, 4 DISP. RESOL. MAG. 14 (1997).

representatives are required to mediate in good faith, but are not compelled to reach an agreement."[82] The ABA Section of Dispute Resolution, via its Mediation Committee, has commissioned a study in an effort to draft a resolution on good faith for mediators and mediation advocates in court-mandated mediation programs. This project, called the Good Faith Subcommittee, issued a preliminary Report in August 2003 with the following principles:

1. Sanctions should be imposed only for violations of rules specifying objectively determinable conduct.
2. The content of mediators' reports to the court or court administrators should be narrowly restricted.
3. Court-mandated mediation programs should engage in collaborative planning efforts and establish educational programs about mediation procedures for participants.[83]

It is anticipated that a final report, which will be on the ABA Section of DR website, will be issued later in 2004.

On balance, I am disinclined to add another layer of regulation and uncertainty created by what necessarily must be a broad rule or vague standard. I am also concerned about mediators being drawn into the substantive conflict by a party seeking tactical advantage. It is likely that clever advocates will seek to use the mediator to prejudice the judge against the other party. Some good faith disputes can only be resolved via testimony of the mediator. Issues involving the necessary level of active participation by decision makers can be troublesome. The testimonial slope is exceptionally slippery. How testimony can be reconciled with conventional notions of impartiality is beyond me.

Good faith requirements encourage institutionalism and will interfere with the activities of mediators in the field. I fear their harm mediation in the long term. I am reluctant to have a few bad actors or cases make bad law for the legal and mediation communities. Having a body of case law on good faith participation in mediation will result in the loss of mediation's informality as mediation becomes more procedurally oriented and adversarial. Application of legal standards to what happened in the mediation session creates a more adversarial process. This is ironic because Florida and other states by court rule order that mediators should "encourage the participants to conduct themselves in a collaborative, non-coercive, and non-adversarial

82. IND. R. FOR ALTERNATIVE DISP. RESOL. R. 2.1 (2002).
83. AM. BAR ASS'N, DISP. RESOL. COMM., JUST RESOLUTIONS (Jan. 2004).

manner."[84] There is an inherent, and perhaps irreconcilable, tension in rules requiring good faith, cooperation, and zealous representation of clients.

Lawyers are adept at exploiting the opposition's procedural faults. Rules create the opportunity for violations that can be leveraged by the opposition. This is what lawyers are trained, and expected, to do for their clients. This is antithetical to mediation, which is based on express[85] or implied cooperation and collaboration. In courts, rules are hard and fast, while in mediation rules are soft and slow. A rule-making response to process challenges seems problematic even though I must acknowledge that California, Florida, and numerous states have vibrant court mediation programs under many of the approaches subject to criticism by the mediation community. Professional mediators have arisen in those jurisdictions primarily from the ranks of lawyers and judges giving up traditional practice despite increasing regulation. This may be proof of Professor Sally's concept of adapting and consolidating gains while avoiding loss.[86]

On the other hand, I am not certain that some flexibility in this regard should not be explored within limited parameters for certain types of cases. Specifically, when settlements or other aspects of a claim, such as attorney fees, must be approved by the court, some limited communication may be desirable and manageable without violating core values of either the legal system or the mediation process. One way that comes to mind is for the court to have a designated ADR judge or empowered administrator who does not sit on the merits of the case but can address these procedural issues without fear of prejudicing the actual trial judges. Although having a separate ADR judge may make sense for limited purposes, the necessary drafting of rules and procedures to define the scope of interaction will be difficult. Yet, there is an invaluable opportunity for mediators and courts to engage interactively and have a constructive dialogue in class action and other complex litigation. Popular framing of the concept of impartiality and the constrictions of confidentiality may impair the most productive use of ADR professionals in this context. It is my understanding that many federal judges have successfully created hybrid processes for particular claims where the mediator and the judge interact at various stages in the litigation. Many court programs, and the Uniform Mediation Act, have a strict rule that limits the reports filed with the court to procedural matters. A blanket prohibition of communication between mediator and judge is suspect in

84. FLORIDA SUPREME COURT, *supra* note 73.
85. Florida's rule is one example. *Id.*
86. *See* Sally, *supra* note 4.

many types of cases. It also violates the mediation principle against self-determination, which encourages parties to be flexible by designing a process to meet their own needs. To have a rule that prevents the parties from working closely with the judge makes little sense. Hence, the dilemma.

