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PERSPECTIVES ON CONSENT IN MEDIATION



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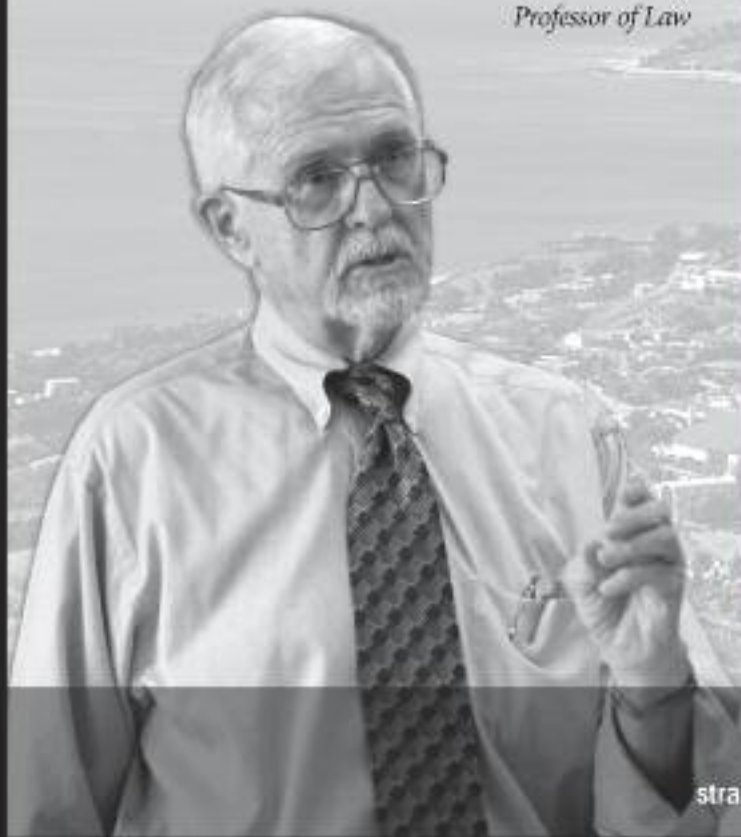
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You Can Get What You Need

*You can't always get what you want,
but if you try sometimes you just might find,
you get what you need.*

—The Rolling Stones

There is wisdom in the words of Mick Jagger. From the point of view of a litigator, cases are won and lost to varying degrees. In a contested case, it is rare that a client wins everything the client wants. Moreover, there seems to be a growing concern among lawyers that the court system does not deliver the “just, speedy, and inexpensive determination” of disputes envisioned by the drafters of the civil rules.

Although a lawyer can never guarantee a favorable result for his or her client, the lawyer can design or influence the dispute resolution process to ensure the client's claims are decided in a fair and cost-effective manner. In this respect, you can't always get the result you want, but you should be able to get a process that meets your needs.

Perhaps the most flexible dispute resolution process for determination of contested civil cases is arbitration. In arbitration, you can choose the decision maker; you can agree on prehearing procedures; the case can be resolved faster; and the proceedings are confidential.

All too frequently, litigators limit their arbitration cases to “demand cases,” that is, cases where a pre-existing contract contains an arbitration clause requiring a dispute to be arbitrated. But virtually any case can be taken to arbitration, whether or not a pre-existing contract provision exists, if the parties agree to make it a “submission case” by stipulating, after the dispute has arisen, to arbitration. Arbitration, whether a demand case or a submission case, can take any form acceptable to the parties.

In 2003, the ABA Section of Litigation Task Force on ADR Effectiveness conducted a survey of Litigation Section members regarding their attitudes toward arbitration. Seventy-eight percent of the respondent litigators said they believe arbitration is more efficient than court proceedings in resolving disputes, and 56 percent of respondents said they believe arbitration is more cost-effective than litigation.

Nonetheless, in the same survey, more than 60 percent of litigators responding said they suggest arbitration to clients less than four times out of ten or, stated another

way, about 34 percent of the litigators surveyed said they actively counsel clients against arbitration six times out of ten. Of the litigators responding to the survey who recommend *against* arbitration, the four most often cited reasons are (1) lack of appellate options (38 percent); (2) lack of discovery (24.4 percent); (3) excessive costs involved (22.2 percent); and (4) bias of the panel—lack of neutrality or occupational prejudices (15 percent).

