ALTERNATIVE RESOLUTIONS

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION

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CHAIR'S CORNER
By John Charles Fleming, Chair, ADR Section

John Charles Fleming

The 80th Texas Legislature is underway, and as of the first weekend in February, over 1,000 bills have already been filed. Many of these bills will die before reaching the floor of either chamber for debate. This year marks the 20th anniversary of the passing of the Texas ADR Act, which survived the 70th Texas Legislature and made a big difference in all of our lives. I think that the Act has well stood the test of time, and continues to provide a strong statutory infrastructure to support and promote the alternative resolution of disputes.

The ADR section will be a co-sponsor of the American Bar Association's Advanced Mediation Skills Training, which will be held in October in San Antonio. This program should be of significant interest to all of our members. In the planning sessions, I am very pleased when ADR professionals from across the country always comment about the strength of ADR in Texas. On a recent phone call, a former chair of the ABA Dispute Resolution Section referred to Texas as a "mature ADR state." On the one hand, I was quite proud of what you all have helped accomplish. On the other hand, I was cognizant that "mature," if not continually nurtured, can become "stale" or "stagnant."

And here lies the continuing challenge for the ADR Section as we move into the next twenty years.

One of the challenges is to continue to embrace new ways of doing dispute resolution. Collaborative law in the family law area is moving from promise to fulfillment, and thanks to Larry Maxwell, Sherrie Abney and others, collaborative law is moving to expand into other areas of disputing as well.

To date, the most interesting ADR bill introduced is Senator Wentworth's Senate Bill 160 on employer ombudsman programs. The bill is a thoughtful attempt to address confidentiality of information in an employment setting. This area of the law is unclear, and the lack of clarity may impede the implementation and appropriate utilization of these programs. The bill also highlights the conflicting concerns raised by these programs by permitting the ombuds to disclose information where there is an imminent threat of harm to an employee. Whether the bill strikes the right balance between the need for confidentiality and legitimate competing interests will be a subject of interest to the Section.

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EL PASO COURT OF APPEALS ADMONISHES TRIAL COURT'S FAILURE TO RULE ON EMPLOYER'S MOTION TO COMPEL ARBITRATION

By Amy M. Reyes*

The El Paso Court of Appeals recently held a trial court's failure to rule on an employer's motion to compel arbitration an abuse of discretion warranting mandamus relief.[1] An employer, Shredder Company, L.L.C. ("Shredder"), alleged that its employee, Luis B. Cuevas ("Cuevas"), signed an arbitration agreement requiring him to arbitrate all disputes involving work-related injuries. Shortly thereafter, Cuevas allegedly sustained an on-the-job injury during his employ with Shredder and filed suit. Shredder filed a motion to compel arbitration. After at least three hearings addressing the motion to compel, the trial court failed to rule on the motion; instead, it ordered discovery of an administrator of Shredder's work injury plan and set the case for trial. Apparently frustrated with the trial court's failure to rule on its motion to compel, Shredder filed a petition for a writ of mandamus in the court of appeals.

Mandamus, according to the appellate court, "is proper to correct a clear abuse of discretion . . . ."[2] When a trial court refuses to rule on a pending motion within a reasonable amount of time, it commits a clear abuse of discretion.[3] Noting the Texas legislature's requirement that courts "summarily" determine whether arbitration agreements are enforceable,[4] the court cited additional precedent that "[e]ven if a party contests the validity and scope of the arbitration agreement, a trial court abuses its discretion by delaying a ruling on whether the agreement is enforceable until after discovery is complete."[5]

The record in this case reflected a period of approximately six months during which Shredder, without success, repeatedly attempted to obtain a ruling on its motion to compel. The appellate court agreed with Shredder that the trial court abused its discretion by delaying a ruling on the motion. The delay, according to the appellate court, frustrated some of the chief benefits of arbitration (i.e., less time and expense in resolving a dispute).[6]

The appellate court noted its "jurisdiction to direct the trial court to exercise its discretion in some manner,"[7] but recognized it could not "tell the trial court what its decision should be."[8] Accordingly, while it expressed no opinion on whether Shredder had conclusively established its case for arbitration, it conditionally granted the writ of mandamus. The writ would issue, according to the appellate court, only if the trial court failed to rule on the motion to compel arbitration.[9]

***Amy M. Reyes** is a student at Thurgood Marshall School of Law in Houston. She received a Master of Arts degree with a major in Legal Studies from Texas State University in San Marcos. While attending Texas State, Amy earned a mediation certificate and a paralegal certificate. She earned a Bachelor of Arts degree in Criminal Justice from St. Mary's University in San Antonio. Amy is originally from Castroville.*

ENDNOTES

1 In re Shredder Co., L.L.C., 2006 WL 3234186 (Tex. App.—El Paso 2006).
2 *Id.* at *1 (citing Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992)).
3 *Id.* (citing In re Greenwell, 160 S.W.3d 286, 288 (Tex. App.—Texarkana 2005, orig. prodeeding)).
4 *Id.* at *2 (citing Tex. Civ. Prac. & Rem Code Ann. § 171.021(b) (Vernon 2005)).
5 *Id.* (citing In re MHI Partnership, Ltd., 7 S.W.3d 918, 923 (Tex. App.—Houston [1st Dist. 1999, orig. proceeding)).
6 *Id.* (citing Jack B. Anglin Co., Inc. v. Tipps, 842 S.W.2d 266, 269 (Tex. 1992) (orig. proceeding)).
7 *Id.*
8 *Id.*
9 *Id.* at *3.

Peace is not the absence of conflict but the presence of creative alternatives for responding to conflict --alternatives to passive or aggressive responses, alternatives to violence.

Dorothy Thompson

THE STATE OF MEDIATION CONFIDENTIALITY IN CALIFORNIA FOLLOWING THE DECISION IN *SIMMONS V. GHADERI*

By Steven M. Fishburn*

In September 2006, a California appellate court made a decision in a case, *Simmons v. Ghaderi*,[1] that blew a SUV-sized hole in the protections that precedents of California's intermediate and highest appellate courts have accorded mediation confidentiality. In short order, perhaps because the *Simmons* case received a great deal of notice, attention, and consternation,[2] the Supreme Court of California granted a petition for review in December.[3] Some of that attention highlighted a vigorous, well-written dissent by Justice Aldritch.[4] It seems likely, given the precedents laid down in *Ryan v. Garcia*,[5] *Eisendrath v. Superior Court*,[6] *Foxgate Homeowners Ass'n., Inc. v. Bramelea California, Inc.*,[7] and, more recently, *Rojas v. Superior Court*[8] that *Simmons* will be overruled and will become a temporary, misplaced sidestep outside the mainstream of legal thinking in California about the importance of preserving mediation confidentiality.

The *Simmons* facts were as follows. The plaintiffs, including Michelle Simmons, a personal representative of the estate of a deceased person, Kintausha Clemmons, and Dr. Lida Ghaderi were parties to a medical-malpractice mediation that began on July 9, 2003.[9] The plaintiffs alleged that Dr. Ghaderi, without first consulting Clemmons's nephrologist, had directed Clemmons's removal from dialysis, which resulted in renal failure leading to Clemmons's death.[10] Dr. Ghaderi held professional-liability coverage through CAP-MPT. Prior to entering into settlement discussions, she executed a written consent on a CAP-MPT form authorizing CAP-MPT and its representatives to negotiate a settlement not to exceed $125,000.[11] The form clearly stated, "I understand and agree that this consent to settlement may be revoked in writing" and it was signed and dated by Dr. Ghaderi.[12] During the mediation negotiations, Dr. Ghaderi and her attorney were in a room separate from the room in which her insurance carrier conducted negotiations. CAP-MPT eventually instructed the mediation judge, Judge Altman, to offer Simmons and the other plaintiffs $125,000 if they would settle the matter while agreeing to a dismissal with prejudice and a waiver of costs.[13] The plaintiffs agreed to the settlement, and Judge Altman began preparing a written document to memorialize the settlement. While he was doing so, the CAP-MPT claims specialist, Obi Amanugi, went into the room where Dr. Ghaderi and her attorney were waiting and informed them of the settlement. Dr. Ghaderi said, "Good, because I am revoking my consent."[14] After discussion with Dr. Ghaderi, Amanugi called the CAP-MPT office to relate what happened and to seek advice about how to proceed. CAP-MPT's general counsel advised that Dr. Ghaderi's oral revocation was valid; shortly thereafter, Dr. Ghaderi left the building. Plaintiffs signed the settlement agreement written by Judge Altman, but neither Dr. Ghaderi (being absent) nor a CAP-MPT representative signed the agreement.[15]

The day following these events, a trial court became involved. After hearing the events described above, the judge opined there might be an enforceable agreement. The attorney for CAP-MPT agreed and wanted to persuade Dr. Ghaderi to agree, so the trial court continued proceedings until July 29, 2003. In the interim, on June 16, 2003, Dr. Ghaderi sent a letter to CAP-MPT formally revoking her consent to settle.[16]

On July 29, when the case resumed, the trial court indicated, in the face of Dr. Ghaderi's unwillingness to agree to the settlement, that she might be bound by the court if plaintiffs filed a motion to enforce the settlement. At that proceeding, plaintiffs' counsel asked for two things: (1) a copy of the written consent agreement signed by Dr. Ghaderi; and (2) a declaration from the mediator as to what had occurred during the mediation. Attorney Reback, the so-called *Cumis* counsel[17] representing Dr. Ghaderi, did not object to either request. The trial court agreed, and those documents were provided to the plaintiffs. Subsequently, plaintiffs filed a motion to enforce the settlement on the basis that an oral contract had been formed between CAP-MPT/Dr. Ghaderi and the plaintiffs with CAP-MPT negotiating under the authority of Dr. Ghaderi's written consent. Both the consent agreement and Judge Altman's declaration were presented at trial. Dr. Ghaderi, represented by Attorney Reback, opposed the motion arguing, on two different dates, that Dr. Ghaderi had orally declined the settlement agreement; that because she had not signed the agreement, it had not been consummated; that her June 16 revocation was timely; and that her professional liability policy gave her, as the insured, "the right to approve or reject any settlement negotiated by the insurer."[18] The parties exchanged more motions in August, with the trial court concluding that an oral contract/settlement agreement had been reached and that Dr. Ghaderi's oral and written revocations were ineffective.[19] The court recommended the "plaintiffs amend their complaint to allege a cause of action for breach of contract"; plaintiffs did so on March 9, 2004.[20]

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On September 23, 2004, the trial court bifurcated the proceeding, severing the cause of action for breach of contract and ordering that it be tried first.[21] For the first time, on October 6, 2004, Dr. Ghaderi filed a brief with the trial court contending that "'any attempt to introduce evidence of discussions, purported agreements, or any form of communication at mediation or thereafter' is barred by the mediation confidentiality provisions of the Evidence Code."[22]

The case proceeded to trial, and Amunagi, the CAP-MPT claims specialist, testified as to what occurred during the mediation. The trial court, finding that a valid and enforceable oral contract had been reached before Dr. Ghaderi withdrew her consent, ordered specific performance of the agreement.[23]

The trial court's decision was affirmed by the appellate court, which reasoned that (1) a valid oral contract had been formed;[24] (2) Dr. Ghaderi's consent was unnecessary because her policy gave her insurer the right to settle the case within the policy limits of the policy;[25] (3) Dr. Ghaderi's first written consent on CAP-MPT's form gave CAP-MPT the authority to settle on her behalf, and that consent overrode any authority of Dr. Ghaderi to decline the settlement agreement based on her right under the professional liability policy;[26] (4) recognizing Dr. Ghaderi's late claim of mediation confidentiality might, "allow a disgruntled litigant to use the shield of mediation confidentiality as a convenient place behind which to hide facts, although indisputably true, she no longer believes are favorable;"[27] having asked the court to settle her dispute, she was "estopped from arguing the court's action was, in fact, outside of the court's statutory power to resolve;" and (5) "once a party voluntarily declares certain facts to be true, stipulates that she does not dispute them and extensively litigates the legal effect of such facts, she is estopped to later claim that the court must disregard those facts based upon a belated assertion of mediation confidentiality."[28]

Justice Aldritch's well-reasoned dissent, much longer in length and in terms of authorities cited than the majority's opinion, can be distilled to a single principle: the whole case depends on the plaintiffs being able to prove there was an oral contract, and they cannot do so without the evidence presented in the lower court (i.e., Dr. Ghaderi's written consent, the mediator's declaration, and testimony of the claims specialist). According to Justice Aldritch, all of those items of evidence are barred by the state's mediation statutes, so there can be no means of proving the oral contract. Justice Aldritch asserted the majority, with its estoppel argument, attempted to create an exception to the mediation statutes that simply is not there. As he stated, "Together, *Foxgate* and *Rojas* stand for the proposition that the courts may not craft exceptions to the statutory scheme because the Legislature has decided that mediation confidentiality is required to further the purpose of mediation and has decided to statutorily limit the number of exceptions thereto. Thus, it would be unwarranted for us to expand the Legislature's list of express statutory exceptions by judicially permitting plaintiffs to prove an oral contract when to do so would not further the purpose of the statutory scheme."[29]

Of course, the other shoe will drop when the California Supreme Court reviews *Simmons*. It seems likely that the supreme court's decision will be more in accord with Justice Aldritch's reasoning (and with its own decisions in *Foxgate* and *Rojas*) and that *Simmons* will be reversed.

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ENDNOTES

[1] Simmons v. Ghaderi, 49 Cal.Rptr.3d 342 (Ct. App.-2nd 2006), *pet. granted*, 2006 Cal. LEXIS 15056 (Cal. Dec. 20, 2006) (No. S147848).

[2] Shaun Martin, *Simmons v. Ghaderi (Cal. Ct. App. – Sept. 27, 2006)*, California Appellate Report, Sept. 27, 2006, http://calapp.blogspot.com/2006/09/simmons-v-ghaderi-cal-ct-app-sept-27.html; Victoria Pynchon, *You Say Waiver; I Say Estoppel*, settle it now bl ar g, Oct. 4, 2006, http://mediatenow.blogspot.com/2006/10/you-say-waiver-i-say-estoppel.html ; Victoria Pynchon, *If I settle Now….It will Mean that I Killer Her, reprinted from* Settle It Now Negotiation Blog, National Institute for Advanced Conflict Resolution, Oct. 8, 2006, http://www.niacr.org/pages/blog/articles/2006/10-8-06.htm; Steven Cischke, *Physician Cannot Revoke Settlement Consent After Oral Agreement—C.A.*, Metropolitan News-Enterprise, Sept. 29, 2006, http://metnewscom/articles/2006/simm092906.htm .

[3] *Id.*

[4] *Id.* at 531 (J. Aldritch, dissenting).

[5] Ryan v. Garcia, 33 Cal.Rptr.2d 158, 159 (Ct. App.-3d 1994) (holding that "evidence of statements made during mediation [could not] be admitted in court to prove the parties orally settled the dispute" and that the Evidence Code "protects statements made in mediation from use in litigation.").

[6] Eisendrath v. Superior Court, 134 Cal.Rptr.2d 716, 724-25 (Ct. App.-2d 2003) (rejecting the notion that a person can impliedly waive his confidentiality rights and holding the confidentiality rule "bars discovery and evidence of 'anything said' not merely 'in the course' of mediation, but 'for the purpose of …, or pursuant' to mediation. Only certain communications made after the end of the mediation, or falling under other enumerated exceptions, escape its reach.").

[7] Foxgate Homeowners Ass'n., Inc. v. Bramalea California, Inc., 108 Cal.Rptr.2d 642, 644 (Cal. 2001) (holding that even bad faith on the part of a party to a mediation does not rise to the level of
creating an exception to the strictures on mediation confidentiality and stating, "We conclude that there are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator's reports. Neither a mediator nor a party may reveal communications made during mediation.").

[8] Rojas v. Superior Court, 15 Cal.Rptr.3d 643, 649 (Cal. 2004) (holding that the court of appeal erred when it found a good-cause exception that allowed admission into evidence of photographs, videotapes, witness statements, and "raw test data" from physical samples collected at a complex developed for the purpose of a mediation to resolve a tenant dispute, that the Legislature did not intend such a good cause exception to mediation confidentiality).

[9] *Simmons*, 49 Cal.Rptr.3d at 344.

[10] *Id.*

[11] *Id.* at 344-45.

[12] *Id.*

[13] *Id.* at 345.