I am also of two minds on what involvement, if any, mediators should have in allegations of malpractice or professional misconduct against lawyers for their representational activities in mediation. There are many cases where counsel have done an excellent job for clients, yet claims are filed against them alleging misconduct or poor performance. The mediator may possess facts which further or rebut these claims. The mediator may have regular interaction with counsel on other cases. To have a blanket prohibition against the mediator assisting counsel to defend meritless claims seems wrong. It violates my own sense of fairness to sacrifice counsel or a client on the altar of confidentiality if the mediator is truly the best source of information on the post-mediation claim. At the same time, however, I agree with my colleagues who urge mediators not to start down that evidentiary path.

Issues regarding good faith participation in mediation, enforcement of settlements, and allegations about misconduct of lawyers in the mediation process are unable to be resolved via a one-size-fits-all model. Rule making encourages uniformity. The challenge is to address these issues in a creative and flexible manner while honoring the diversity of mediator and disputant interests. Relying upon a case specific, common law approach, which focuses on specific context and has limited precedential force, is the best approach, particularly if the approach eliminates the need for the testimony or reports of mediators.

7. Capitulation to the Routine

Some of the trends my colleagues and I have observed, which are mentioned above, are troublesome. The most vexing to me, perhaps, is the problem of having the right participants at the mediation. Because mediation takes many hours, more defendants are relying upon counsel to attend while the decision makers are available only by telephone. This means that advocates are coming to mediation with limited authority rather than full authority. Judges have faced this issue in settlement conferences for years but ultimately can issue an order compelling attendance or impose sanctions. Tony Willis, an IAM colleague from London, has "three rules of authority." These are:

1. He specifically asks those who are there if they have full authority;

2. He expects them to say yes;
3. He expects them to lie.

Although I am not as cynical, I am unable to vigorously contest this heuristic.

Mediation should be a holistic process with multiple levels of engagement involving voice, connection, and choice.[87] It is impossible to engage someone not present and usually not even identified by name, title, or function, especially when most communications are being filtered and spun by those present. Absent decision makers eliminate the most human elements of mediation and may reduce it to a long-distance auction. It begins to look like a traditional judicial settlement conference with the mediator playing messenger. This works for situations involving a pre-existing but undiscovered zone of settlement but is hit or miss for those claims involving the mediator breaking a good faith impasse over value, risk, or principle. It is difficult to transform participants who are not engaged in the process.

Many mediators concur with this assessment of the problem. I spend a substantial amount of time before the mediation on this issue. My standard correspondence emphasizes the word "full" before authority. Several years ago, I added a clause to my agreement to mediate to the effect that I retain sole discretion to communicate directly with any person with authority who does not attend the mediation. It is not clear to me what recourse either I or an opposing party has if someone does not honor this provision. Following a two-day mediation, attended only by outside and in-house counsel, outside counsel was reminded of this provision and told that breach of it may be taken up by the other party with the federal court, which mandated mediation. Outside counsel noted they had little, if any, control of their large, corporate client. I am not certain what role, if any, I would have if this question were brought before the court under a good faith requirement or other rule. I am not certain if it makes any difference if the mediation is under a court program or formal order or is just a voluntary referral at the recommendation of the judge.

People, especially lawyers, are creatures of habit and their own experiences. Once they have attended a number of mediation sessions, they begin to look at it as a commodity. In a mass market culture where franchises and sameness dominates, there is a human tendency for repeat players to expect more of the same. The predictability factor gives them a comfort level. One concern expressed as a central theme at the Dickinson Symposium was the "giving in" to the routine. I see this

87. *See supra* notes 25-29 and accompanying text.

happening. I do a number of medical malpractice or construction cases with the same advocates. I can see their eyes glaze over during my opening statement. Although it varies in each case, the themes are the same. I am now transparent about repetitiveness, and I note that I am addressing my remarks primarily to the new folks in this particular case. I do worry about becoming stale. I worry about the ability of all mediators to propose novel approaches or techniques to the parties in a climate of practice regulation. I believe mediation thrives on creativity and flexibility, so "gaming" methods, storytelling, expert-to-expert side-bars, floating unique proposals, flipping coins, direct interchanges and apology, and non-economic issues remain essential elements of breaking impasse.