Without minimizing the litigators' perceived disadvantages of arbitration, creative lawyering can eliminate or ameliorate the litigators' common objections to arbitration.

If it is deemed desirable to give up the considerable advantage of having the arbitration award be final and binding (except for the limited grounds for vacatur as provided by the applicable law), it is possible to provide for a second-stage, merits-based arbitral review by another arbitrator or arbitration panel. In such event, the arbitration agreement could specify that the arbitrator must apply the applicable law; that the award include findings of fact and conclusions of law; and that the standard of arbitral review be that the findings are supported by evidence and the legal conclusions are not clearly erroneous. In order to have meaningful arbitral review, it would also be advisable to arrange for a transcript of the arbitration hearing. Once the appellate arbitral panel has decided the appeal, the award, as modified or corrected on appeal, should be treated as final and binding to the same extent as an award not subject to arbitral review.

If it is deemed desirable to avoid the streamlined, proportional discovery of a typical arbitration and instead to engage in full-blown discovery as permitted by the Federal Rules of Civil Procedure, the arbitration agreement can so provide and the arbitration panel will, in most cases, comply with the level of discovery desired by the lawyers. If the arbitrators believe the discovery agreed upon by the lawyers is excessive or too expensive for the amount in controversy, the arbitrators may schedule a conference call with the lawyers and representatives of the parties to ensure the parties are aware of the arbitrators' concerns regarding costly and time-consuming discovery.

If there is concern that the costs of arbitration are too high, lawyers can take steps to reduce the costs by electing a nonadministered arbitration to avoid provider filing and administrative fees; engaging a single arbitrator, rather than a panel of three, and selecting an arbitrator with a reasonable hourly rate; voluntarily exchanging relevant documents and information to eliminate expensive

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CONSENT IN MEDIATION



BY JACQUELINE NOLAN-HALEY

Most people probably agree that consent is an important requirement in dispute resolution procedures. Judges cannot coerce parties into settlement. Arbitrators cannot adjudicate without party consent. Mediators cannot decide the outcome of parties' disputes. But, compared to dispute resolution through judicial settlement conferences and arbitration, mediation is inherently attractive because it is a voluntary process. The centrality of consent is transparent in the rhetoric of mediation. We tell parties that the mediation process is about empowerment and self-determination. It allows *them* to decide how their dispute will be resolved—that they have nothing to lose if they fail to reach settlement because they can always go to trial.

But we take a lot for granted when it comes to consent in mediation. We assume that parties know what they are consenting to in a process, in a particular mediator style, and in the contents of the final agreement. We also generally assume that the principle of informed consent governs the lawyer/client relationship when lawyers represent clients in mediation. In reality, though, we know very little about how consent operates in mediation, what I will refer to as “mediation consent.”



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To what extent does consent matter in contemporary mediation practice? For what issues? The decision to mediate? The choice of a mediator style or approach? The decision to reach an agreement? The contents of the agreement? This essay attempts to peel away some layers of the assumptions surrounding mediation consent. I begin by discussing the theory of consent and its disconnect from mediation practice. I then suggest and sketch the structural dimensions of consent, and, finally, I share some comparative research on England's approach to consent.¹ The historical connections between English and American mediation practice provide some guidance in this inquiry. The foundations of American mediation practice borrow from the tradition of English equity jurisdiction, an alternative dispute resolution system that developed to soften the harshness of common law rules.² Likewise, mediation developed in the United States as an alternative to court adjudication based on the rule of law. Today, England's approach to mediation remains somewhat more faithful to the original understanding of mediation as a voluntary process.

Why Consent Matters

The legitimacy of mediation depends in large measure upon consensual decision making by disputing parties. Consent promotes fairness and enhances human dignity, and it is linked to durability and sustainability in negotiated agreements.³ Frequently, the fatal flaw in agreements that ultimately unravel is the absence of authentic consent.

Finally, an understanding of consent has implications for how we train mediators, how we train lawyers to represent clients in mediation, and how we educate consumers about what to expect in the mediation process.