[14] *Id.*

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SUBMISSION DATES FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

Issue	**Submission Date**	**Publication Date**
Spring	March 30, 2007	April 30, 2007
Special 20th Anniversary Issue		
Summer-Fall	July 31, 2007	September 30, 2007
Winter	January 15, 2008	February 15, 2008

SEE PUBLICATION POLICIES ON PAGE 34 AND SEND ARTICLES TO:

ROBYN G. PIETSCH, A.A. White Dispute Resolution Center, University of Houston Law Center, 100 Law Center, Houston, Texas 77204-6060, Phone: 713.743.2066 FAX:713.743.2097 or rpietsch@central.uh.edu

THE STATE OF MEDIATION CONFIDENTIALITY IN CALIFORNIA FOLLOWING THE DECISION IN *SIMMONS V. GHADERI*
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[15] *Id.*
[16] *Id.*
[17] "*Cumis* counsel is a term sometimes used to refer to the independent counsel provided to an insured by an insurer contesting coverage but still providing a defense. The authority for such counsel is *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.* (Cal. 1984) 162 Cal. App.3d 356, 364 [208 Cal.Rptr. 494] and Civil Code section 2860." *Simmons*, 49 Cal.Rptr.3d at 344.
[18] *Id.* at 346.
[19] *Id.* at 347.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 347-48.
[23] *Id.* at 348.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 349.
[27] *Id.* at 350.
[28] *Id.* at 351.
[29] *Id.* at 364.

FEDERAL COURT IN MICHIGAN DEFENDS CONFIDENTIALITY, THE HEART OF THE ADR PROCESS

By Kevin S. Casey*

A federal district court in Michigan ordered Irwin Seating Company (Irwin) and International Business Machines Corporation (IBM) to what the court described as "voluntary facilitative mediation."[1] The court's order outlining the procedures for the mediation provided that "all information disclosed during the mediation session, including the conduct and demeanor of the parties and their counsel during the proceedings, must remain confidential, and must not be disclosed to any other party nor to this court, without consent of the party disclosing the information."[2]

The mediator, reminding the parties of the confidentiality of the mediation process, requested each to furnish her with mediation statements and accompanying documents, highlighting those portions of the exhibits the parties felt most important. Each complied. IBM went so far as to mark each page of its mediation statement with "**CONFIDENTIAL COMMUNICATION FOR SETTLEMENT PURPOSES ONLY"** in bold print.[3]

Notwithstanding the above, Irwin, when it did not reach agreement with IBM at mediation, provided copies of IBM's mediation statements and exhibits to its experts. Both experts admitted reading the material, but only "in order to get some sense of what the case was about" and "for context."[4] IBM responded by filing a motion to strike Irwin's experts because of its violation of confidentiality. Irwin did not deny the documents were confidential or that its lawyers provided them to the experts who reviewed them in preparation of their reports. Rather, it argued that IBM's requested sanction was too severe.

The court left no doubt that it fully disagreed with Irwin. "The court finds that plaintiff's conduct was in direct derogation of the order of this court, the directions of the mediator, and the common understanding of the purpose for which the mediation documents were to be used."[5] The court agreed with IBM's argument that even though the documents would have otherwise been discoverable, "the highlighting of portions of documents especially selected by the defendants as referred to in their mediation reports, were communications subject to the settlement privilege, not grist for the experts' mill."[6]

Additionally, the court noted that because the experts' reports were now part of the record, the experts would be subject to cross-examination on them, which "runs the risk of touching on privileged communications."[7] More significantly, the court observed there was no adequate way to access how the mediation briefs may have impacted the experts' evaluation of the case. The experts downplayed any potential impact. The court was not persuaded: "The bell has been rung. There are simply some things that cannot be forgotten once they are learned."[8]

Perhaps most importantly, the court held that the sharing of defendant's mediation briefs and attached documents "with unauthorized persons strikes at the heart of the ADR process."[9] It acknowledged that striking an expert witness was a harsh remedy, but argued it was not an unfair one, especially when the situation arose "from a clear violation of the court's order and the settlement privilege."[10] The court granted IBM's motion to strike Irwin's experts and awarded IBM $1,000.00 in costs and attorney's fees.

Perhaps to ensure no one missed its message, the court, in a footnote, observed it "is aware this resolution may also have a salutary effect in preserving confidences of future mediation participations, and the candor necessary to successful facilitative mediations. A contrary result would certainly have a dramatically contrary impact."[11]

One hopes the court is correct.

***Kevin S. Casey,** *a former executive director of both the Houston and Austin Dispute Resolution Centers, is an attorney and mediator with the Texas Department of Public Safety, where he manages the agency's dispute resolution program and its sexual harassment and discrimination complaints and investigations program. He is also an adjunct professor teaching both Negotiation and Dispute Resolution Systems Design at St. Edward's University's Graduate School of Business. He is an executive board member for the Texas Intergovernmental Shared Neutrals Program.*

ENDNOTES

1 Irwin Seating Co. v. Int'l Bus. Mach. Corp., 2006 WL 3446584 (W.D. Mich. 2006).
2 Id. at *1.
3 Id. at *2.
4 Id. at *3.
5 Id.
6 Id.
7 Id.
8 Id.
9 Id. at *4.
10 Id.
11 Id. at n. 4.

SUPREME COURT OF CALIFORNIA HOLDS MEDIATION SETTLEMENT AGREEMENTS, TO BE ADMISSIBLE, MUST DIRECTLY STATE THEY ARE ENFORCEABLE OR BINDING

By Steven M. Fishburn*

The Supreme Court of California reversed the judgment of the California Court of Appeal in a December 2006 case styled *Fair v. Bakhtiari*,[1] concluding that the court of appeal had erred in its interpretation of section 1123(b) of the California Evidence Code. The supreme court held that a narrower interpretation of the words in the Evidence Code (i.e., "words to that effect") was called for and that such an interpretation would not include language in a draft settlement agreement to a mediation that said, "Any and all disputes subject to JAMS (Judicial Arbitration and Mediations Services) arbitration rules."[2] The court stated: "Although the writing does not need to be in finished form to be admissible under § 1123, subd. (b), it must be signed by the parties and include a direct statement to the effect that it is enforceable or binding."[3]

The plaintiff in the case, R. Thomas Fair, had sued his former business partner, Karl E. Bakhtiari, and his ex-wife, Maryanne E. Fair, and their associated business entities alleging several instances of financial misconduct and that Bakhtiari had physically assaulted him on more than one occasion. After a two-day mediation session, a memorandum was drafted titled, "Settlement Terms." Number 9 of the Settlement Terms said, "Any and all Disputes subject to JAMS [Judicial Arbitration and Mediation Services] arbitration rules."[4] Subsequently, because their financial dealings were complex and interwoven, the settlement agreement began to fall apart, whereupon Fair's attorney wrote a letter demanding arbitration according to the terms of the settlement agreement memorandum.[5] Counsel for the defendants rejected that demand and asserted that the settlement agreement was inadmissible under section 1119 (b) of the Evidence Code, "which protects the confidentiality of writings 'prepared for the purpose of, in the course of, or pursuant to, a mediation.'"[6] Plaintiff's response to the assertion of confidentiality was to claim that the memorandum was admissible because section 1123(b) of the Evidence Code contemplated that a memorandum containing an arbitration provision made the parties' agreement enforceable.[7] The trial court would not allow the memorandum into evidence, found that the requirements of section 1123(b) were not met, concluded "there is insufficient demonstration of an arbitration agreement given the inadmissibility of the term sheet," and denied the plaintiff's motion to compel arbitration.[8] The court of appeal reversed the trial court, holding that the memorandum reflected an intent to agree on arbitration and that the language referring to JAMS arbitration rules "could only mean the parties intended the settlement terms document to be 'enforceable or binding.'"[9] The court further held that "the memorandum included 'words to that effect' and was admissible under section 1123(b)."[10]

The supreme court rejected the court of appeal's decision based, in part, on its understanding of the history of section 1123(b).[11] According to the supreme court, for the Court of appeal to assume the provision stating "[a]ny and all disputes subject to JAMS arbitration rules" meant the parties "intended" the settlement terms to be enforceable or binding[12] was to make the same error as the plaintiff. The court said, "Plaintiff would have us infer the parties'intent from the mention of arbitration in the settlement terms memorandum. . . .If such a typical settlement provision were to trigger admissibility, parties might inadvertently give up the protection of mediation confidentiality…Durable settlements are more likely to result if the statute is applied to require language directly reflecting the parties' awareness that they are executing an 'enforceable or binding'agreement."[13]

The supreme court, analyzing the court of appeal's decision and how it erred, wrote: "The Court of Appeal correctly reasoned that the 'words to that effect' clause reflects a legislative concern not with the precise words of a settlement agreement, but with terms unambiguously signifying the parties' intent to be bound. The Court erred, however by concluding that the inclusion of an arbitration clause in the parties' list of settlement terms satisfied section 1123(b), on the ground that the clause could only reflect an intent that the document would be 'enforceable or binding.'"[14] The supreme court reasoned a narrower interpretation was called for, holding that "[i]n order to preserve the confidentiality required to protect the mediation process and provide clear drafting guidelines, we hold that to satisfy the 'words to that effect' provision of section 1123(b), a writing must directly express the parties' agreement to be bound by the document they sign."[15] And, in a restatement of that holding and an expansion of it, the court also held:

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2007 CALENDAR OF EVENTS

Negotiation ★ Denton ★ *Texas Woman's University* ★ March 15-18, 2007 ★Trainer: Kay Elliott ★ For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu ★Website: www.twu.edu/lifelong

Mediation Skills and Ethics ★ Denton ★ *Texas Woman's University* ★ April 12-15, 2007 ★Trainer: Kay Elliott ★ For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu ★Website: www.twu.edu/lifelong

Basic 40-Hour Mediation Training ★ Houston ★*Worklife Institute* ★April 19-21, continuing April 26-28, 2007 ★ 2 Thursdays 4:00 p.m.-8:30 p.m.; 2 Fridays and Saturdays 9:00 a.m. - 6:00 p.m. ★ For more information call 713-266-2456, Elizabeth or Diana, or see www.worklifeinstitute.com calendar page.

40-Hour Basic Mediation ★ Houston ★ ★ *University of Houston AA White Dispute Resolution Center* ★ May 29-31 continuing June 1-3, 2007 ★For more information contact Robyn Pietsch at 713.743.2066 or rpietsch@central.uh.edu ★ Website: www.law.uh.edu/blakely/aawhite

30-Hour Family Mediation Training ★ Houston ★ ★ *University of Houston AA White Dispute Resolution Center* ★ June 8-9, 2007 ★For more information contact Robyn Pietsch at 713.743.2066 or rpietsch@central.uh.edu ★ Website: www.law.uh.edu/blakely/aawhite

Basic 40-Hour Mediation Training ★ Houston ★ *Worklife Institute* ★June 14-16, continuing June 21-23, 2007 ★ 2 Thursdays 4:00 p.m.-8:30 p.m.; 2 Fridays and Saturdays 9:00 a.m. - 6:00 p.m. ★ For more information call **713-266-2456**, Elizabeth or Diana, or see www.worklifeinstitute.com calendar page.

Basic 40-Hour Mediation ★ Denton ★ *Texas Woman's University* ★ June 20-24, 2007 ★Trainer: Kay Elliott ★ For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu ★Website: www.twu.edu/lifelong

Family and Divorce Mediation Training ★ Houston ★ *Worklife Institute* ★July 18-21, 2007 ★ Wednesday-Friday 9:00 a.m. - 6:00 p.m.; Saturday 9:00 a.m. - 4:00 P.M ★ For more information call 713-266-2456, Elizabeth or Diana, or see www.worklifeinstitute.com calendar page

Family Mediation ★ Denton ★ *Texas Woman's University* ★ August 23-26, 2007 ★Trainer: Kay Elliott ★ For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu ★Website: www.twu.edu/lifelong

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SUPREME COURT OF CALIFORNIA HOLDS MEDIATION SETTLEMENT AGREEMENTS, TO BE ADMISSIBLE, MUST DIRECTLY STATE THEY ARE ENFORCEABLE OR BINDING

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> [T]o satisfy section 1123(b), a settlement agreement must include a statement that it is "enforceable" or "binding," or a declaration in other terms with the same meaning. The statute leaves room for various formulations. However, arbitration clauses, forum selection clauses, choice of law provisions, terms contemplating remedies for breach, and similar commonly employed enforcement provision typically negotiated in settlement discussions do not qualify an agreement for admission under section 1123(b).[16]

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ENDNOTES

[1] Fair v. Bakhtiari, No. S129220, 2006 Cal. LEXIS 14727 (Cal. Dec. 14, 2006).
[2] *Id.* at **2.
[3] *Id.* at **2-3.
[4] *Id.* at **3
[5] *Id.* at **5.
[6] *Id.*
[7] *Id.* at **6.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at **11 (The full text of section 1123 is as follows: "A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied: (a) The agreement provides that it is admissible or subject to disclosure, or words to that effect; (b) The agreement provides that it is enforceable or binding or words to that effect; (c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure; (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute."); *see also id.* at **8-10 (discussing the history of the development of section 1123 in 1997 and the California Law Revision Commission's efforts to address the problem of admissibility of settlement agreements).
[12] *Id.* at **6.
[13] *Id.* at **15.
[14] *Id.* at **13.
[15] *Id.* at **14.
[16] *Id.* at **19-20.

FIFTH CIRCUIT REEXAMINES STANDARD FOR FINDING "EVIDENT PARTIALITY" UNDER THE FEDERAL ARBITRATION ACT

By Ann Ryan Robertson*

On January 18, 2007, the Fifth Circuit, sitting *en banc* in *Positive Software Solutions, Inc. v. New Century Mortgage Corporation*,[1] held "[t]he draconian remedy of vacatur is only warranted upon [an arbitrator's] nondisclosure that involves a significant compromising relationship."[2] With this pronouncement, the Fifth Circuit not only joined most circuits that have addressed the issue of "evident partiality" under 9 U.S.C § 10 (a)(2) of the Federal Arbitration Act ("FAA"), but also reversed its earlier *Positive Software* opinion.[3] In reaching its decision that an undisclosed, significant, compromising relationship is required for vacatur ("Narrow Interpretation"), the Fifth Circuit addressed two primary issues: (a) the proper interpretation of the FAA's standard of "evident partiality" and (b) whether vacatur of the arbitration award was appropriate under the Narrow Interpretation. The court also examined whether vacatur would have been required if the Fifth Circuit had adopted a broader interpretation that required vacatur for the failure to "disclos[e] to the parties any dealings that might create an impression of possible bias."[4] The court concluded that based on the facts of the case, vacatur was not warranted under either standard and that public policy further supported its adoption of the Narrow Interpretation.

The Arbitration

In 2003, the underlying dispute between New Century Mortgage Corporation ("New Century") and Positive Software Solutions, Inc.("Positive Software") was submitted to arbitration. Pursuant to the American Arbitration Association's ("AAA") procedures, the AAA provided the parties with a list of prospective arbitrators and asked the parties to rank them. Based on the parties' rankings, Peter Shurn ("Shurn") was selected as the sole arbitrator. In connection with his appointment, Shurn represented to the AAA (and hence, to the parties and their counsel) that he had nothing to disclose regarding past relationships with the parties or their counsel. Following a seven-day hearing, Shurn issued an eighty-six-page ruling in favor of New Century.

The "Nondisclosure"

Following Shurn's arbitral award, Positive Software conducted a detailed investigation of Shurn's background and uncovered that seven years before, in the early 1990s, one of New Century's arbitration counsel, Ophelia Camiña ("Camiña") and her law firm, Susman Godfrey L.L.P., had represented Intel Corporation in litigation between Intel and Cyrix Corporation ("Intel Litigation"). Shurn and his former firm, Arnold, White & Durkee ("Arnold White"), had also represented Intel in the Intel Litigation. Importantly, the Intel Litigation involved six different lawsuits in which Intel was represented by seven law firms and at least thirty-four lawyers.