E. Consolidating Gains

By being proactive and adaptive, mediators can maintain their gains while striving for continuous improvement. As Professor David Sally recommends, we must learn to live in the limbo of optimum frustration while we consolidate our gains and continually strive for gains plus, while avoiding gains minus or any backward steps.[88] Mediators, to be in a "perfect practice," must continually redefine perfection.

The mediation community should resist the linearization of mediation as the by-product of the forces of institutionalization. One approach in commercial or licensing ventures is called freedom to operate, or FTO. A party wants the ability to be creative, flexible, and efficient. I suggest that mediators insist upon as much FTO as can be transparently negotiated between the disputants and the mediator.

I contend my own experience is supported by recent research based upon interviews with disputants before, shortly after mediation, and eighteen months later. A summary of an excellent study by Professor Nancy Welsh and Grace D'Alo on mandatory mediation between parents and school districts in Pennsylvania was published just prior to publication of this Article. Professor Welsh noted:

> Further, the interviews with disputants suggest that if they are reassured that the mediation process and the mediator's behaviors are grounded firmly in procedural justice, they also value an eclectic and apparently conflicting variety of mediator interventions designed to achieve resolution . . . . These reactions suggest that the mediation field's current debate over the relative superiority of evaluative, facilitative, or transformative approaches misses the point . . . . Thus, the focus of the field should not be upon ensuring orthodoxy with any

88. *See* Sally, *supra* note 4.

> particular mediation model, but with crafting processes that use all three types of interventions in a manner that serves *both* procedural justice and resolution.[89]

Two questions were posed at the Dickinson Symposium: (1) Is there an irresolvable clash of core values between mediation's core values and the courts' core values?; and (2) Is mediation, as institutionalized by the courts, actually a different process intended to fulfill a different set of core values?

My answer to these two questions is "maybe, but not necessarily so." First let me note there is some internal dissonance in question number one because it compares an institution, i.e, courts, to a process, i.e, mediation. A more apt differential analysis is to compare litigation to mediation and courts to mediators. Comparing processes in terms of a "clash" is weak because the two processes are intended to have different means to different goals. From a process standpoint, mediation and litigation "clash" because they are *meant* to be alternative or complementary processes. Mediation tends to focus on private and restorative, not retributive, justice and on the future rather than fault for past conduct. Adjudication finds blame (truth) and implements a consequence (justice) in a public manner.

The same discussion can be applied to mediators and judges or juries. They do different things for different reasons. Perhaps any "clash" is a more a difference of focus or prioritization. Question number two, however, can be the answer to question number one in a court program that dis-empowers mediation, mediators, and litigants. Regulation, including narrow definitions of mediation itself or restrictions on mediator approaches, takes away voice and connection, two core values of mediation. The more "inside" the court system mediation becomes by regulation of mediation procedure and creation of protocols, the greater the opportunity for a clash of core values. I do not, however, think this tension is required to be resolved or reconciled, but instead it should be acknowledged and accommodated. By practicing mediation in a transparent manner, including articulation of it as an alternative process, parties can have their expectations met by selecting closure and/or transformation in mediation over resolution by court adjudication.

There is a tension, if not a clash, between the core values of the Rule of Law as embodied by courts and the mediation core value of empowerment. Legal commentator Robert P. Burns frames the independent bases of the Rule of Law as involving substantive

89. Welsh, *supra* note 26, at 581-82.

legitimacy; principles of natural justice; popular sovereignty; protection of the individual; and consistency and equality of treatment.[90] He writes:

> [Rule of Law] ensures that democratic judgment, constitutionally structured and channeled, will be brought to bear on individual cases . . . . The second basis for the Rule of Law focuses more on the dangers of the abuse of power by individual government actors . . . . A corollary to the law as limitation on the power of officialdom is its role in protecting the liberty of the citizen, the third basis for the Rule of Law . . . . Finally, the Rule of Law "implies the precept that similar cases be treated similarly." Consistency itself will prevent a willful official from injuring Citizen A, whom he dislikes, if the rule he establishes will injure Citizen B, whom he favors. Consistency, or the "principle of regularity," however, is not merely a policing device to constrain government action. It rests on substantive grounds as well—the principle of equal respect for persons, a basic norm of morality as well as of legality.[91]

The goal of claim settlement takes the specific and almost always uniquely individual dispute from the public realm back to its private origins.