Theory–Practice Divide

My interest in mediation consent practices derives from my experience for more than 20 years mediating in the small claims courts of New York City as part of a mediation clinic. Working frequently with pro se parties and in situations where only one party is represented by counsel, I have been struck by the disconnect between the way in which we train students to mediate and the advice we give them about self-determination, consent, voluntariness, and neutrality, and then what really happens in court. Litigants come to small claims court with the expectation of having a trial before a judge. Typically, they are asked to participate in mediation before the court will hear their case. If the parties decline the invitation to mediate and insist upon a trial, their cases are put back on the calendar, and they are required to return to court in several months for a trial. Few parties are eager to come back and, therefore, agree to mediate. What does this say about their “consent?”



Multiple variations of mandatory mediation exist in the United States, whether through court rule, judicial referral, or legislation; courts take mandatory mediation laws seriously. The case of the disputing pig farmers recently discussed in this journal shows that even parties who slip through the screen and go directly to trial ultimately will pay the price if mediation was a condition precedent to trial.⁴

How do we explain the disconnect between the theory and practice of mediation—between the popular understanding of mediation as a voluntary, consensual process and the reality of mediation, which often actually involves mandates to mediate camouflaged under the guise of strong judicial recommendations for mediation? The traditional response to this question in the United States has been that there is a distinction between requiring parties to enter into a mediation process and coercing them to reach an agreement. The former is permissible; the latter is forbidden. As I will discuss later in this article, England makes no such distinction.

Dimensions of Consent

Mediation consent as a stand-alone concept is amorphous. Consent to what? To whom? When? In an effort to give this concept some flesh and meaning, I conceptualize consent as having a two-part structure: front-end or

entry-level consent, which is required for participation in the mediation process, and back-end or outcome consent that supports an authentic agreement.

In the United States, we generally have no problem dispensing with front-end consent in mediation. Many statutes require “good faith” participation, mandatory mediation programs flourish, and judges impose sanctions when parties refuse to mediate when required to do so by court rule or statute. Some literature suggests that people who are required to participate in mediation report high levels of satisfaction with the process.⁵

The Model Standards of Conduct for Mediators define mediation as a process that emphasizes voluntary decision

Consent promotes fairness and enhances human dignity, and it is linked to durability and sustainability in negotiated agreements.

making and honors self-determination as its controlling principle.⁶ Thus, Americans are quite comfortable requiring back-end consent in mediation, insisting that parties voluntarily consent to the outcome and that no coercion take place during the mediation process.

What Is the Problem?

Mediation, once considered an alternative to the court adjudication of disputes, is now generating its own set of disputes as evidenced by the volume of litigation related to consent practices. A review of developing mediation case law shows that most cases relate to issues dealing with mandates to mediate, good faith requirements, and challenges to the enforceability of mediated agreements.⁷ These are all issues that relate to consent. And, for the most part, these consent cases are not brought by pro se litigants whom we might assume would be the most vulnerable parties in mediation. Rather, they are brought by parties who were represented by attorneys. Some of the cases involve claims against attorneys and mediators and not just opposing parties.

In addition to the fact that the volume of consent cases is growing, the outcome of these cases is problematic. The majority of parties who challenge the enforceability of mediated agreements are not successful.⁸ This is true

even for challenges based on defenses such as duress and coercion. Such results have led some scholars to suggest that, in the case of agreements made in mediation, there should be a cooling-off period before agreements become final so that parties have time to reflect.⁹

England's Experience with Mediation Consent

Beginning in the mid-1990s, England underwent a major overhaul of its litigation procedures under the leadership of Lord Woolf, one of its leading senior judges. Lord Woolf conducted an extensive study of the civil justice system and issued a report entitled "Access to Justice."¹⁰ As a result of the report, the longstanding Rules of the Supreme Court of England were replaced by a new set of Civil Procedure Rules (CPR) that required courts to encourage parties to use ADR processes where appropriate.¹¹ In a series of cases beginning with *Cowl v. Plymouth City Council*,¹² English courts strongly encouraged parties to use ADR—a term used almost interchangeably with "mediation."

While costs have been awarded in some cases for parties' refusals to mediate, this is by no means an inevitable result.