From August 1991 until July 1992, Camiña participated in representing Intel in three of the six lawsuits, although her name remained on one of the pleadings until June 1993. In September 1992, Shurn, along with twelve other Arnold White attorneys, entered an appearance in two of the three cases on which Camiña had worked. Despite the fact their names appeared together on pleadings, Shurn and Camiña never attended or participated together in any meetings, telephone calls, hearings, depositions, or trials**.**

Motion for Vacatur

Armed with Shurn's failure to disclose his connection with Camiña as counsel in the Intel Litigation, Positive Software filed a motion to vacate the arbitration award, alleging a variety of grounds, including that Shurn had been biased, as evidenced by his failure to disclose his past connection to Camiña. In September 2004, the district court vacated the award, finding that Shurn failed to disclose a "a significant prior relationship with New Century's counsel," thus creating an appearance of evident partiality requiring vacatur.[5]

The Initial Appeal

New Century appealed, and a panel of the Fifth Circuit affirmed the vacatur on the ground that the prior relationship "might have conveyed an impression of possible partiality to a reasonable person."[6] Neither court found that Shurn was actually biased towards New Century. Thereafter, New Century filed a petition for rehearing *en banc.*

Rehearing *En Banc*

Upon rehearing, in an 11 - 5 decision,[7] the Fifth Circuit reversed the district court, holding, "the Federal Arbitration Act does not mandate the extreme remedy of vacatur for nondisclosure of a trivial past association, and we reverse the district court's contrary judgment."[8]

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***Commonwealth Coatings* is to be Interpreted Narrowly; Vacatur was not Warranted**

To reach its conclusion, the Fifth Circuit examined, in depth, the Supreme Court's "plurality-plus" decision in *Commonwealth Coatings Corp. v. Continental Cas. Co.*,[9] and noted that Justice Black, who delivered the Supreme Court's opinion, imposed "the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of bias."[10] Thus, reasoned Justice Black, while arbitrators are not expected to sever all ties with the world, the courts are to be scrupulous in safeguarding the impartiality of arbitrators.[11] Accordingly, arbitrators "not only must be unbiased but also must avoid even the appearance of bias,"[12] thereby assuring continued confidence in the arbitration system.

Justice White, in an opinion joined by Justice Marshall, while being "glad to join" Justice Black, wrote additional remarks, emphasizing that "[t]he Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges"[13] and that arbitrators are not "automatically disqualified by a business relationship with the parties before them if . . . [the parties] are unaware of the facts but the relationship is trivial."[14]

Based on Justice White's statements, the Fifth Circuit determined that Justice White, while supporting a policy of arbitrator disclosure to enhance the selection process, also concluded, in a practical vein, that an arbitrator "cannot be expected to provide the parties with his complete and unexpurgated business biography."[15] Thus, noted the Fifth Circuit, Justice White's "opinion fully envisioned upholding awards when arbitrators fail to disclose insubstantial relationships."[16] The Fifth Circuit further interpreted Justice White's joinder to be pivotal to the judgment in *Commonwealth Coatings* and to be based on a narrower ground that Justice Black's opinion.[17] Consequently, the Fifth Circuit found Justice White's decision to be the Supreme Court's effective *ratio decidendi.*[18]

> The resulting standard is that in nondisclosure cases, *an award may not be vacated because of a trivial or insubstantial prior relationship* between the arbitrator and the parties to the proceeding. *The "reasonable impression of bias" standard is thus interpreted practically rather than with utmost rigor.*[19]

Applying the "reasonable impression of bias standard" practically, the Fifth Circuit found that

> Shurn's failure to disclose a trivial former business relationship does not require vacatur of the award. The essential charge of bias is that the arbitrator, Peter Shurn, worked on the same litigation as did Ophelia Camiña, counsel for one of the parties. They represented Intel in protracted patent litigation that lasted from 1990 to 1996. Camiña and Shurn each signed the same ten pleadings, but they never met or spoke to each other before the arbitration. They were two of thirty-four lawyers, and from two of seven firms, that represented Intel during the lawsuit, which ended at least seven years before the instant arbitration.
>
> No case we have discovered in research or briefs has come close to vacating an arbitration award for nondisclosure of such a slender connection between the arbitrator and a party's counsel. In fact, courts have refused vacatur where the undisclosed connections are much stronger.[20]

Vacatur was Not Warranted under a Broad Interpretation of "Evident Partiality"

Having concluded that the proper standard was one of "practicality rather than utmost rigor" the Fifth Circuit nevertheless found that even if Justice White's "joinder" was not read as a limitation on Justice Black's opinion in *Commonwealth Coatings*, vacatur was not required because the facts of *Commonwealth Coatings* were readily distinguishable from the case at bar and did not create an impression of possible bias. In *Commonwealth Coatings*, the undisclosed relationship was a repeated, substantial, and recently terminated business relationship that involved the payment of fees and included services on the very projects at issue in the arbitration.[21] In contrast, the undisclosed relationship in *Positive Software* was "tangential, limited and stale."[22]

A Narrow Interpretation of "Evident Partiality" is Supported by Public Policy

The Fifth Circuit further supported its Narrow Interpretation with numerous public policy grounds, stating

> Awarding vacatur in situations such as this would seriously jeopardize the finality of arbitration. . . . [L]osing parties would have an incentive to conduct intensive, after-the-fact investigations to discover the most trivial of relationships, most of which they likely would not have objected to if disclosure had been made. Expensive satellite litigation over nondisclosure of an arbitrator's "complete and unexpurgated business biography" will proliferate. Ironically, the "mere appearance" standard would make it easier for a losing party to challenge an arbitration award for nondisclosure than for actual bias.
>
> [R]equiring vacatur based on a mere appearance of bias for nondisclosure would hold arbitrators to a higher ethical standard than federal Article III judges. . . . Had this same relationship occurred between an Article III judge and the same lawyer, neither disclosure nor disqualification would have been forced or even suggested (citations omitted). While

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> it is true that disclosure of prior significant contacts and business dealings between a prospective arbitrator and the parties furthers informed selection, it is not true, as Justice White's opinion perceptively explains, that "the best informed and most capable potential arbitrators" should be automatically disqualified (and their awards nullified) by failure to inform the parties of trivial relationships (citation omitted).
>
> Finally, requiring vacatur on these attenuated facts would rob arbitration of one of its most attractive features apart from speed and finality – expertise. Arbitration would lose the benefit of specialized knowledge, because the best lawyers and professionals, who normally have the longest lists of potential connections to disclose, have no need to risk blemishes on their reputations from post-arbitration lawsuits attacking them as biased.
>
> Neither the FAA nor the Supreme Court, nor predominant case law, nor sound policy countenances vacatur of FAA arbitral awards for nondisclosure by an arbitrator unless it creates a concrete, not speculative impression of bias. Arbitration may have flaws, but this is not one of them.[23]

The Dissent

The dissenting opinion found the Supreme Court's decision in *Commonwealth Coatings* to be absolute and subject to but one interpretation: "In 1968 the Supreme Court held that an arbitral award could not stand where the arbitrator had failed to disclose a past relationship that might give the impression of possible partiality. The Court has never changed that holding: it is the law that rules us today."[24]

The schism in the Fifth Circuit stems in large part from differences over the interpretation and weight to be given Justice White's opinion in *Commonwealth Coatings*. While the majority found Justice White's opinion to be based on narrower grounds than Justice Black's opinion and therefore *ratio decidendi*, the dissent found "that is quite pellucid that six Justices of the Court agreed that despite the fairness and impartiality of the arbitrator, failure to disclose 'any dealings that might create an impression of possible bias' justifies the vacatur of the award."[25]

And like the majority, the dissent proffered public policy grounds to support its position, noting that the ability to prove improper influence and bias is rarely possible, and "[i]t is imperative that we not allow even the good faith memory of the potential arbitrator to control disclosure for, . . .it is the protection and reassurance of the party that matters most."[26]

Judge Weiner, specially concurring with Judge Reavley's dissent, further stated, "That a potential arbitrator himself might deem one or more of such relationships to be so *de minimis* as not to require its divulgence is irrelevant; such culling of information by a candidate must never be allowed to seep interstitially into the disclosure calculus."[27] Thus, reasoned Judge Weiner, unlike a dispute in the court system, "it is the parties to arbitration themselves who have sole responsibility for the selection of their arbitrator or arbitrators."[28] Consequently, "full, unredacted disclosure of every prior relationship – must be rigorous adhered to and strenuously enforced." In the absence of full disclosure, "the system fails when the nominee for the post of arbitrator takes it upon himself to make the value judgment whether a relationship is so inconsequential that it need not be disclosed at all."[29]

Conclusion

Because the question of whether an arbitrator's nondisclosure involves a significant, compromising relationship will necessarily be determined on a case-by-case basis, the court's decision does not eradicate "expensive satellite litigation." Motions for vacatur based on undisclosed relationships will continue to be filed, and the courts will continue to be called upon to determine how "slender the connection." And importantly, the decision does not obviate an arbitrator's duty to disclose past and present relationships with the parties or their counsel. Prudence continues to dictate that an arbitrator disclose all relationships, no matter how trivial they may appear. Evident partiality, like beauty, is often in the eye of the beholder.

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ENDNOTES

1 ___ F.3d ___, 2007 WL 111343 (5th Cir. 2007) (hereinafter *En Banc Opinion*).
2 *Id.* at *8.
3 436 F. 3d 495 (5th Cir. 2006) (hereinafter *Panel Opinion*).
4 *En Banc Opinion* at *3.
5 Positive Software Solutions, Inc. v. New Century Mortgage Corp., 337 F. Supp. 2d 862, 865 (N.D. Tex. 2004).
6 *Panel Opinion* at 504.
7 Chief Judge Jones authored the majority opinion.

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CLAUSE REQUIRING OUT-OF-STATE MEDIATION OR ARBITRATION PRIOR TO LITIGATION NOT ENFORCEABLE IN CALIFORNIA, PER DECISION IN *TEMPLETON DEVELOPMENT CORP. V. DICK EMARD ELECTRIC, INC.*

By Steven M. Fishburn*

California appellate court recently decided, in *Templeton Development Corp. v. Dick Emard Electric, Inc.*,[1] that a contractual provision requiring out-of-state mediation and/or arbitration was unenforceable because it violated a California statute.

In January 2006, Dick Emard Electric, Inc. (Emard), an electrical subcontractor, sued Templeton Development Corporation (Templeton), a Nevada-based general contractor, over labor, equipment, and materials Emard had supplied for an apartment-complex construction project in Sacramento, California.[2] Templeton moved to dismiss Emard's complaint on the grounds of *forum inconveniens,* arguing that the subcontract agreement between Emard and Templeton required Emard to submit any disputes for mediation or arbitration in Las Vegas, Nevada.[3] The trial court ruled that section 410.42 of the California Code of Civil Procedure made the out-of -state mediation provision unenforceable.[4] Templeton then filed a petition for writ of mandate with the a court of appeal, requesting that the court set aside the trial court's denial of its motion to dismiss and, alternatively, requesting a remand of the case to determine whether the Federal Arbitration Act preempts the California statute.[5] The court of appeal did not entertain the federal preemption issue, instead finding the trial court was correct with its ruling that section 410.42 controlled and rendered unenforceable the provision requiring mediation or arbitration in Nevada.

A couple of provisions in the Templeton—Emard subcontract agreement were key to understanding the nature of their dispute. The first was the agreement's provision that disputes would be mediated on demand by either party and that such mediation was a condition precedent to arbitration. That part of the agreement provided, "If, and only if, the parties hereto are unable to resolve the dispute through mediation, then the dispute shall be submitted to binding Arbitration."[6] The second provision was that unless both parties agreed otherwise in writing, any mediation or arbitration would take place in Las Vegas, Nevada.[7] Templeton claimed before the trial court that Emard had failed to meet the condition precedent of resolving their dispute by mediation and arbitration in Nevada before filing their lawsuit.[8] Emard responded that the California statute voided the agreement to the extent it required mediation to take place outside of California and precluded a party from initiating a suit in California. Emard refused to mediate in Nevada; Templeton refused to negotiate in California.[9]

An issue pivotal to the decision was whether section 410.42 of the California Code of Civil Procedure applied to mediation; the appellate court found that it did. The issue arose because the statute did not specifically mention mediation. The court wrote, "As we explained, section 410.42 renders void and unenforceable a provision in a construction contract 'which purports to require any dispute between the parties to be litigated, arbitrated, or *otherwise determined* outside this state.'"[10] The court also found that the words "otherwise determined" included mediation because, according to the court, "it is clear the Legislature enacted section 410.42 to prevent one party to a construction contract to be performed in California from forcing the other party to suffer the inconvenience and expense of resolving contractual disputes outside California. In light of this purpose, we read the phrase 'otherwise determined' to include mediation."[11]

The court, having decided that section 410.42 prevented enforcement of a provision requiring mediation outside California, severed the part of the agreement that violated section 410.42.[12] Then, agreeing with the trial court, the appellate court found there was no requirement to arbitrate the dispute in Nevada because mediation was a condition precedent to arbitration. The parties did not agree to mediate; therefore, there could be no compulsion to arbitrate in Nevada or any place.[13] Finally, the court found that Emard did not violate the provision of the subcontract agreement that required mediation prior to filing a lawsuit because the record clearly showed that Emard had made a demand for mediation before starting its lawsuit and had offered to stay those proceedings until mediation could be held in California.[14]

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COMBINING COLLABORATIVE LAW AND PATIENT SAFETY PROGRAMS: A PROPOSAL FOR THE USE OF PARALLEL PROCESSES TO FACILITATE EARLY DETECTION OF SAFETY ISSUES AND EARLY REPARATION FOR INJURY-CAUSING AND NEAR-MISS EPISODES

By Karen S. Fasler*

(Note from the Chair of the Newsletter Editorial Board: This article continues a series whose purpose is to expose our readers to perspectives on Collaborative Law. If you would like to contribute an article about Collaborative Law, please contact Sherrie Abney at SAbney913@aol.com or Walter A. Wright at ww05@txstate.edu.)

Too often, an adverse medical event will be followed by evasion, secrecy and blame-shifting as healthcare personnel attempt to avoid entanglement in litigation proceedings or individual losses to reputation. Healthcare providers may act on the advice of counsel or otherwise adhere to limitations in insurance policies that ultimately restrict the flow of information provided to injured patients. The ensuing "safeguard shuffle" interferes with communications and has led to instances of patients or families entering litigation simply to find out what happened.[1] Explanations offered by healthcare personnel are sometimes so guarded and stilted that patients feel providers are acting dishonestly or even attempting to cover up facts. Patients may also assume there is undisclosed fault when an occurrence is followed by non-engagement and delay.[2]

Further adding to dysfunctional communication styles are existing processes tending to interfere with the acquisition and use of safety-enhancing information. For example, adverse-event investigations are sometimes conducted only when litigation is actively pursued. Even if routine assessments are performed, the accumulated information may be filed away, never to be looked at again unless a lawsuit is filed. Once filed, important information may be withheld for several years as cases wind their way through the litigation system. As a result, information that could have (and should have) been used immediately to improve safety processes becomes so dated it is of little use in improving patient safety.[3] This system further wastes valuable healthcare resources as personnel assess and re-assess cases over a period of years before a final disposition occurs.

This paper investigates whether Collaborative Law[4] and Patient Safety Programs can be run simultaneously as parallel processes and whether this combination can act to facilitate the following: early detection and response to safety issues; early reparation for injury-causing events; and preservation of provider / patient relationships through understanding and effective communication.

ELEMENTS NECESSARY TO SUPPORT AN EFFECTIVE SAFETY PROGRAM

1. Access to Information

Information is critical to the provision of safe health care.[5] Experts believe multiple warnings signs, or near-misses, happen prior to the occurrence of many serious adverse events.[6] Unfortunately, most Patient Safety Programs focus only on after-the-fact detection and analysis.[7] Few efforts are made to identify trends that could circumvent potential injury-causing practices.[8] The result of this one-sided focus is that many patient safety systems remain reactive in nature and lose out on the potential for proactive error avoidance. An effective Patient Safety Program must be able to access information from all available sources, including both adverse events and near-miss episodes.

2. Open discussion of near-miss and injury causing events

Open discussion is necessary to get to the root cause of events that have resulted or may eventually result in injury. In order for parties to feel safe enough to engage in open discussion about such events, they must believe their good-faith efforts to resolve issues will not come back to haunt them at a later date.

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They must be assured they can fully discuss events and they are free to express anger, grief and even remorse. Providers must be assured they can offer apologies without the fear of later repercussions. Similarly, patients must believe their own contributory actions or omissions will not be used against them if the case does not achieve resolution.

3. Quick response to safety issues

Providers and institutions must be able to respond quickly to events that have caused or that have the potential to cause injury. Safety cannot be enhanced if one waits years before taking steps to correct dangerous situations. Injured patients want assurances they will not be re-harmed and want to be sure that other patients will not be exposed to similar dangers. A safety program must have the ability to access, analyze and utilize all available information if it is to respond to safety issues in a timely manner.

COLLABORATIVE LAW CAN FACILITATE THESE ELEMENTS

1. Access to Information

An effective Patient Safety Program must examine all adverse events and near-miss episodes. A near-miss incident can be defined as an act of commission or omission that could have injured the patient but did not do so as the result of chance, prevention or mitigation.[9] An adverse event can be defined as an unintended harm to the patient by an act rather than a harm that is the result of the underlying disease or condition of the patient.[10] Adverse events can be further subdivided into those that are the result of negligence and those that are not.