Mediation as a process of resolution and closure does not directly clash with the bases of the Rule of Law as articulated by Burns and other legal philosophers. The issues of abuse from government and protection of individual rights have all been already resolved in the larger context and they are unlikely to be present in the specific dispute. Consistency in terms of precedent or governmental action is also not often at issue. The dispute is between parties who have no more concern for the effect of a resolution upon themselves than morality, precedent, or any larger concern. For those cases where public policy or other justice issues are of prime concern, they will not settle because one or more parties will seek a public resolution pursuant to the activity of the courts under the Rule of Law. In other specialized litigation, the parties can self-determine by creating an approach that involves active engagement between the court and the mediator. Mediators can identify narrow threshold issues of fact or law for the court to resolve while mediation is held in abeyance or the case proceeds on a dual track. Mediators can "pocket" dual or multiple settlement agreements. All of these things can happen if the field resists the urge to create a mediation orthodoxy. In a world of diversity of mediation application and practice, the two questions become moot.

Robert Burns contends that the trial is in service to the Rule of Law

90. *See* BURNS, *supra* note 27.
91. *Id.* at 11-13.

because it requires a process for making factual determinations. He notes:

> Factual accuracy is clearly important to those who defend the Rule of Law on substantive grounds . . . . For the individual case to be justly decided, facts must be accurately determined and available in a form that will allow the preferred norms to be "applied." The importance of accuracy in moral and legal theories where fairness of distribution is intimately linked to the first principles, such as retributive theories in criminal law, is obvious.[92]

The prime mission of trials is to find facts. The opposite is true of mediation. Mediators may evaluate risks and credibility issues, but no formal findings are ever made. Facts are intentionally discussed as probabilities to be resolved only if mediation fails. Acknowledgments, apologies, and acceptance of moral or other responsibility is usually done privately and confidentially. Rarely is "guilt acceptance" part of a formal mediated settlement. Resolution is made in a fact-neutral context. Disputants may, and should, have different expectations of mediators than judges and juries.

My colleague, Robert Jenks, trains the MAPS mediators to think of the mediation process as being the mediator's client; the mediator is an advocate for mediation. Perhaps one way to look at it is that for courts, a just outcome is the "client," while for many mediators it is the process itself. I do believe, however, that courts and the legal system often treat the Rule of Law (due process) and the system itself as the client.

Mediation thrives as an alternative process intended to meet goals other than the state imposed Rule of Law. At times, mediation can serve similar goals: for example, when much of the mediation is focused on a search for what happened, an explanation and/or an apology or some other equitable remedy. For most cases, it is a much different process with dissimilar values and goals.

Mediators can contribute to each other by recognizing the value of a variety of models, styles, and approaches in a diverse mediation community. Any debate over orthodoxy within the mediation community or between mediators practicing in different substantive or geographic areas should be minimized. Mediators should be encouraged to try new methods and techniques. A minimalist approach to legislation and regulation should be advocated. Non-lawyer mediators should not be banned by the legal community. Real harm to a significant segment of the public must be proven, and not argued or presumed, before attempting to codify or regulate mediation practice. Courts may

92. *Id.* at 14.

implement any rules they deem necessary to further their own goals, but mediators should simply decline to participate in these programs if they are not in harmony with individual mediator practices. There should be no mediation gospel; apostasy should not only be permitted but encouraged. Progress is often made by being unconventional, so resistance is not futile. Nevertheless, there may be areas were voluntary standards and compliance may be productive and successful to meet certain market and/or other political needs.