Despite its newfound appeal in the courts, ADR raised critical questions about consent. Could parties be required to participate in mediation? What consequences would occur if they refused? For several years, the courts grappled with these questions, going back and forth on the necessity of front-end consent.¹³ Finally, in *Halsey v. Milton Keynes General NHS Trust*,¹⁴ the Court of Appeal resolved the uncertainty in favor of requiring front-end consent. Parties could not be compelled to participate in mediation for two reasons. First, such compulsion would interfere with a litigant's right of access to the courts, which is guaranteed by Article 6 of the European Convention on Human Rights. The court believed that "to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court." The second reason for rejecting mandatory mediation was a practical one. Requiring unwilling parties to mediate would achieve nothing, but it could have negative effects, including adding to the costs to be borne by the parties, possibly postponing the time when the court deter-

mines the dispute, and possibly damaging the perceived effectiveness of the mediation.

But the *Halsey* court's requirement of front-end consent for mediation did not automatically let parties off the hook. The court held that there would be cost consequences for parties who *unreasonably* refused to consent to mediation. As a result, even successful parties would have to pay costs if they unreasonably refused to consent to mediation. This approach is at odds with the traditional English rule that the unsuccessful party pays costs. The court offered six nonexhaustive guidelines to determine the reasonableness of a refusal to mediate: (1) the nature of the dispute; (2) the merits of the case; (3) the extent to which other settlement methods have been attempted; (4) whether the costs of the ADR would be disproportionately high; (5) whether any delay in setting up and attending the ADR would have been prejudicial; and (6) whether the mediation had a reasonable prospect of success.

Most post-*Halsey* mediation consent cases deal with the reasonableness of refusals to mediate or negotiate.

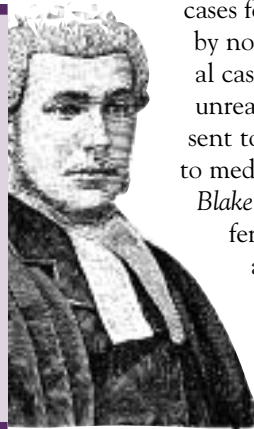
While costs have been awarded in some cases for parties' refusals to mediate, this is by no means an inevitable result. In several cases, courts have found that it was not unreasonable for parties to withhold consent to mediation or even to delay in going to mediation.¹⁵ For example, in *Hickman v.*

Blake Laphorn,¹⁶ a claimant who had suffered serious head injuries in a traffic accident brought an action against his solicitors and counsel for negligence in advising him to settle the accident claim for too low an amount. Judgment was rendered in favor of the claimant, and liability was apportioned as one-

third to the first defendant solicitors and two-thirds to the second defendant barrister. The first defendants argued that the second defendant should pay all costs after a specific date because of its unreasonable attitude in refusing to negotiate and mediate. Finding no unreasonableness on the part of the second defendant, the court noted that the second defendant's view of the case had been formed after a review of the case by experienced solicitors and counsel.

Was it unreasonable in the light of that estimation to refuse mediation and to refuse to see what could be achieved by negotiation? It is apparent that the second defendant's insurers were not prepared to take a "commercial" view like the first defendants: they were not prepared to pay more than they thought the claim was worth because, if costs were taken into account it would save them money. I consider this was a legitimate stance because, as I have stated, otherwise the threat of a costs consequence can be used to extract more than a claim in worth.

Likewise, in *Chaudry v. Yap*,¹⁷ an employment case involving unfair dismissal, the court found that the success-



ful petitioner should not be deprived of his costs for failing to mediate because the respondent had not demonstrated a genuine interest in mediation. Although the respondent made repeated suggestions that the parties mediate, it offered no specific proposals for mediators or provider organizations. The court found that this behavior was inconsistent and uncertain, not a “serious engagement in the process of mediation.”

Few post-*Halsey* cases have challenged the enforceability of mediated agreements.

Concluding Reflections

This brief comparative analysis of the United States and English approaches to mediation consent raises policy questions about the merits of mandatory mediation. Is England on a better course by requiring consent at the front end of mediation? Will mediation be stronger in the long run when it has a consensual foundation? Arguably, the use of cost sanctions in England’s mediation regime makes it close to a mandatory mediation system. For some litigants, participating in mediation will be potentially less costly than arguing that it was not unreasonable to refuse mediation. But despite the mandatory gloss, mediation is still a consensual process in England, both in terms of the front end and the back end. Leaving aside the differences in procedural systems, whether the English model would work in the United States depends in part on how comfortable we are with our system “as is,” as well as the long-term effects of U.S. consent litigation, and English reasonableness litigation, on the integrity of the mediation process. ♦

Endnotes

1. This analysis is part of a larger research project I am conducting on comparative mediation law and practice. I thank Lela Love for her comments on this article.
2. See generally Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329 (2005).