Access to information is sporadic at best. Currently, very few safety programs examine near-miss episodes. As a result, this potential wealth of information remains largely untapped. On the legal front, statistics reveal that lawsuits are filed only in a very small percentage of cases involving medical negligence.[11] Attempts to study these cases limit the pool to only those acts falling below a set standard of care and resulting in actual harm to a patient. Further limiting the number of cases that could provide information is the fact that, as a practical matter, only those cases with the potential for sufficient dollar recovery are taken on contingency. These factors all tend to compartmentalize and limit the amount of valuable information ultimately available for use in improving patient safety.

The collaborative process has the potential to extend beyond these limited boundaries and is capable of addressing cases involving both near-misses and adverse incidents.[12] This ability to span almost the full spectrum of possible incidents gives Collaborative Law a distinct advantage over other processes.

The combined parallel programs have the potential to intersect at the following points **in the table below**:

2. Open discussion of near-miss and injury causing events

Collaborative Law can provide the safe environment necessary to promote open discussion of events. Collaborative Law sessions provide the following:

a) face-to-face communications

An environment allowing face-to-face communications is essential for open discussion of injury-causing events and near-miss episodes. The participants must feel safe enough to talk about events and to express remorse, anger, grief, and even forgiveness.[15] Detailed information is essential when performing root-cause analysis of factors that may have precipitated injury.

Collaborative Law provides an excellent venue for this exchange process, as communications are all face-to-face. In typical litigation proceedings, initial communications come in the form of dueling onslaughts of paperwork as the process of discovery begins. Answers are crafted to give only what is immediately demanded and nothing more. The atmosphere is often one of evasion rather than solution, and parties may never see each other until they arrive in court. Other legal alternatives also have the potential to interfere with direct communications. Although mediation may help open communication channels,

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NEAR-MISS -episode avoided due to **chance** ie: contraindicated drug given but patient has no reaction[13]	**NEAR-MISS** -episode avoided due to **prevention** ie: incorrect medication recognized and never given	**NEAR-MISS** -episode avoided due to **mitigation** ie: overdose given but countered with antidote	**ADVERSE INCIDENT without negligence** ie: inadvertent bowel perforation during surgery	**ADVERSE INCIDENT with negligence** ie: clamp left in patient's abdomen during surgery
Collaborative Law may be appropriate	Collaborative Law is not required[14]	Collaborative Law may be appropriate	Collaborative Law may be appropriate	Collaborative Law may be appropriate

COMBINING COLLABORATIVE LAW AND PATIENT SAFETY PROGRAMS: A PROPOSAL FOR THE USE OF PARALLEL PROCESSES TO FACILITATE EARLY DETECTION OF SAFETY ISSUES AND EARLY REPARATION FOR INJURY-CAUSING AND NEAR-MISS EPISODES

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sometimes the process amounts to nothing more than a mission of "shuttle diplomacy" comprised of back-and-forth settlement offers.[16]

b) confidentiality

Confidentiality concerns may surface in a few different ways. Concerns typically arise in the healthcare setting as physicians worry whether their apologies and other efforts towards disclosure will subsequently be used against them in court as admissions of wrongdoing.[17] In response to these concerns, a few states have enacted statutes protecting certain types of apologies made by healthcare providers.[18] Although these statutes may protect some physicians, most healthcare providers remain concerned they will say too much and may even lose insurance coverage if they somehow manage to "admit" liability. As a result, they clam up, avoid contact, and for years play the waiting game with the hope that a lawsuit will never be filed.

Collaborative Law offers a safe place to talk and provides a level of confidentiality that can facilitate open discussion of issues. The confidentiality of settlement conferences is protected by statute.[19] Provisions for confidentiality are also made part of Collaborative Law participation agreements.[20] Since Collaborative Law proceedings are voluntary and can be entered very soon after an incident, healthcare workers have a safe venue to tender the apologies and explanations they might otherwise be reluctant to offer. Because mediation and arbitration proceedings are often entered very late in the game, the opportunity for apology and forgiveness may have passed by the time such proceedings begin.

Confidentiality concerns also surface in other ways. For example, court proceedings are a matter of public record, and many jurisdictions now have documents posted on-line. This level of publicity has caused concern for parties who are reluctant to have private information readily accessible to friends and neighbors. Collaborative Law can help alleviate this problem, as its proceedings are not open to public scrutiny. As a result, participants may be more willing to participate in open discussions.

c) mandatory attorney withdrawal

The mandatory withdrawal provisions for Collaborative Law attorneys may also facilitate the willingness of parties to engage in open discussions. The separation of collaborative attorneys from the litigation process provides just one more layer of protection for parties and therefore is more conducive to open communication. One of the limitations of mediation has always been the fear that divulging too much information would provide opposing counsel with more ammunition in court. Because parties undergoing mediation usually keep the same attorneys if the case continues to court, there is always the feeling that the "cat is out of the bag," even if confidentiality agreements are signed. Collaborative Law attorneys must withdraw if resolution is not achieved, and parties may be more apt to speak out if they do not feel that opposing counsel is ready to pounce on each tidbit of information revealed.

3. Quick response to safety issues

Collaborative Law has a distinct advantage over other proceedings in that it can be voluntarily entered upon the request of any party. There is no need to wait for legal machinations to grind on at a snail's pace. Better yet, if the process is offered routinely as part of a safety resolution program, valuable information can be quickly gathered, assessed, and utilized as a means to address safety concerns.

As an added bonus, Collaborative Law offers an excellent venue to obtain permission to use confidential patient information for safety studies, thereby alleviating some potential concerns associated with HIPAA requirements.[21] Patients can be informed that both the institution and provider are deeply committed to providing safe patient care and that information obtained in these proceedings will be useful in avoiding future problems. Patients can also be informed of any state and federal reporting requirements, as appropriate.

One may well ask why patient disclosure of near-miss episodes should even be considered in cases where there is no resultant injury. Many physicians take a "no harm, no foul" approach and consider it unnecessary to inform patients of these types of occurrences. Patients, on the other hand, want acknowledgment of even the simplest of errors.[22]

The obligations regarding disclosure to patients are not the same as the obligations to report incidents to various institutional or governmental agencies. Physicians have an obligation to inform patients of complications, including all facts necessary for understanding and to make informed decisions regarding future medical care.[23] Near-miss episodes may fall under this umbrella because even when there is no apparent injury at the time, harmful effects might develop at a later date (i.e., Rh-female becomes sensitized following the inadvertent administration of Rh+ blood and may have complications in later pregnancies). Sometimes follow-up testing is all that is necessary to ensure there truly will be no future complications (i.e., serial testing for HIV and hepatitis following the inadvertent use of a contaminated needle). Patients have the right to know about anything materially affecting their care and welfare and should not have to bear the financial responsibility for these additional procedures.[24]

Disclosure of near-miss episodes is also important because patients and families may possess vital information about points of contact that may have altered the course of events or points where danger might ultimately have been averted.[25] The amassed information from these events can be invaluable for improving safety operations and preventing future injuries. Patients may also reap the benefits of near-miss disclosure if incidents are used as teaching opportunities to help them prevent future injuries (i.e., the importance of reporting medication allergies to providers).[26]

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Healthcare personnel are extremely fortunate when their near-miss actions fail to result in injury to a patient. However, future patients encountering the same set of circumstances may not be so lucky.

Disclosure of near-miss episodes is probably discretionary,[27] as may be the case where there has been no injury and there is absolutely no chance the non-disclosure will affect future healthcare decisions.

Whether patient disclosure is deemed necessary or not, each near-miss episode should be evaluated with the goal of overall improvement in patient safety. The circumstances surrounding all the near-miss episodes likely hold valuable information that can be used to prevent similar scenarios from eventually resulting in harm.

4. Why address adverse incidents that do not rise to the level of negligence?

Physicians are sometimes reluctant to discuss the particulars of an incident when they believe they have delivered an appropriate level of patient care. They feel they have "done nothing wrong" and therefore should not have to justify their actions. However, patients often believe healthcare providers must have acted negligently if they suffer harm while undergoing treatment. When faced with unanswered questions, patients sometimes seek redress through litigation until their concerns are addressed.

The general consensus is that physicians and healthcare organizations are obliged to disclose errors that cause harm.[28] Even if physicians would like to distinguish injury or harm-causing events that do not amount to negligence, the bottom line is that repercussions on the health of injured patients are not dependent upon whether the care was delivered in a negligent fashion (i.e., even if a surgeon performs in a competent manner, the inadvertent perforation of a bowel during surgery will likely add time to a patient's hospitalization as well as increase the overall costs associated with care).

5. Other reasons to distinguish negligent vs. non-negligent incidents

a. patients may need the information

Patients are consumers of healthcare services and often have long-term, ongoing relationships with healthcare providers. When something goes wrong, patients and families often express an intense need to know exactly what happened (including whether something could have or should have been done differently that might have prevented the ensuing harm). Some need this information in order to forgive, and others need it to make decisions about whether they wish to continue a particular physician-patient relationship. The level of "fault" or "responsibility" they attach to the incident can sometimes affect their ultimate decisions.

b. physicians have a right to safeguard their reputations

Much of the harm patients suffer is not due to negligence. When competent care has been provided, physicians want their patients to know they acted appropriately and they did everything within their power to prevent injury. For many, the perception that their personal reputation is at stake is a significant factor in any decision whether to defend a lawsuit. Physicians are often held responsible for bad outcomes even in the absence of error, particularly if the injuries are significant. This result can cause great angst to physicians who feel doubly wronged when their names are subsequently reported to state and federal data banks.

Studies of closed cases have shown that many adverse events occur even when there is no evidence of error on the part of practitioners. Patients often receive compensation under these circumstances; sometimes even when there is no verifiable injury. Jury awards do not correlate strongly with actual negligence or even iatrogenic injury.[29]

The Collaborative Law process offers an opportunity for healthcare providers to explain the circumstances of an incident, to demonstrate that appropriate care was bestowed, and possibly to avoid the stigma associated with a lawsuit. The process allows for the use of a neutral expert to assess the situation and provide an opinion to all parties involved. The use of an expert whose sole purpose is to come to an unbiased conclusion may increase confidence in overall results.

The Collaborative Law process also offers a solid "reality check" for both patients and providers regarding the medical care in question. Attorney representation should help clarify to patients the potential consequences of pursuing litigation if it appears the injury is not based upon negligence. Similarly, providers should understand the potential consequences of a "deny and defend" stance if liability is probable.

c. the information may be necessary for patient safety improvement

To improve patient safety, one must know what, if anything, could or should be done differently in the future to help prevent the occurrence of similar injuries. To make these determinations, one must know the existing standards of care and whether these standards have been met. If deviations have occurred, training programs can be developed to educate all who will benefit from the information. If the standard has been met and injuries have still resulted, the standard itself must be re-evaluated and changes made accordingly.[30] Discussion of issues related to standard of care and the determination of fault do not require that parties engage in accusatory tactics or finger-pointing. Discussions of responsibility similarly do not have to include long and drawn-out or overly detailed narratives of each element of negligence. However, they must include enough information to determine what happened.

Many incidents are due to systems failures rather than individual incompetence. These errors are the result of badly designed systems in which multiple factors combine to produce ideal conditions for error.[31] Systems failures must be analyzed along

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with individual failures as the potential bases for near-miss episodes as well as negligent and non-negligent injuries. In a complex environment, there are numerous opportunities for error as multiple interactions occur between physicians, nurses, laboratory personnel, and others who come into contact with patients and their families. Instead of focusing on a few bad actors, the focus should be on errors of individuals working in systems where mistakes can and do occur.[32]

A totally blame-free environment probably cannot exist, however, and may even be irresponsible.[33] Whether individual or systems factors are responsible for injury, patients expect and deserve accountability.[34] Many providers appear to recognize this fact and seem willing to accept reasonable consequences to their own actions.[35] Other caregivers also seem to recognize this fact and are not willing to shelter co-workers who fail to disclose injuries to patients. In fact, the numbers of lawsuits initiated upon the advice of other healthcare workers[36] supports the penchant for accountability and the refusal to cover up negligent incidents at the expense of patients.

Disclosure in a blame-free environment involves two prongs, the first being the truthful and ethical disclosure to a patient or family after which the injured party has the option to consider absolution.[37] The second prong looks at blameworthy acts from the point of view of the organization. On one hand, an organization will want to facilitate reporting by creating a non-punitive environment, but on the other hand it might be irresponsible for an organization not to punish terrible and egregious errors.[38]

The organizational culture within an institution will play a major role in how individuals respond to incidents.[39] A progressive increase in self-reporting by doctors and nurses was experienced at the VA Medical Center in Lexington, Kentucky that is believed due to the general air of openness and the fact that management does not punish honest errors.[40] Errors are inevitable and expected within complex systems. Latent failures, those embedded in the design of complex systems, are "accidents waiting to happen" and can be the most dangerous because they often remain unrecognized.[41] Organizations must endeavor to treat healthcare workers fairly and with respect when incidents occur if they wish to develop the trusting relationship necessary to facilitate self-reporting of all potentially harmful situations.

It simply makes sense to use a parallel program to promote resolution of safety issues. Organizational responsibility and individual responsibility can be assessed together while seeking solutions and facilitating reparations.

THE COMPETING INTERESTS

Patients typically want at least three things when faced with an unanticipated medical outcome. They want to know why or how an incident happened; they want to know what has been done to see that it will not happen again; and they want an apology.[42] The more serious the injury, the more detailed an explanation is desired.[43] Additionally, some may want financial recovery, while others may want to preserve ongoing relationships with their physicians.[44]

Many physicians would like to provide sincere apologies, but are reluctant to do so because of they fear any statements they make will be construed as admissions of liability. Physicians do not want to see their patients faced with added medical expenses, but do not feel monetary recovery should come out of their insurance if they believe they "have done nothing wrong." They vigorously defend actions because of the stigma attached to being labeled a "bad doctor" and the fear of being reported to various state and federal data banks. When no negligence is involved, they want their patients to know they acted appropriately even though there has been a bad result.

Some insurance companies and healthcare organizations worry their costs will explode if they fail to defend all but the most blatant of negligent actions. Others look to new solutions involving apology and disclosure and recognize such actions can result in significant cost savings. Institutions recognize they must respond to many new requirements for reporting adverse incidents and near-misses.

A Collaborative Law program run in a parallel process with a Patient Safety Program has the ability to address many of these competing interests.

SAMPLE PARALLEL PROGRAM SET-UP

A parallel program could be set up in the following manner:

A Parallel Team is formed to investigate all adverse incidents and near-miss episodes. The team includes a medical doctor (capable of determining whether disclosure is required) and a report officer (capable of determining whether reporting is required). All members of the healthcare team (including affiliated physicians) are educated about the benefits, purposes and requirements of the program. Members are informed of reporting mechanisms and provided with contact information.

The Parallel Team is notified immediately following all incidents.[45] The facts are then reviewed with the healthcare provider to determine whether disclosure is necessary, and if so, whether disclosure has already occurred. If disclosure is not necessary, the information is routed to the Patient Safety Program for in-house evaluation, statistical use, and to ensure necessary safety revisions are made to existing processes.

If a provider desires assistance with disclosure or otherwise prefers the use of Collaborative Law (perhaps for added confidentiality), the Parallel Team explains the program to the patient and requests participation in the process.

If disclosure has already occurred, the Parallel Team should contact the patient for the following reasons:

- to see if he or she has any further questions or concerns, and if so, whether the patient would prefer to have the issues addressed within the Collaborative Law process;

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- to explain the overall commitment of both the institution and provider to patient safety and how information gained from each incident could be used to foster change;
- to request patient consent for the use of confidential information for safety improvement purposes.[46]
- to inform patients of the opportunity for independent attorney representation within the Collaborative Law process that can help to ensure protection of their interests.

The Collaborative Law process can be initiated by either the patient or the healthcare provider with the assistance of the Parallel Team. Since all incidents in the parallel process are evaluated by the Parallel Team and since entering the process is not dependent upon whether or not error has occurred, the stigma of participation can be far less than that associated with litigation.

Once the process is completed, the Parallel Team follows through to ensure that any mandatory state and federal reporting requirements have been met. The Team also takes whatever steps are necessary to see that the appropriate safety changes are made to existing processes, protocols and policies.

WHY ADD ATTORNEYS TO THE MIX?