The mediation community must guard against rule making and the need to define and predict all possible variations and consequences of dispute resolution. Mediation is a process that is far more holistic than the sum of its various parts. Rules create orthodoxy. Stricter rules result in stricter orthodoxy. Orthodoxy and mediation are antonyms and not harmonious concepts. Mediation will be strangled by an encircling patchwork of legislation and rule making. Mediation protocols work against recognition and empowerment of litigants by undermining core values of mediation. There is, and can, however, be accommodation by continuing to permit mediation to act in a parallel manner with limited court involvement in specific cases. Court programs should continue to permit parties the freedom to operate in a voluntary manner by private contract. To the extent court annexation results in regulation and/or limitation on contracts and process design, there is a potential for a clash of core values and a transformation of mediation into a different process.

F. Qualifications, Competencies, Credentialing, and Certification

My views of this controversial issue evolve as an adaptation to the reality of the marketplace. I believe that ultimately the market, as defined by the mediation community, should be the determinant of the competency and qualifications of mediators. Mediation will lose some of its core values if this is not the case. To the extent there are qualifications, there should be different standards for different mediation practices, especially those in certain substantive areas.

I do not believe there should be any entry level barriers prohibiting individuals from offering mediation services. Mediation skills can only be implemented in the field and not in the class room. This does not mean that any individual may apply and be approved for a court, governmental agency, or private sector roster. Each entity should be free to determine its own set of qualifications and assignment methods. I believe this is what we have now and this should be permitted to continue. This does not mean, however, that there is not a need for a unified approach to mediator training programs.

The Association for Conflict Resolution and the American Bar

Association Section on Dispute Resolution have independently been studying this issue for a number of years. Both have issued draft reports.[93] The ABA and I seem to have approaches that are not inconsistent on this matter, although the ABA DR Section focuses more on a national accreditation program for mediator trainers and preparation programs than a credential for advanced practitioners.

The evolution of my thinking is that there has to be something more to distinguish professional mediators from the novices or less experienced practitioners. The outline of a proposal for a certified professional mediator follows.

G. Certified Processional Mediator: A Call for WOCAM

A commission or board should be created with the sole function to issue credentials to mediators. It should be a non-profit, non-governmental organization. There are numerous models in the financial, health care, and engineering fields to follow. One obvious example is in accounting with the Certified Public Accountant ("CPA"), a specific credential with many other providers offering similar services as accountants, book-keepers, and financial and tax advisors. Although some functions may be restricted to a CPA, there is numerous overlap and free choice by consumers of the level of professional services necessary for a specific matter. The same can happen in mediation; some courts or programs may require a Certified Professional Mediator ("CPM") but others need not be frozen out of the marketplace. Every mediator may aspire to a CPM level, regardless of formal educational background, if the CPM requirements are based on experience and other performance-based criteria. These levels can be by tiered and/or by substantive area.

The organization can have an international scope, be limited to North America, or have divisions for specific geographic or practice areas. It should be independent of any existing organizations but have a governing board composed of representatives of the major stakeholders in the mediation community. For example, the proposed Professional Mediator Accreditation Commission ("PMAC"), or the World Organization for Certification and Accreditation of Mediators ("WOCAM"), could have a twenty to thirty member board of governors with delegates from organizations such as the American Arbitration

93. ASS'N FOR CONFLICT RESOL., ADVANCED PRACTITIONER WORKGROUP REPORT (June 2003), *available at* http://www.acrnet.org/about/taskforces/APWorkgroup.htm (last visited Feb. 1, 2004); AM. BAR ASS'N, DISP. RESOL. COMM., JUST RESOLUTIONS (Oct. 2002); *see also* Judith M. Filner, *New Trends: Will Mediator Credentialing Assure Quality and Competency?*, 8 DISP. RESOL. MAG. 3 (2001).

Assocation, American Bar Association, American College of Civil Trail Mediators, Association for Conflict Resolution, California Council of Mediators, CPR Institute for Dispute Resolution, Federal Mediation and Conciliation Service, Harvard Project on Negotiation, Hong Kong Mediation Center, International Academy of Mediators, Maryland Mediation and Conflict Resolution Office, Missouri Law School, JAMS, Pepperdine Law School, Singapore Mediation Center, United States Department of Justice, United Nations, World Intellectual Property Organization, funding foundations, and a number of at large delegates. It could be headquartered in New York City, Washington, Chicago, or any other major metropolitan area.