Some early resolution programs seek solutions without the active participation of attorneys. Although this approach may work well for some parties, attorneys can offer some assistance for others facing healthcare issues. Lawyers can help equalize some of the power imbalances that often occur in physician-patient relationships, especially when the physician and healthcare institution have legal backup. Some injured parties may avoid early resolution attempts because they feel they are easy prey for sophisticated organizational representatives. On the other hand, some institutions find it helpful for patients to have attorney representation because counsel can help clarify standard-of-care and accountability issues.[47] Some facilities advise patients of the right to retain counsel, and some encourage them to seek representation if they have not already done so.[48]

Many institutions have successfully relied upon in-house counsel to resolve issues related to medical injury. However, there are some advantages to outsourcing the entire process to Collaborative Law professionals.[49] First and foremost is the opportunity to focus 100% of efforts solely upon settlement and resolution. Outside collaborative professionals do not have to face the impossible tasks of trying to settle a case while also preparting for trial. Collaborative attorneys are also trained in seeking solutions through interest-based negotiations and will not be focused solely on monetary recovery. Additionally, some in-house attorneys might find it impossible to turn over detrimental information even though all parties have agreed in advance to full disclosure.[50]

Further, even if firewall protections are instituted, the potential for inadvertent release of information between co-workers exists. Even when there is no impropriety, a certain level of mistrust and the appearance of the impropriety may cloud some efforts at solution. The mandatory attorney withdrawal provisions of the Collaborative Law process can help alleviate concerns that information and apologies will be used against the parties if resolution is not achieved. Outsourcing leaves in-house counsel available to take over if the case proceeds to litigation.[51]

COST / BENEFIT ANALYSIS – WHY SUPPORT A PARALLEL PROCESS?

Although it may seem counterintuitive for open disclosure of mistakes to result in overall cost savings, the savings do occur.[52] The cost-saving potential associated with the utilization of parallel processes actually comes from a variety of sources. For starters, unwarranted and outrageous jury awards are avoided because settlements are made only upon agreement of all parties.

A Parallel Team has the ability to coordinate efforts and avoid the costs associated with multiple reviews of the same set of facts by multiple departments. For example, an institution may have separate Risk Management and Safety Review processes operating independently to analyze the same set of circumstances. Then, if the case goes on to litigation, more reviews follow. Through a Parallel Program, it is possible to combine some of these elements. By addressing issues as they arise, the team can potentially avoid costs to dismiss or to otherwise defend unwarranted lawsuits. Additional savings are realized as systems and safety improvements prevent the recurrence of similar patient injuries.

Recently, several programs promoting early disclosure and apology have been developed and studied. Early results are impressive. Programs have been successfully adopted at the following institutions: the Veterans Administration Medical Center in Lexington, Kentucky;[53] the University of Michigan Health System;[54] COPIC Insurance Company in Colorado;[55] and Catholic Healthcare West.[56] The financial results have been very positive.

The Parallel Program combines Collaborative Law and patient safety processes in an attempt to provide reparation for medically injured patients. The program is able to meet patient needs for early answers, apology and prevention of further harm. The program is also able to meet physician needs for assistance with disclosure and apology, protection of reputation, and prevention of unwarranted reporting or accessing of individual insurance for non-negligent injuries. The program is able to meet organizational needs for identification of near-miss and injury-causing events for reporting and safety improvement purposes. The program also meets the needs of medical institutions and insurance companies by providing a cost-effective process for resolution of medically related issues.

Parallel Programs combine elements of no-fault, enterprise, and professional-negligence theories of liability, and they have the

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potential to provide reparation for both negligent and non-negligent injury while maintaining the cost-saving benefits and potential for increased satisfaction among all participants.

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Author's Note: This paper should not be construed as creating an attorney-client relationship, as offering legal advice, or as offering any warranties, including warranties of merchantability or fitness for a particular purpose.

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ENDNOTES

[1] Carol B. Liebman & Chris Stern Hyman, *Medical Error Disclosure, Mediation Skills, and Malpractice Litigation, in* THE PROJECT ON MEDICAL LIABILITY IN PENNSYLVANIA, at 22-23 (2005), *available at* http://www.pewtrusts.org/pdf/LiebmanReport.pdf (citing Hickson et. al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries,* 267 J. AM. MED. ASS'N 1359 (1992)). Hickson's study of the reasons parents sued after the occurrence of perinatal injury reported, "33% sued because they were advised to do so by a third party, often another health care provider; 24% felt the doctor was not completely honest or had lied to them; 24% needed money for the child's future care; 20% couldn't get anyone to tell them what had happened; and 19% wanted revenge or to protect others from harm." *Id.*

[2] Dale C. Hetzler, *Superordinate Claims Management: Resolution Focus From Day One, 21 GA. ST. U. L. REV. 891,* 897-98 (2005).

[3] Liebman & Hyman, *supra* note 1, at 76 (dated information is of little use in improving patient safety).

[4] Karen S. Fasler, *A Niche of Its Own – The Use of Collaborative Law in Medical Malpractice Cases,* 2005 (for overview). *See generally* SHERRIE R. ABNEY, AVOIDING LITIGATION: A GUIDE TO CIVIL COLLABORATIVE LAW (2005).

5 Philip Aspden, Janet M. Corrigan, Julie Wolcott, & Shari M. Erickson eds., PATIENT SAFETY: ACHIEVING A NEW STANDARD FOR CARE 3 (2004).

[6] *Id.* at 18.

[7] *Id* at 169.

[8] *Id* at 171-72.

[9] *Id* at 34.

[10] *Id* at 32.

[11] Barry R. Furrow, Thomas L Greaney, Sandra H. Johnson, Timothy S. Jost & Robert L. Schwartz, HEALTH LAW: CASES, MATERIALS AND PROBLEMS 33-34 (3d ed. 1997) (excerpt from Patients, Doctors and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York – The Report of the Harvard Medical Practice Study to the State of New York (1990)). This New York study estimated that eight times as many patients suffered negligent injury as filed malpractice claims and that sixteen times as many were injured than received compensation.

[12] Note: the potential to span the complete spectrum of near-miss and injury cases will require that the program be funded by a means other than contingency-fee agreements.

[13] Some refer to similar episodes as "harmless hits" (as in cases where there is no appreciable effect on the patient). *See* Carol Bayley, *Medical Mistakes and Institutional Culture, in* ACCOUNTABILITY: PATIENT SAFETY AND POLICY REFORM 108 (Virginia A. Sharpe ed. 2004).

[14] Note: the "prevention" category of near-miss episodes does not require Collaborative Law intervention, as there would be no patient contact; the circumstances can be addressed solely within a safety program.

[15] Liebman & Hyman, *supra* note 1, at 63 (questions, grief, understanding and empathy are expressed during mediation caucuses).

[16] Hetzler, *supra* note 2, at 902. Separating the parties into caucus rooms may be more familiar to some attorneys and neutrals and may quickly become an exercise in shuttle diplomacy.

[17] Liebman & Hyman, *supra* note 1, at 51.

[18] *Id.*

[19] *See* ABNEY, supra note 4, at 93.

[20] *Id.* at 95.

[21] For a discussion of HIPPA, see Bryan A. Liang, *Error Disclosure for Quality Improvement: Authenticating a Team of Patients and Providers to Promote Patient Safety, in* ACCOUNTABILITY: PATIENT SAFETY AND POLICY REFORM 69-71 (Virginia A. Sharpe ed. 2004). Patient safety researchers may consider obtaining HIPAA authorization from patients to gain access to patient-identifiable materials. *Id.* at 70.

[22] Steve S. Kraman & Ginny Hamm, Ginny, *Risk Management: Extreme Honesty May Be the Best Policy,* 131 ANNALS INTERNAL MED. 963 (1999).

[23] Nancy Berlinger, AFTER HARM: MEDICAL ERROR AND THE ETHICS OF FORGIVENESS 40 (2005) (citing Code of Medical Ethics of the American Medical Association).

[24] JOHN D. BANJA, MEDICAL ERRORS AND MEDICAL NARCISSISM 25 (2005).

[25] E. Haavi Morreim, *Medical Errors: Pinning the Blame versus Blaming the System, in* ACCOUNTABILITY: PATIENT SAFETY AND POLICY REFORM 216 (Virginia A. Sharpe ed. 2004). (arguing that if errors are understood by gathering detailed information, it makes little sense to exclude information from possible firsthand witnesses).

[26] Albert W. Wu, *Is There an Obligation to Disclose Near-Misses in Medical Care?*, in ACCOUNTABILITY: PATIENT SAFETY AND POLICY REFORM 141 (Virginia A. Sharpe ed. 2004).

[27] *Id.* (although discretionary, it is also desirable).

[28] *Id.* at 142.

[29] William M. Sage, *Reputation, Malpractice Liability, and Medical Error, in* ACCOUNTABILITY: PATIENT SAFETY AND POLICY REFORM 167 (Virginia A. Sharpe ed. 2004).

[30] *See generally* Furrow et al., *supra* note 11, at 175.

[31] See Bayley, *supra* note 13, at 101.

[32] Liang, *supra* note 21, at 61.

[33] Robert Wachter ed., *AHRQ Interview with Professor John Banja,* AHRQ WebM&M, SORRY WORKS! NEWSLETTER (March 1, 2006).

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[34] For a patient / family perspective, see Sandra M. Gilbert, *Writing/Righting Wrong, in* ACCOUNTABILITY: PATIENT SAFETY AND POLICY REFORM 36 (Virginia A. Sharpe ed. 2004). When errors occur, patients want, need, and should demand accountability – as another word for justice.

[35] Steve S. Kraman, *A Risk Management Program Based on Full Disclosure and Trust: Does Everyone Win?* 27 COMPREHENSIVE THERAPY 257 (2001).

[36] Liebman & Hyman, *supra* note 1, at 22-23.

[37] Wachter, *supra* note 33.

[38] *Id.*

[39] For a discussion of a program at Catholic Healthcare West directed at changing the culture of medical mistakes, see Bayley, *supra* note 13, at 102.

[40] Kraman, *supra* note 35, at 255.

[41] Liang, *supra* note 21, at 61.

[42] Hetzler, *supra* note 2, at 894.

[43] BANJA, *supra* note 24, at 23.

[44] Hetzler, *supra* note 2, at 894.

[45] Notification opportunities should be made available to all healthcare employees and even to patients. Consider that 33% of patients sued when advised to do so by a third party, often other healthcare personnel (see n.1, *supra*).

[46] Liang, *supra* note 21, at 69-71. Patient safety researchers may consider obtaining HIPAA authorization from patients to gain access to patient-identifiable materials. *Id.* at 70.

[47] Hetzler, *supra* note 2, at 899.

[48] Kraman & Hamm, *supra* note 22, at 967; *see also* Bayley, *supra* note 13, at 106.

[49] Note: Even if "outside" Collaborative Law attorneys are used, discussions may be held at the facility if an appropriate venue is available and if desired by the participants.

[50] ABNEY , *supra* note 4, at 25.

[51] *Id.* at 132.

[52] Morreim, *supra* note 25, at 217 (claiming recent evidence indicates that "extreme honesty" may reduce rather than exacerbate the net cost of claims).

[53] Liebman & Hyman, *supra* note 1, at 53-54. The Veterans Administration instituted a radical policy of apologizing to patients as soon as possible after medical error and, when appropriate, offering a fair settlement. They experienced sharp increases in settlements and reductions in the mean malpractice settlement. Savings in litigation costs have been significant. The policy of "assuming responsibility" has led to more healthcare providers promptly reporting errors.

[54] *Id.* at 54. Physicians report error and (after review by risk management) disclose and apologize. Open claims fell from roughly 250-260 down to 120-130 and were resolved in approximately 320 days (down from 1,100 days). The annual cost of handling claims declined from approximately $3 million to $1 million.

[54] *Id.* at 55. Under the 3R's Program, the physician and patient engage in open, honest and empathic conversation within forty-eight to seventy-two hours of a complication or injury. COPIC offers immediate compensation (if appropriate) for out-of-pocket expenses without requiring a release of legal claims.

[55] *d.* at 55-56. After an adverse event, patients are given a copy of the medical record and all relevant information about the event. They are told of the cause and extent of the harm and of their right to compensation. CHW takes responsibility for mistakes and apologizes. They advise patients to consult a lawyer to decide whether offers of compensation are fair.

[56] *Id.* at 55-56. After an adverse event, patients are given a copy of the medical record and all relevant information about the event. They are told of the cause and extent of the harm and of their right to compensation. CHW takes responsibility for mistakes and apologizes. They advise patients to consult a lawyer to decide whether offers of compensation are fair.

The pursuit of peace and progress cannot end in a few years in either victory or defeat. The pursuit of peace and progress, with its trials and its errors, its successes and its setbacks, can never be relaxed and never abandoned.

Dag Hammarskjold

REFLECTIONS FROM THE EDGE

SETTLEMENT ADVOCACY[1]

By Kay Elkins-Elliott[2]

(Note from the Chair of the Newsletter Editorial Board: This article continues a series entitled "Reflections from the Edge," written by Kay Elkins-Elliott and Frank W. Elliott. In this series, Kay and Frank review the latest research and literature in the interdisciplinary field of dispute resolution, and they explore possible applications of the research and literature to everyday practice.)

There is art in persuasion, and there is science. The art is sometimes referred to as emotional intelligence, and is exemplified by heroes such as Abraham Lincoln, Winston Churchill, and Clarence Darrow. The art and power of rhetoric in trial advocacy can be taught, and is backed by science composed of years of jurisprudential research and writing. The art and power of negotiation and settlement advocacy can also be taught, and is backed by science composed of a solid multi-disciplinary base of research and writing.

EFFECTIVE SETTLEMENT ADVOCACY

Persuasion can be accomplished through the use of power, rights, or collaborative problem solving. The use of power carries risks of impasse and injury to relationships. Persuasion of a judge or jury that one party is right and the other wrong is a high-stakes gamble: someone will always be a loser. Both of these methods are costly. The history of negotiation in the shadow of the law reflects delays, high costs, and the risk of loss (i.e., time lost, financial loss, and emotional trauma). Mediation and other forms of ADR were introduced to alleviate those costs and reflect a collaborative, rather than adversarial, method of problem solving.

A. Influencing the Minds of Conflict Partners

Although the arts of persuasion and negotiation are powerful tools for influencing others, they have palpable limits. Mastery of either or both does not guarantee success for advocates. In transactions and disputes, lawyers and clients make choices: shall we use power (e.g., economic leverage or a strike rally)? Shall we focus on who is right under the law or morality or fairness norms? Shall we negotiate from an interest-based perspective and attempt to create value that can be appropriately allocated in a problem-solving process? Shall we bring in a transformative facilitator to provide an opportunity for the parties to become empowered to make their own decisions and develop ground rules based on their own values and perceptions of the problem and each other?

In a dispute that has escalated to the level of litigation, we typically first use negotiation or its cousin, mediation, as the preferred type of interpersonal communication. Even after that process decision has been made, many other questions arise. What style of negotiation is best suited to this case: adversarial or problem-solving? What tactics should we use in the distributive bargaining phase of negotiation: competitive or cooperative? How much involvement, if any, should our client have, and how should her role be defined? Is there a particular strategy that will increase our effectiveness? Does negotiation theory have a useful application in settling a lawsuit? Should the settlement advocate strive for objectives beyond just settling the lawsuit? What financial incentives could be created to more closely align the interests of the client and those of the attorney?

B. History of Settlement Science: Law and Social Science

Until quite recently, research and writing in the related fields of conflict resolution, communication, negotiation, and the psychology of influence, have come more from social scientists than from lawyers. Many attorneys simply never read the abundant literature that would have informed a paradigm shift. If the objective of an advocate is to make the deal, or end the lawsuit, why bother to add new skills? Lawyers achieve those objectives constantly. The phenomenon of collaborative law and the institutionalization of ADR in many Texas courts, agencies, and organizations, however, points to an expansion of consciousness in consumers and their attorneys. Recently, I took a call from a man who wants to have a collaborative divorce and has already bought a book about the subject. He is not a lawyer. So law firms, corporations, and government employers have to become more frequent and sophisticated users of ADR and market their competency in these areas.

From a therapeutic justice[3] or peacemaking perspective, conflict can be an opportunity for the creation of mutual gain, personal growth, redefinition of the issues, and enhancement of an existing relationship that is threatened. These goals are not inconsistent with traditional advocacy. In fact, they are implicit in the ancient role attorneys have always played: protecting the client and society. The methods used to resolve conflict will determine if these objectives are met. The alternative is to continue to be content with mere split-the-difference compromise, less than optimal results for our clients, and a negative image in our society.

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SETTLEMENT ADVOCACY[1]
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Until recently, the impact of negotiation analysis on the legal profession has been relatively slight when compared to the "juggernaut of adjudication analysis that dominates the legal horizon."[4] We hear the civil trial to a jury is an endangered species. Despite more civil law suits being filed in the last decade than in the previous decade,[5] only 3% actually are tried.[6] The civil trial will never disappear, but more attention needs to be given to negotiation analysis and the creation of faster, cheaper, better outcomes for our clients. The responsibility for this shift lies with educators in continuing education courses and law schools.

In the last two decades, research and writing in the field of understanding conflict and eliminating barriers to successful negotiation and dispute resolution have blossomed.[7] No one discipline or level of analysis is sufficient for this work. Lawyers benefit from the continued research focusing on conceptual analysis, theory building, and application. From that work, some concerns and issues have emerged that form the basis for this article. Some of those issues are addressed in this article; others will be discussed in future articles. It has been said that the knowledge base from scholarly output operates like an expensive perfume because "while the fragrance of sound bargaining knowledge may be universal, the scent takes on the individual characteristics of each bargainer's personality."[8]

C. Is it Critical to the Success of a Mediation to Have the Parties Brainstorm as Many Options as Possible Before Deciding on the "Solution?"

One step in the classic integrative bargaining process articulated by Roger Fisher and William Ury [9] is to brainstorm as many options as possible to meet the previously identified interests of the parties. The purpose of this activity is to create value or opportunities for mutual gain from which the parties will later produce actual proposals for settlement. The creation of options is supposed to be an exercise in free association without evaluation. However, evaluation of options frequently coincides with brainstorming, due to several psychological phenomena, one of which is known as *reactive devaluation*. In a mediation, one party will hear an option from the other side and may immediately devalue it in reaction to the competitive climate and in the belief that if the idea came from the opposition it must be suspect.[10] While having many options on the table from all stakeholders is an important ingredient in creating value, the problem of reactive devaluation can have a negative impact on the mutual gain perceived.

One operational solution is to have the parties generate options in separate rooms and then to have the mediator or a spokesperson for each stakeholder group communicate the preferred options as merely areas for discussion that are likely to be attractive to the other party. The mediator may even be instructed to convey some of the favored options to the other party as the mediator's hypothetical ideas for ways to meet the parties' interests. This reframing of the options could preclude or diminish reactive devaluation. After the initial presentation of ideas for meeting the parties' needs, the evaluation of those options could then be accomplished in joint session, where the comparisons to reference points or expectations could be aired, or in caucus, where the mediator could interject some rational methods of evaluation based on actual value.

It is useful for all clients, particularly sophisticated businesses professionals and anyone with negotiation expertise, to be prepared by the advocate to participate fully by bringing to the table many ideas for resolving the joint problem the parties share.[11] Often, options generated by one side will duplicate or be complementary to options generated by the other, particularly when the clients have spent sufficient time preparing for the process. Although the processes differ, advocates should coach their clients to be eloquent and creative participants in the settlement process, just as they would prepare the clients for success on the witness stand. Some clients are more capable than others, but all need to be prepared to participate actively in resolution.

Clients can also be coached to listen actively and openly, without critiquing the ideas of the other side, to get useful ideas on the table. Advocates should present options strategically to the other party or the mediator to gain any possible advantage for their client. There may be low-cost-for-our-side but high-value-to-the-other-side options (value-creating trades) that provide benefit for both. In order to prevent leaking strategic information, strong preference for one option over another should not be disclosed until the final phases of negotiation. While openness and creativity are important, a strategic plan should be formulated and followed to achieve as much of the joint value as possible. All of these techniques represent zealous, ethical, and effective advocacy.

Another type of devaluation occurs when recipients of an option for settlement compare it with a result achieved in a separate, but similar, negotiation. This devaluation may arise because a disputant will speak with family, friends, or colleagues about a prospective negotiation or mediation and will be told what they have achieved in supposedly similar situations. Knowledge of those other processes may lead the disputant to expect an equal or better outcome in her own process, even though each negotiation has its own unique mix of human dynamics, facts, exogenous climate, and alternatives. *Anchoring* is the cognitive process of determining value based on some reference point in the negotiator's mind, or by comparing an offer to a predetermined reservation price in the current negotiation.[12] Dispute resolution scholars have noted that this tendency to link current options and offers to past events impedes rational decision-making and frustrates the point of brainstorming: to create opportunities for mutual gain.[13] The settlement advocate should be prepared to explain each option in terms of value to the other side and urge that, in the brainstorming phase of negotiation, option generation just be a trigger for creative thinking rather than a suspicious interchange. When the options suggested by the advocate are discounted because she is not neutral, the mediator can accomplish the same objectives.

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MEDIATION'S ADVANCES AND BACKWARD MOVEMENTS: PERSONAL EXPERIENCES IN BRAZIL, ARGENTINA, PARAGUAY, PORTUGAL, AND ANGOLA

By Juan Carlos Vezzulla*

(*Note from the Chair of the Newsletter Editorial Board: This article continues a series whose purpose is to expose our readers to perspectives on Alternative Dispute Resolution from other parts of the world. If you are aware of ADR initiatives in other countries that may be of interest to our readers, please contact Walter A. Wright at ww05@txstate.edu. Alternative Resolutions expresses sincere thanks to Josefina M. Rendón, who translated this article from Spanish to English.)*

This article is partly based on the ideas of David Held,[1] who describes the status of citizens as one of autonomy (the possibility of exerting their rights and of freeing themselves) or nautonomy (the condition of being put under or subjected to others). The article is also based on the ideas of Boaventura de Souza Santos,[2] who categorizes the times according to the types of laws or legislation that govern a society, that is, laws that provide citizens' emancipation as opposed to laws that provide regulation. We apply those concepts to our own experience in diverse countries. Based on the above, we intend to demonstrate that mediation is supported and sustained by the dominant classes - hegemonic power - when it is at the service of regulation and nautonomy, and that it is limited in its application when it is at the service of emancipation and autonomy.

According to the above-mentioned variables, it seems clear that the intentions of many countries are to incorporate mediation and use it in the service of globalization and the maintenance of a structure of dependency, while taking note of the specific circumstances and momentary necessities of each diverse country in the world.

We were lucky to participate in introducing mediation in Latin America (Argentina, Brazil and Paraguay) as well as Europe (Portugal) and Africa (Angola). In Argentina, Portugal and Angola, the training of mediators and the implementation of their use were by governmental decision, while in Brazil and Paraguay it was by direct action of the citizenship.

We know that the reasons put forth to justify this introduction of mediation is indicative of the displeasure and dissatisfaction of citizens with the services and traditional ways of conflict resolution. These include delays and case overload in the courts, as well as high economic and psychological costs.[3]

The steps taken in each country [to incorporate mediation and other forms of alternative dispute resolution into the legal system] send signals to the globalized business world that countries are modernizing and preparing themselves to receive business and facilitate the entry of international capital. This imported methodology to simplify the resolution of conflicts with transparency, has also produced secondary effects undesired by the leading classes. That these effects were unwanted can be perceived as follows:

- in the attempts to limit the reach of mediation by transforming it into a simple conciliatory routine of objective conflicts,
- in the attempts of the professional classes traditionally related to the courts (lawyers, promoters, and judges) to make mediation exclusive,
- in the devaluation of the mediator profession by providing low honoraria or opening it exclusively to volunteers and trainees who donate their work in order to establish their practices or to fulfill an almost missionary objective.

Why such limitations? Why such fear? From our experience, it is possible to affirm that the citizens who go through a true mediation are able to recognize their own capacity to exert the "autonomy" of being able to approach their own conflicts and to apply what they learned in mediation to solve those conflicts on their own. This collectively generates an "emancipation" that leads them, individually and/or collectively, to seek progressively greater participation in the decision making of issues that concern them personally and collectively.

In Argentina, you can see the dichotomy between the formal use of the so-called mediation related to the courts (in Buenos Aires it is reserved for lawyers) as opposed to the mediation practiced in communities, schools, and with families.

In Brazil, as of 1994, when founded by Angelo and Guta Volpi and Juan Carlos Vezzulla, in Curitiba, Paraná, the Institute of Mediação and Arbitragem do Brasil (Institute of Mediation and Arbitration of Brazil) or IMAB, there was an expansive wave generated that extended mediation throughout most of the

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country. In Paraná, we worked seven years in the Public Defender's Office, mediating more than eighty cases per month with a team of over twenty volunteers coordinated by Lidercy Prestes Aldenucci and Juan Carlos Vezzulla until it was deactivated by the decision of public defenders to not send any more cases to us. We (Marcia Maconk, Lidercy Prestes Aldenucci and Juan Carlos Vezzulla) worked for the Secretary of Education to train school teachers and directors in conflict resolution until the change of state government in 2003 ended our work. In São Paulo, we opened services next to the Universities of São Paulo(11th of August Center) and Catholic University (Legal Offices). We continue managing those offices and participating in the team coordinated by Adolfo Braga Neto that trains mediators for the State Courts. In Santa Catarina, we collaborated in the creation of "the Houses of Citizenship," [4] and every year we participated as professors to the professionals who work in those houses. Throughout these years, the number of training hours was reduced and the number of participants increased. Today, we coordinate a team of ten mediators (coordinated by Dulce Bittencourt and Juan Carlos Vezzulla) who, together with the Childhood and Adolescence Court under Judge Alexandre Morais da Rosa, handle cases dealing with infractions and general problems involving teenagers, families, schools, and the community.[5] In most other states in Brazil, we collaborated in different ways in the training of mediators and the creation of mediation centers.

In each state, mediation has grown in different ways depending on the characteristics of the region. Private experiences, experiences related to commercial and industrial associations,[6] sector or international trade chambers and experiences promoted by the courts were developed with different objectives and levels of success. Today, after almost fifteen years of mediation, we can see the experiences related to institutions such as the IMAB maintain a professional, scientific and ethical rigor that respect the principles and procedures of mediation. These institutions united about ten years ago, creating the Conselho Nacional das Instituições de Mediação e Arbitragem. (National Council of Mediation and Arbitration Institutions) or CONIMA).

On the other hand, court mediations, with few exceptions, have been losing their scientific and professional rigor and instead are giving more superficial attention to what the courts consider smaller cases. This watered-down mediation, practiced almost exclusively by volunteers, is steered to give services to the less-favored classes. In short, the result has been justice for the poor (those who get it and those who give it) without the benefits of the exercise of "autonomy" and instead maintaining their previous dependency.

Dependence on the Judicial Power and the Public Ministry,[7] require the handling of a greater number of cases to the detriment of quality and depth of the work. This also destroys the social function of mediation to enable people to end their "social childhood and adolescence" and to begin their "social adulthood" by assuming responsibly the importance for their own acts without delegating or using go-betweens for the solution of their problems or the satisfaction of their needs.

The attempts in Brazil to pass a mediation law that confuses it with conciliation,[8] annulling its better effects and destroying part of what has already been built, is another indication of the concern with preventing the creation of the culture of mediation that has now become a conciliatory stage previous to the judicial process.

In Paraguay, our work with the Catholic University bore fruit with the creation of a permanent Training Center and the attention of the community.

In Portugal, deriving from the Argentine and Brazilian experiences, the recreation of Courts of Peace was implemented with a solid training of the first mediators who were going to serve in them. This project was entrusted to the IMAB by the Ministry of Portuguese Justice.[9]

Starting in 2003, we (Conceição Oliveira, Celia Nobrega Reis, Pedro Martins and Juan Carlos Vezzulla) have opened training courses for mediators, guides, supervisors and teachers of mediation and created the Instituto de Mediação e Arbitragem de Portugal (Institute of Mediation and Arbitration of Portugal), or IMAP. After four successful years of operation, mediation, which can be quickly incorporated into other areas such as victim-offender mediation, still faces opposition from certain sectors of society resistant to change. The Order of Lawyers of that country recently released a notice requesting the extinction of those Courts of Peace. Similarly, in the Tutelary Education Law that regulates the rights of children and adolescents, mediation was established and made available by request of victims or offenders, but unfortunately it exists only on paper, since judges do not use it.

Similarly, in the European community, there have been clear recommendations for the extended use of mediation. This is the case even in areas like Criminal Law and the successful Juvenile Justice program in Barcelona[10] that demonstrated that mediation was the best way for pacification and the diminution of the violence. Nevertheless, the pressures from the traditional powers, fearful of yielding participative space and decision-making power to the community, have in most of the countries progressively reduced the use of mediation.

Our experience demonstrates that it has become increasingly necessary to require a greater number of training hours to get good, qualified mediators, since in the last thirty years, as a result of research and experience, mediation has acquired a scientific, academic base (Harvard, Transformative Mediation, Systemic Mediation, and Narrative Circular Mediation) with the contributions of psychology, sociology, law, communication, anthropology, and other sciences. Nowadays, the most serious institutions offer courses to groups of no more than 25 participants, with more than two hundred hours of theory and practice, similar to a university specialization. Unfortunately, the national entities of diverse countries in which we have worked, as well as some international entities, are limiting resources and increasing the minimum number of participants. This has resulted in a pressure to reduce training requirements and in less qualified professionals who may be less inclined to

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follow the ethical, professional and scientific rigors demanded by the practice of mediation. It has also resulted in the natural occurrence of superficial conciliatory methods that primarily services the elite.

By nature, mediation has the philosophical and procedural goals of: 1) the empowerment of people so that they can face and solve their conflicts to their total satisfaction, and 2) the opening of greater space for citizen participation in the management of their own lives and in creating a true participative democracy. If we cannot offer these goals, then the opposite will occur, that is: a mediation that is not for the service of the people but instead for the service of international capital and the traditional structures of the courts, which do not wish to lose their power.

If we continue to accept all these pressures, we will produce an enormous backward movement in the societies that have already incorporated mediation. If we accept that mediation's social function be reduced to a mere procedure that services the economic, legal and political powers, we will see the indefectible loss of mediation's prestige and its demise as a procedure that fosters autonomy and emancipation.

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ENDNOTES

1 HELD, David "Desigualdades de Poder: Problemas da Democracia"; in MILIBAND, David (org) *Reinventando a esquerda*; São Paulo, Brasil, UNESP (1997).
Translator's note: David Held is an international known author and professor of political scince at the London School of Economics.
2 SANTOS, Boaventura de Sousa, *A crítica da razão indolente: Contra o desperdício da experiência*; 3ª ed. São Paulo, Cortez (2001).Translator's note: A Yale University graduate, Boaventura de Sousa Santos is Director of the Center for Social Sudies in Coimbra, Portugal and professor at the University of Wisconsin-Madison Law School.
3 SINGER, Linda; *Resolución de conflictos: Técnicas de actuación en los ámbitos empresarial, familiar y legal*.; Buenos Aires, Paidós (1995).
4 Tribunal de Justicia de Santa Catarina; *Prometo Casa da Cidadanía*: Florianópolis, TJSC (2000). Translator's note: The House of Justice is a community center established with the help of private donations and the Catholic Church that has, among other objectives: to encourage ciitizen participation in community affairs, to facilitate entreneurship among the poor and to promote social justice. See: http://www.casadacidadania.org.br.
5 VEZZULLA, Juan Carlos, (2005) *La mediación de conflictos con adolescentes autores de acto infractor*; Universidad de Sonora, México, Hermosillo.
6 Some of these were financed by the Bank of International Development (BID) which cut the number of course hours CONIMA had required for training and only trained spokespeople and no mediators.
7 SIX, Jean-François *Dinámica de la Mediación*; Buenos Aires, Paidós (1997).
8 Translator's note: In Brazil, conciliation may involve more evaluation than facilitation.
9 VEZZULLA, Juan Carlos *Mediação, Teoria e Práctica. Guia para utilizadores e profissio*
nais; Ministério da Justiça de Portugal, Lisbon (2003).
10 DAPENA, José Méndez, "La mediación y la reparación em el ámbito de la justicia juvenil"; in POYATOS, Ana García, (coord.) *Mediación familiar y social en diferentes contextos*; Seville, Publicaciones Digitales (2003).

FIFTH CIRCUIT REEXAMINES STANDARD FOR FINDING "EVIDENT PARTIALITY" UNDER THE FEDERAL ARBITRATION ACT
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8 *En Banc Opinion* at 1.
9 393 U.S. 145 (1968).
10 *Id.* at 149.
11 *Id.*
12 *Id.* at 150.
13 *Id.*
14 *Id.* There is a split among the circuits regarding whether *Commonwealth Coatings* is, in fact, a "plurality" opinion. The Ninth Circuit has held that because three justices dissented, the vote of Justice White or Justice Marshall was necessary for the formation of a majority for reversal. *See* Schmitz v. Zilveti, 20 F.3d 1043, 1045 (9th Cir. 1994).
15 *Id.* at 151.
16 *En Banc Opinion* at *3 (citing *Commonwealth Coatings,* 393 U.S. at 152).
17 *Id.*
18 *Id.* at *4 (relying on Marks v. United States, 430 U.S. 188-89 (1977)).
19 *Id.* at *5 **(**emphasis added).
20 *Id.* at *5-*6.
21 In *Commonwealth Coatings*, the arbitrator and a party had a "repeated and significant" business relationship. The relationship involved fees of about $12,000 paid to the arbitrator by the party, extended over a period of four or five years, ended only one year before the arbitration, and even included the rendering of services on the very projects involved in the arbitration before him.
22 *En Banc Opinion* at *7.
23 *Id.* at *7-*8.
24 The dissenting opinion was authored by Judge Reavley. Judge Wiener specially concurred to Judge Reavley's dissent, joined by Judge Reavley. Judge Reavley had authored the earlier Positive Software opinion.
25 *En Banc Opinion* at *9 (Reavley dissenting).
26 *Id.* at *11.
27 *Id.* at *14 (Wiener concurring in Reavley dissent).
28 *Id.* at *15.
29 *Id.* at *16.