The initial funding could be from foundations, the United States federal and state governments, or the ABA, AAA, and private providers. Each represented organization could fund its own delegates to the governing board. Additional funding should include an annual fee by each certified mediator. There may be other funding sources via publications and educational training programs.

This "commission" could then create the specific credentials for various levels of certification. This may include minimal training and annual educational requirements, competency based examinations, peer review, and/or specific minimum caseload experience. A complaint and grievance procedure administered by WOCAM would be part of the certification system.

WOCAM can be flexible and adaptive to changes in the legal and business community. As an organization managed by delegates of the key stakeholders in the mediation and academic communities, it can be responsive in a responsible manner. It can create legitimacy via a move towards uniformity of expectations of the professional mediator. WOCAM can implement expectations on mediator accountability, training, ethical guidelines, and best practices. A representative organization can address perplexing issues such as which consumers must be protected and how to assure delivery of a high quality of ethical services to certain segments of the marketplace. Being responsive, and ultimately accountable, to the marketplace caters to the disputant voice in mediator selection while promoting the core values of mediation.

V. Conclusion: I Mediate, Therefore I Am?

When I am mediating, my energy, concentration, and focus are at its peak. Many, including Professor Hensler, have written about being in the "zone" of maximum calm and effectiveness. Len Riskin, among others, views this from a mindfulness perspective and others from a

Gestalt angle.[94] I do not disagree with any of them, but I have my own perspective and way of articulating my work as a mediator. My senses are heightened, I am overloaded with stimuli, and my mind churns all data simultaneously on multiple levels. Much of what I do has been learned. Some of it comes automatically and is not on a reflective or mindful level; some actions are "intuitive," while others are strategic and calculated to provoke a set of reactions or moves by the participants. Some things that happen I can never fully explain why or how they were effective. I analyze ineffective macro goals and micro in hindsight, without the ability to replay, to see what would have or could have happened. There are plenty of these mental playbacks. But when mediation is successful, I do believe I am an integral part of the outcome. This pleases me.

The Maslow Hierarchy is applicable to the individual mediator practice.[95] It may reflect a trajectory of the career of the mediator as he or she ascends into professionalism. In the beginning, focus is on the physiological (economic and skills) and the safety of a reliable caseload. Mediators also quickly focus on the "social" aspects by affiliation with other professionals and integration into a mediation community and culture. After feeling comfortable with these three primary needs, many mediators look inward. Perhaps self-esteem or actualization was the key motivator all along, but these can not be fulfilled without an active caseload and integration into the mediation culture. Committed mediators may proselytize and fall into a trap of orthodoxy born of the conviction of self-fulfillment. Engaging in good deeds leads many mediators to refer to themselves as peacemakers. The self-actualization obtained in successful mediation artistry may constitute the purest form of transformative mediation.

Professor Randy Lowry of Pepperdine reminds us that we must never forget that we are invited into the gravitas of human conflict and tragedy. I have seen too much trauma and stress on both sides of a conflict. I am proud to have contributed to any economic security, closure, and healing that has happened as a direct result of mediation.

Let me close with one peace story. One of my "golden era" cases stands out. This involved a father who backed over his three-year-old son with his power riding lawn mower. This cut off the child's arm. The mother blamed the father; the father blamed the mother for not properly watching the boy. They sued the maker of the lawn mower for defective

94. Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Mediation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002); *see also* Julianna Birkhoff & Robert Rack, *Points of View: Is Mediation Really a Profession?*, 8 DISP. RESOL MAG. 10 (2001).

95. *See supra* notes 34-38 and accompanying text.

product on the theory that the blades should stop when the mower is in reverse. A financial settlement was obtained that provided lifetime security for the boy and his family. The parents seemed to reconcile at the end of the mediation session. The next day, I unexpectedly observed them at the airport on the way home while they were awaiting a separate flight. They were holding hands and smiling. I did not interrupt nor let them know I saw them. On my plane ride home I was looking at the window when I started to cry. I guess it was a release of all the emotions of the mediation. The gentleman sitting next to me asked if I was okay. I responded, "I couldn't be better."