REFLECTIONS FROM THE EDGE SETTLEMENT ADVOCACY

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Negotiators tend to be more risk-averse to a perceived loss than to a possible gain, even though a rational person would simply weigh the probabilities and the expected outcome of each transaction and make decisions based on statistics.[14]

Since the negotiator is not a computer, many factors impact decision making: reactive devaluation, anchoring, risk preference, and attitude toward the other party are a few of these factors. Skilled advocates craft options in language that minimizes the irrational, distorted reception they may receive at the bargaining table. Settlement advocates prepare for the psychological aspects of bargaining just as assiduously as they prepare their presentation concerning the facts and the law, and they coach their clients to assist actively in the creation of mutual gain from which optimal outcomes arise. In choreographing the mediation or negotiation process, settlement advocates should devise a representation plan that reflects the functions of the forum for the client. Implementing this plan will shape the process itself along lines that best serve each client's needs in the particular fact pattern at issue: the form of the process follows its function.

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ENDNOTES

1. This article is adapted from a chapter in SIMPLE DISPUTE RESOLUTION: A HANDBOOK OF SETTLEMENT SCIENCE SOLUTIONS, written by Kay and Frank Elliott, to be published by Knowles Publishing Co. in 2007.

2. Kay Elkins-Elliott, J.D., LL.M., M.A., has arbitrated and mediated over 1700 cases since 1982, specializing in employment, family, and business matters. She served for three years as an Administrative Law Hearing Officer for the EEOC. She has taught ADR, Mediation, Family Mediation, Settlement Advocacy, and Negotiation at Texas Wesleyan University School of Law for 13 years, and during that time has coached national championship teams in Negotiation and in International On-Line Negotiation, and regional championship teams in Client Counseling and Representation in Mediation. She has coordinated the Certificate in Conflict Resolution program for Texas Woman's University for 9 years, teaching courses on Arbitration, Conflict Resolution, Mediation, Family Mediation, and Negotiation. She is a Life Fellow of the Texas Bar Foundation, president of ACR, Dallas , Council Member of the Texas Mediation Trainers Round Table, a former Council Member of the ADR Section of the State Bar of Texas, a Credentialed Distinguished Mediator, and serves on the Board of the Texas Mediator Credentialing Association. She was co-editor of the State Bar of Texas ADR Handbook (3d ed. 2003).

3. Therapeutic Justice is a concept that is finding particular favor with family judges. It is characterized by a concern for the welfare of society at large, and third parties to the law suit (such as the children in a custody hearing) rather than a narrow focus on which of the litigants should prevail based on legal or factual arguments and proof. Hon. John Coselli, April 30, 2004, Luncheon address, Peacemakers and the Law Symposium.

4. CHARLES L. WIGGINS & L. RANDOLPH LOWRY, NEGOTIATIONS AND SETTLEMENT ADVOCACY, Foreword (1997).

5. Over the same time period, civil litigators complained of the increasingly uncivil behavior of other civil litigators. *Id.* at 40.

6. Speech by Hon Ed Kinkeade, April 30, 2004 Peacemakers and the Law Symposium.

7. Kay Elliott & Frank Elliott, *Introduction, in* ALTERNATIVE DISPUTE RESOLUTION SECTION, STATE BAR OF TEXAS, ADR HANDBOOK 10 (2003) (noting research and writing in the ADR field since the Pound Conference, including 3,988 books on Mediation, 2,910 books on Negotiation and 2,376 books on Conflict Resolution).

8. WIGGINS & LOWRY, *supra* note 4.

9. ROGER FISHER & WILLIAM URY, GETTING TO YES (2d ed. 1991).

10. Robert Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 246-47 (1993).

11. HAROLD I. ABRAMSON, MEDIATION REPRESENTATION 191,192 (2004).

12. Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107,138-42 (1994).

13. *Id.*

14. RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY 45 (2002).

CLAUSE REQUIRING OUT-OF-STATE MEDIATION OR ARBITRATION PRIOR TO LITIGATION NOT ENFORCEABLE IN CALIFORNIA, PER DECISION IN *TEMPLETON DEVELOPMENT CORP. V. DICK EMARD ELECTRIC, INC.*

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ENDNOTES

[1] Templeton Dev. Corp. v. Dick Emard Electric, Inc., 51 Cal.Rptr.3d 19 (Ct. App.-3rd 2006).
[2] *Id.* at 21.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.* at 22.
[7] *Id.*.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 24 (emphasis added).
[11] *Id.* at 25.
[12] Id. at 27.
[13] *Id.*
[14] *Id.*

WORKING THROUGH ENVIRONMENTAL CONFLICT: THE COLLABORATIVE LEARNING APPROACH

Steven E. Daniels
and Gregg B. Walker

Reviewed by Lisa Weatherford*

Second perhaps only to love in its power to evoke emotional response, nature has inspired centuries of poets, artists, composers, and philosophers. Worshipped and reviled, protected and exploited, it is both master and mastered. The relationship between the environment and humanity is complex, intimate, and volatile because we cannot figure out whether we are part of nature, or its rival. That struggle is manifest in environmental policy debates, as groups and individuals vigorously promote their own personal relationships with the natural world.

Typically, the objective of traditional collaborative public policy-making processes is classic consensus; however, conflicting worldviews about the environment frustrate attempts to reach that elusive goal. The authors of *Working Through Environmental Conflict: The Collaborative Learning Approach*[1] suggest that given the "rancorous nature"[2] of public policy debates, a more realistic objective would be to strive for a plan that makes the situation better than it was before, rather than one that is, in effect, a compromise of competing positions. They want to provide disputants with a "more attainable goal—meaningful progress . . ."[3]—and disagree with the notion that environmental conflicts can be resolved permanently. "*Success* as the measure of effectiveness assumes that consensus can be reached among the numerous parties on what constitutes success. *Progress*, on the other hand, implies that conflicts and their management are ongoing."[4] In other words, situation improvement is attainable; conclusive resolution is not.

Perhaps it does make more sense to talk about *managing* environmental and other public policy conflicts, not resolving them. Managing the conflict requires "the generation and implementation of tangible improvements in a conflict situation,"[5] not necessarily a resolution which with every stakeholder can live. The idea that a facilitator should arrive at a negotiation with an expectation that the dispute cannot be resolved flouts the optimism that permeates discourse about mediation, but that is precisely what the authors of *Working Through Environmental Conflict* have in mind. It is a framework designed to make progress, and not necessarily to "balance competing interests."[6] For most facilitators and stakeholders, learning to accept this nontraditional way to think about conflict situations will require "cognitive reframing,"[7] a significant adjustment in perspective. One way to look at environmental conflict management is to realize that "enduring conflicts," such as "conflicting views and philosophies over the importance of preserving old growth forests," will continue long after the decision has been made.[8] Disputes about specific timber harvest, stream buffer, and salvage, on the other hand, are "identifiable, issue-specific interactions that arise at particular points in time, often as episodes within longer-running conflicts . . ."[9] Consequently, "enduring conflicts need to be managed, while the disputes that arise within them offer opportunities for settlement."[10]

An obstacle to any sort of agreement in environmental situations is the "juxtaposition between technical competence and open process."[11] This relationship is a "defining characteristic of American policy formation"; however, it is also a "fundamental paradox" because "achieving one value may compromise our ability to achieve the other."[12] Even though citizens "demand technically sound decisions," they seldom possess the technical background needed to "meaningfully contribute to, or even critique, the decisions."[13] Environmental problems are notoriously complex, typically grounded in multiple disciplines, and the decision-making creates situations in which the fundamental paradox frustrates attempts to include the public, and simultaneously preserve the scientific integrity of the decision. It is nearly impossible for average citizens to comprehend the depth and scope of an environmental issue, which is a clear disadvantage. Collaborative Learning—which the authors claim is not so much a method, technique, or even a framework, as it is an orientation or style—aims to mitigate the effect of the fundamental paradox on complicated public policy decision-making.

Collaborative Learning has little in common with the traditional "inform, invite, and ignore" public "participation" policy decision-making process that is generally touted, yet broadly maligned. The so-called "'Three-I' Model" is based on a scenario in which an agency *informs* the public of a proposed policy change, *invites* the public to a meeting to comment on that change, and then *ignores* the comments.[14] Even when the process includes some kind of collaborative effort, the authors stress that mandated consensus does not work, especially when two-party mediation models are applied to multi-party environmental situations. Environmental mediation is generally inadequate to deal with the "multi-faceted complexity of natural resource controversies."[15]

The approach is grounded in three distinct fields of knowledge that the authors claim have never been integrated before: conflict management, learning theory, and systems thinking. These three "conceptual foundations" are equally important,[16] and the value of Collaborative Learning comes from its "strong foundation in the best contemporary thinking about how people process information, how they deal with different viewpoints and goals, and how to best organize their thinking about complex situations."[17]

After two chapters that introduce the nature of public policy dispute, and explain the essence of Collaborative Learning, the

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next four chapters present the theoretical basis for Collaborative Learning. The first part of Chapter Three is an excellent review of conflict resolution theory in which the authors synthesize the works of several dispute resolution theorists. The second part of the chapter is an application of these theories to environmental issues.

Chapter Four defines collaboration as "a process in which interdependent parties work together to affect the future of an issue of shared interests,"[18] and presents Collaborative Learning as a deliberative process that allows for "emergent consensus" rather than mandated consensus.[19] Collaborative interaction begets emergent consensus as it "arranges the relationships between the stakeholders in a manner that more closely matches the resources and responsibilities that each brings to the process."[20] This process promotes and enhances learning, the next component of Collaborative Learning.

Chapter Five outlines the learning theories, particularly adult learning theories, and like the conflict management chapter, draws on the work of learning theorists. Most environmental situations are currently filtered through analysis, which may not be the best approach. Since "[l]earning begins with the admission that you don't know everything," it may be preferable in a complex environmental context. As the stakeholders learn about the different perspectives, they abandon the defense of positions, and begin to collaborate rather than compete. "[T]he kinds of learning that occur in collaborations follow a fairly predictable pattern, from concrete experiences through reflective observation, abstract conceptualization, and active experimentation."[21] It is this pattern that becomes a "rough template" upon which Collaborative Learning processes are based.[22]

Chapter Six "describes the way that Collaborative Learning uses systems thinking."[23] The three broad applications of systems thinking—organization learning, community-based planning, and natural resource management—are directly related to Collaborative Learning.[24] In this chapter, as they did in the conflict management and learning theory chapters, the authors synthesize the work of several prominent theorists. A comparison of linear thinking, nonlinear thinking, and systems thinking illustrates the need for all three thinking styles, that "[a]ny [one] way of seeing is also a way of not seeing."[25] Since most complex problems require all three styles, "the most versatile thinkers will use them all."[26] There are three systems features:

- transformation (a system transforms other things, and the system itself can be transformed);
- feedback loops (a system or part of it repeats a pattern of activity); and
- emergent properties (a system's emergent properties do not derive from some part of the system—rather, they emerge from the system as a whole . . .yet the meaning of the whole is not the sum of its parts, and the whole cannot be reduced to its parts and compartmentalized into independently resolvable packets).[27]

The second part of the chapter distinguishes hard and soft systems methodology, and explains why Collaborative Learning is grounded in soft systems. A general definition of hard systems are those with a "clearly defined objective function."[28] Soft systems are those with functions that cannot be clearly defined, and Collaborative Learning "incorporates soft systems methods because [there is] a need to meaningfully address the multiple worldviews that arise in most environmental and natural resource public policy decisions."[29]

No public policy decision-making methodology would work without effective communication, and Collaborative Learning "integrates and applies systems, learning, and conflict management through meaningful communication."[30] Chapter Seven discusses the importance of communication competence and cultural communication differences in a Collaborative Learning context.

The first seven chapters lay the theoretical foundation of Collaborative Learning; Chapter Eight presents the practical application, the "how to" techniques and ideas that can help facilitators and stakeholders create a successful Collaborative Learning project. The authors stress there is no standard approach, no right or wrong way to conduct Collaborative Learning projects, that one of the attractive characteristics of the approach is its flexibility. It can be adapted to each situation and purpose, and "there may therefore be as many ideas in [the] applied chapter that . . . readers ignore as there are ideas that they adopt."[31] The chapter features exercises, worksheets, and training ideas, and includes a detailed section for facilitators.

Chapters Nine and Ten explore case studies in which the authors have applied Collaborative Learning. The studies demonstrate the versatility of the approach, and how it can be adapted to diverse situations. Chapter Eleven is a short summary of the book, and a brief reflection about how Collaborative Learning fits into existing collaboration-based processes, and how it could fit into a broader range of applications in the future.

The book is not an easy read because the dense and detailed theoretical material must be absorbed in overlapping layers, in a sort of sequential integration rather than taken neatly in isolated, self-contained droughts. However, once the theoretical base is laid, the practical application chapters clear up lingering ambiguity. Collaborative Learning is not a quick and easy miracle, but when used in the appropriate context, it can help people learn to work together to find the best decision for the situation.

**** Lisa Weatherford*** *holds M.A. degrees in English and Legal Studies. She has taught college-level composition, business writing, literature, and public speaking, and has worked in several fields, including retail, hospitality, petroleum, insurance, and archaeology. Lisa is a volunteer mediator and arbitrator, and is employed at the Texas Legislative Council—Legal Division.*

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ETHICAL PUZZLER

*by Suzanne Mann Duvall**

This column addresses hypothetical ethical problems that mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, 4080 Stanford Avenue, Dallas, Texas 75225, and Office #214-361-0802 and Fax #214-368-7258.

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ETHICAL PUZZLER

By Suzanne M. Duvall*

This column addresses hypothetical ethical problems that mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, 4080 Stanford Avenue, Dallas, Texas 75225, or fax it to her at 214-368-7258.

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It is past midnight. Because one party (the wife in a divorce mediation) has flown in from the East Coast and because trial is set within the next week if the case does not settle, both counsel and the parties in this nasty divorce case have requested that the mediation continue "as long as it takes" to reach a settlement.

The parties have, in fact, reached an agreement, and the attorneys are in the process of drafting the Mediated Settlement Agreement, when the wife (whom everyone agrees has "issues" and a mercurial temperament) returns from the restroom. She announces that she has swallowed the contents of two bottles of a prescription sleeping medication and has written letters to both her husband and their college-aged children telling them they are responsible for her (potential) suicide. She then runs out of the office and onto the elevator. Although her lawyer immediately pursues her, she gets away and is nowhere to be found. Attempts to contact her by cell phone are unsuccessful.

As a mediator, are there ethical issues created by this set of circumstances? If so, what are they? What actions, if any, should you take? Would your responsibilities be different if you were an attorney-mediator? What about your responsibilities if you were not an attorney-mediator? Please explain.

Maynard Green (Waco): Over the years, I have conducted many mediations in which I thought one or more of the parties had "issues" and "mercurial" temperaments; however, I have never had one that rose to this level.

My obligation in conducting a mediation is to do so in such a way so as to insure that it remains the parties' process. In this case, at this late hour, clearly, there was not party competence on the wife's side. That revelation throws a question over the entire proceeding, including any agreement that the parties may have reached. To meet my obligation to insure the quality of the process, I would have no choice but to terminate the mediation.

The ABA/AAA Model Standards of Conduct for Mediators, AA-M's Ethical Guidelines for Mediators, and TAM's Code of Ethics are all intended to insure the participants' ability to understand and participate meaningfully in the mediation process. In this case, that has not, and cannot, occur at this time.

As a mediator, I am also required to maintain the confidentiality of what has occurred at the mediation. I assume that, in this case, the husband and his attorney do not know what has happened in the other conference room. In terminating the mediation, I would simply state that I am terminating the mediation without going into the reason for doing so.

Because mediation is not the practice of law, I do not see that my responsibilities are different because I am an attorney-mediator. Neither of the parties is my client, and both are represented by counsel.

While there is nothing in the facts on which to base such a concern, I would also question whether anything had occurred earlier in the mediation that should have made me realize one of the parties was not emotionally able to participate meaningfully in the process.

Michael Anderson (Harlingen): Be forewarned: my background is in the social and behavioral sciences, as well as in a Roman law or canon law system. Having counseled and mediated numerous divorce and child custody issues, I do know what you mean when you refer to a "nasty divorce case." Many times there are no "winners" just "survivors." With the above in mind, I would like to address several issues:

1. The parties, including the attorneys and mediator, seem to be exhausted emotionally….past midnight… flown in from the East coast…trial set next week….requested the mediation to continue "as long as it takes." I think a trial or rough draft of a settlement agreement could have been proposed and then "slept on" until the next day when all the parties would be more rested and rational. Haste makes waste! While not an ethical issue, this is more of a process issue.

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ETHICAL PUZZLER
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2. The wife has "issues" and a mercurial temperament – this makes me wonder if she was a good candidate for participating in the mediation process. Her "emotional blackmail" must have scared everyone… funny how she "got away!" Ethically I would call for the police and engage them in helping to find a supposedly suicidal woman. Her life first, then the divorce/mediation process. When she allows herself to be found, her attorney and the mediator should do a rigorous assessment of her capabilities and intention to work with the mediation process. If she is not capable, or does not intend to cooperate, then a court trial with a judge seems inevitable. If necessary, she should be referred for therapeutic help in dealing with a very emotional and painful experience.
3. I am not sure what the implications are in asking if the responsibilities would be different if I were an attorney or not…I presume we are all held to the highest standards of conduct and want to do the best possible for our clients as well as other parties involved.

Will Pryor (Dallas): What a wonderful hypothetical, because it highlights a serious and commonly overlooked aspect of the practice of mediation. Most of us do not have training as a mental health therapists, and yet we are routinely engaged in working through highly stressful disputes, sometimes under highly stressful circumstances, with those who are highly emotionally vulnerable. In some cases, mental illness is present. But in many others, the vulnerability is appropriate: the husband who has lost a wife, the parent who has lost a child, a businessman who has lost a career, an investor who has lost a fortune. The grief is often too real, and trauma and pain too recent, to expect a participant to act "normally." Mediators must be ever watchful, and ever sensitive, that the process facilitated is not too hard, and that the encouragement to resolve the issues does not go too far.

The hypothetical: I will presume the wife flew in (the night before), got a little or perhaps no sleep to prepare her for the grueling day, and the mediation convened in the morning and lasted past midnight. Exhausted, physically, mentally, and emotionally, she attempts (or so she says) to take her life by overdosing.

From the fact statement, we don't know whether the mediator "crossed the line" – by pushing too hard and manipulating the decision-making process of the vulnerable wife. There is no reason to assume the mediator is at fault.

Mediators have an obligation to all parties to facilitate a process that is as fair to all parties as possible. If one or more of the participants is visibly suffering from exhaustion, depression, or any other debilitating condition, I believe the mediator should suggest, and eventually recommend, that a recess be declared. But ultimately, the decision belongs to counsel and client.

If, for any reasons that may or may not be known to the mediator, the parties express a desire to "stay the course" and "git 'er done," it is not the mediator's role to declare a recess.

With regard to the enforceability of the Mediated Settlement Agreement, it would be my view there is not one. Whether or not the wife was mentally competent to enter into an agreement, until a Mediated Settlement Agreement is signed, it's not an agreement.

A non-attorney-mediator's role here would differ, in my opinion, if the mediator was, in fact, someone with training and a license as a psychologist, psychiatrist, or mental health therapist.

Alvin Zimmerman (Houston): First, as mediators, we must be vigilant and sensitive to a party's ability to continue with a mediation beyond a reasonable hour. If a party is fully engaged in the process and the mediation continues after hours with the full and meaningful agreement of the attorneys and parties, then the mediator should not be criticized for conducting the mediation late into the evening. If, on the other hand, the mediator senses weariness or that something is amiss, the mediator should adjourn and set a reconvening date.

From the Association of Attorney-Mediators Ethical Guidelines for Mediators, Guideline 13 states:

13. **Termination of Mediation Session.** A mediator should postpone, recess, or terminate the mediation process if it is apparent to the mediator that the case is inappropriate for mediation or one or more of the parties is unwilling or unable to participate meaningfully in the mediation process.

The lateness of the hour and the sensitivity of the subject matter could have provided signals by which the mediator should have recessed the mediation in light of Guideline 13.

Yes, the case must not settle as a result of the delay, but that outcome is better than an unconscionable mediation.

Next, the example states an agreement has been reached. If it is in the form of a written mediated settlement, but the attorneys are merely remaining to draft closing documents, then the mediator's role is complete. As a citizen of the community, and not as a mediator, the mediator certainly should consider calling 911 if the attorney, after the mediator's request, refuses to do so. Although the MSA may not be enforceable as a result of duress or other contractual defense, that is no moment to the mediator and is of interest to the parties and their attorneys. If the MSA has not been signed because all were awaiting their final document to approve, the mediator, whether an attorney or not, should decline to participate further until the mediator is satisfied the fleeing party has given renewed assurance that she is competent to sign the MSA and there has not been duress.

The mediator, although tempted to do otherwise, must remember that the ADR statute provides a mandate not to reveal the confidences of the mediation:

> [A] communication relating to the subject matter of any dispute…made by a participant

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ETHICAL PUZZLER
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> [A] in an alternative dispute resolution procedure…is confidential, is not subject to disclosure, and may not be used in evidence against the participant in any judicial or administrative hearing.
>
> [T] he participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring full disclosure of confidential information or data relating to or arising out of the matter in dispute.

Tex. Civ. Prac. & Rem. Code §154.073(b)

I do not believe this provision is violated if the mediator calls 911 if the party's attorney refuses to do so.

****

Comment: In this mediation, as in all others, the mediator should "know when to hold 'em and know when to fold' em" – that is, when to recess or when to call an impasse if (after conferring with the party(ies) and counsel), in the judgment of the mediator, it would be improper to continue.

However, not every case that involves late hours, "issues" and/or personality flaws is automatically disqualified as a viable case for mediation resulting in an improper agreement. Indeed (as pointed out by Will Pryor), if that were so, only a few truly difficult cases could ever be suitable for mediation. Instead, it is a judgment call based on cumulative knowledge built up over the course of the mediation. Attempts to manipulate the process and/or outcome can arise in an infinite variety of ways – including the invocation of pseudo or exaggerated "issues," temper flare-ups and suicidal hyperbole.

One issue not directly addressed by any of our participants was that of the alleged attempted suicide. Is attempted suicide a crime? If so, would attorney-mediators, as officers of the court, be required to report such a crime, thereby calling upon a potential exception to confidentiality? Would the answer be different if the mediator were not an officer of the court? What do you think?

* ***Suzanne Mann Duvall*** *is an attorney-mediator in Dallas. With over 800 hours of basic and advanced training in mediation, arbitration, and negotiation, she has mediated over 1,500 cases to resolution. She is a faculty member, lecturer, and trainer for numerous dispute resolution and educational organizations. She has received an Association of Attorney-Mediators Pro Bono Service Award, Louis Weber Outstanding Mediator of the Year Award, and the Susanne C. Adams and Frank G. Evans Awards for outstanding leadership in the field of ADR. Currently, she is President and a Credentialed Distinguished Mediator of the Texas Mediator Credentialing Association. She is a former Chair of the ADR Section of the State Bar of Texas.*

Book Review
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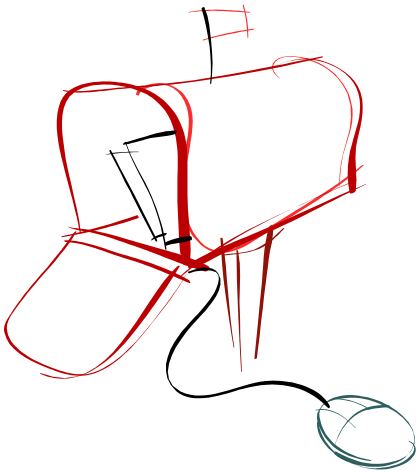
ENDNOTES

[1] Steven E. Daniels & Gregg B. Walker, WORKING THROUGH ENVIRONMENTAL CONFLICT: THE COLLABORATIVE LEARNING APPROACH (2001).
[2] *Id.* at xix.
[3] *Id.* at 37.
[4] *Id.* at 36 (emphasis in original).
[5] *Id.* at 35.
[6] *Id.* at xiii.
[7] *Id.* at 36.
[8] *Id.* at 41.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 4.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 9.
[15] *Id.* at 51.
[16] *Id.* at 18.
[17] *Id.* at 20.
[18] *Id.* at 57.
[19] *Id.* at 75.
[20] *Id.* at 64.
[21] *Id.* at 95.
[22] *Id.*
[23] *Id.* at 97.
[24] *Id.*
[25] *Id.* at 101.
[26] *Id.*
[27] *Id.* at 108.
[28] *Id.* at 111.
[29] *Id.*
[30] *Id.* at 130.
[31] *Id.* at 153.

It isn't enough to talk about peace. One must believe in it. And it isn't enough to believe in it. One must work at it.

Eleanor Roosevelt



ADR on the Web

By Mary Thompson*

CIVILRIGHTSMEDIATION.ORG

http://www.civilrightsmediation.org/

This web site, developed by Heidi and Guy Burgess of the Conflict Research Consortium of the University of Colorado and Illinois mediator Richard Salem, offers an array of interesting and innovative resources on managing racial and civil rights conflicts. The topics include:

- An overview of civil rights mediation in the United States
- Extensive interviews with civil rights mediators from around the county (including Texan Nancy Farrell) about their approaches to a variety of interesting cases
- "Responding to Racial Conflicts", a practical checklist to guide practitioners through the analysis, design and intervention stages of managing a racial dispute
- A Racial Conflict Simulation that can be used as a teaching tool for conflict resolution educators or as a learning tool for neutrals

The most intriguing sections are the sections on "Responding to Racial Conflicts" and the simulation.

"Responding to Racial Conflict" leads the reader through a series of topics, each of which links to 1) a detailed essay on the specific topic and 2) relevant commentary from the interviews with civil rights mediators. This in-depth information covers such areas as:

- Conflict assessment
- Intervention options
- Fact-finding
- Culture and conflict
- Reframing
- Emotional and Psychological Dimensions
- Unrightable wrongs

The Racial Conflict Simulation describes a conflict in a school community and outlines the roles of four participants: the school principal, the black activist student, the white student body president, and the mediator. Each character is instructed to fill out a form about the various aspects of the conflict. As with the previously-described section, each form contains links to in-depth information on conflict management. For example, the section that asks the character to list the interests of the parties, contains a link to a description of interests in dispute resolution processes. The simulation can be used either as a teaching tool or as a guide to thinking through the process of addressing racial conflicts

Although most mediators are not experts in civil rights mediation, issues of race and differences permeate so many of the disputes we see. This site is a valuable resource for neutrals who want to sharpen their knowledge and awareness of issues in the civil rights mediation field.

* ***Mary Thompson***, *Corder/Thompson & Associates, is a mediator, facilitator and trainer in Austin.*

If you are interested in writing a review of an ADR-related web site for Alternative Resolutions, contact Mary at emmond@aol.com

There is more treasure in books than in all the pirates' loot on Treasure Island and at the bottom of the Spanish Main... and best of all, you can enjoy these riches every day of your life.

Walt Disney

ENCOURAGE COLLEAGUES TO JOIN ADR SECTION

This is a personal challenge to all members of the ADR Section. Think of a colleague or associate who has shown interest in mediation or ADR and invite him or her to join the ADR Section of the State Bar of Texas. Photocopy the membership application below and mail or fax it to someone you believe will benefit from involvement in the ADR Section. He or she will appreciate your personal note and thoughtfulness.

BENEFITS OF MEMBERSHIP

✓ Section Newsletter, *Alternative Resolutions* is published several times each year. Regular features include discussions of ethical dilemmas in ADR, mediation and arbitration law updates, ADR book reviews, and a calendar of upcoming ADR events and trainings around the State.

✓ Valuable information on the latest developments in ADR is provided to both ADR practitioners and those who represent clients in mediation and arbitration processes.

✓ Continuing Legal Education is provided at affordable basic, intermediate, and advanced levels through announced conferences, interactive seminars.

✓ Truly interdisciplinary in nature, the ADR Section is the only Section of the State Bar of Texas with non-attorney members.

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San Antonio, Texas 78212-3166

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I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2006 to June 2007. The membership includes subscription to *Alternative Resolutions*, the Section's Newsletter. (If you are paying your section dues at the same time you pay your other fees as a member of the State Bar of Texas, you need **not** return this form.) Please make check payable to: ADR Section, State Bar of Texas.

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1. An author who wishes an article to appear in a specific issue of the newsletter should submit the article by the deadline set in the preceding issue of the newsletter.
2. The article should address some aspect of negotiation, mediation, arbitration, another alternative dispute resolution procedure, conflict transformation, or conflict management. Promotional pieces are not appropriate for the newsletter.
3. The length of the article is flexible. Articles of 1,500-3,500 words are recommended, but shorter and longer articles are acceptable. Lengthy articles may be serialized upon an author's approval.
4. All quotations, titles, names, and dates should be double-checked for accuracy.
5. All citations should be prepared in accordance with the 18th Edition of *The Bluebook: A Uniform System of Citation*. Citations should appear in endnotes, not in the body of the article or footnotes.
6. The preferred software format for articles is Microsoft Word, but WordPerfect is also acceptable.
7. If possible, the writer should submit an article via e-mail attachment addressed to Walter Wright at ww05@txstate.edu or Robyn Pietsch at rpietsch@central.uh.edu. If the author does not have access to e-mail, the author may send a diskette containing the article to Walter Wright, c/o Department of Political Science, Texas State University, 601 University Drive, San Marcos, Texas 78666.
8. Each author should send his or her photo (in jpeg format) with the article.
9. The article may have been published previously or submitted to other publications, provided the author has the right to submit the article to *Alternative Resolutions* for publication.

Selection of Article

1. The newsletter editor reserves the right to accept or reject articles for publication.
2. If the editor decides not to publish an article, materials received will not be returned.

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1. The editor reserves the right, without consulting the author, to edit articles for spelling, grammar, punctuation, proper citation, and format.
2. Any changes that affect the content, intent, or point of view of an article will be made only with the author's approval.

Future Publishing Right

Authors reserve all their rights with respect to their articles in the newsletter, except that the Alternative Dispute Resolution Section ("ADR Section") of the State Bar of Texas ("SBOT") reserves the right to publish the articles in the newsletter, on the ADR Section's website, and in any SBOT publication.

ALTERNATIVE RESOLUTIONS

Policy for Listing of Training Programs

It is the policy of the ADR Section to post on its website and in its Alternative Resolution Newsletter, website, e-mail or other addresses or links to any ADR training that meets the following criteria:

1. That any training provider for which a website address or link is provided, display a statement on its website in the place where the training is described, and which the training provider must keep updated and current, that includes the following:

a. That the provider of the training has or has not applied to the State Bar of Texas for MCLE credit approval for ____hours of training, and that the application, if made, has been granted for ____hours or denied by the State Bar, or is pending approval by the State Bar. The State Bar of Texas website address is www.texasbar.com, and the Texas Bar may be contacted at (800)204-2222.

b. That the training does or does not meet The Texas Mediation Trainers Roundtable training standards that are applicable to the training. The Texas Mediation Trainers Roundtable website is www.TMTR.ORG. The Roundtable may be contacted by contacting Cindy Bloodsworth at cebworth@co.jefferson.tx.us and Laura Otey at lotey@austin.rr.com.

c. That the training does or does not meet the Texas Mediator Credentialing Association training requirements that are applicable to the training. The Texas Mediator Credentialing Association website is www.TXMCA.org. The Association may be contacted by contacting any one of the TXMCA Roster of Representatives listed under the "Contact Us" link on the TXMCA website.

2. That any training provider for which an e-mail or other link or address is provided at the ADR Section website, include in any response by the training provider to any inquiry to the provider's link or address concerning its ADR training a statement containing the information provided in paragraphs 1a, 1b, and 1c above.

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SAMPLE TRAINING LISTING:

40-Hour Mediation Training, Austin, Texas, July 17-21, 2006, Mediate With Us, Inc., SBOT MCLE Approved—40 Hours, 4 Ethics. Meets the Texas Mediation Trainers Roundtable and Texas Mediator Credentialing Association training requirements. Contact Information: 555-555-5555, bigtxmediator@mediation.com, www.mediationintx.com

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