3. *Id.* at 792–93.
4. See *Klinge v. Bentien*, 725 N.W.2d 13 (Iowa 2006) (discussed in *DISP. RESOL. MAG.*, Summer 2007, at 37).
5. Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641 (2002) (study included mediations that were both mandatory and voluntary); Craig A. McEwen and Thomas W. Milburn, *Explaining a Paradox of Mediation*, 9 NEG. J. 23 (1993).
6. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005).
7. James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171 (2001); James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006) [hereinafter Coben & Thompson, *Disputing Irony*]; James R. Coben and Peter N. Thompson, *Mediation Litigation Trends: 1999–2007*, 1 WORLD ARBITRATION & MEDIATION REV. 395, 401 (2007) [hereinafter Coben & Thompson, *Mediation*].
8. Coben, *Mediation*, *supra* note 9, at 74; Alfini & McCabe, *supra* note 9, at 200–02; Coben & Thompson, *Mediation*, *supra* note 9 at 403.
9. Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2000); Steven Weller, *Court Enforcement of Mediated Agreements: Should Contract Law Be Applied?* JUDGES’ J., Winter 1992, at 13.
10. There are two reports. Access to Justice-Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (1995), available at www.led.gov.uk/civil/interim/contents.htm and Access to Justice-Final Report, July 1996 available at www.led.gov.uk/civil/finalfr.htm.
11. See Loukas A. Mistelis, *ADR in England and Wales*, 12 AM. REV. INT’L ARB. 167, 171–73 (2001).
12. [2001] EWCA Civ. 1935.
13. *E.g.*, compare *Dunnett v. Railtrack Plc*, [2002] EWCA Civ 303 (refusing to order an unsuccessful party to pay costs), with *Hurst v. Leeming*, [2002] EWHC 1051 (upholding a defendant’s refusal to mediate on the grounds that the mediation had no realistic prospect of success).
14. [2004] EWCA Civ. 576.
15. *The Wethered Estate Ltd. v. Davis, Davis and Foundations for Living*, [2005] EWHC 1903 (Ch.).
16. [2006] EWHC 12 (QB).
17. [2004] EWHC 3880 (Ch.).

From the Chair

(continued from page 2)

prehearing discovery; and stipulating to facts to reduce the hearing time. Yes, in arbitration the parties must pay an arbitrator rather than using a “free” judge provided by the court system, but in a litigated commercial arbitration hearing where the parties are represented by counsel, the arbitrator is generally the lowest-paid professional in the hearing room, and arbitrator fees should not present a cost impediment to choosing to arbitrate.

Finally, if there is concern about arbitrator bias, particularly because the grounds for vacatur of an arbitration award are quite limited, lawyers and parties should carefully select the agreed-upon arbitrator. Arbitrators must comply with the disclosure requirements of the applicable arbitration law, and arbitrators serving on panels of rep-

utable arbitration organizations must comply with the disclosure guidelines in the Code of Ethics for Arbitrators in Commercial Disputes. Nonetheless, it is incumbent upon the participants in an arbitration to investigate carefully the background, qualifications, and demonstrated fairness of candidates to serve as arbitrator before the arbitrator is appointed. If there is any question of actual or apparent bias, the factual basis for the question should be called to the attention of the arbitral organization or the arbitrator before or during the arbitration so that the arbitrator can recuse herself or be removed. Allegations of bias after an adverse award should be viewed with skepticism.

There are considerable benefits of choosing arbitration as an alternative to the courts for resolution of civil disputes. Parties electing arbitration can get the fair and cost-effective process they need, even if they can’t always get the outcome they want. ♦



***Achieving Meaningful
Threshold Consent
to Mediator Style(s)***

By Frank E.A. Sander

Professor Nolan-Haley has provided a helpful overview of the role of consent in mediation. This article will deal with one particular aspect of that broad topic: what a mediator should do and say at the outset of the mediation to achieve knowing consent to the style of mediation to be employed.

There is a surprising dearth of discussion of this basic topic in the literature, despite voluminous scholarly work on approaches to mediation. Ever since Professor Riskin's pathbreaking 1996 article¹ describing two basic mediator "orientations"—"facilitative" and "evaluative"—there has been endless discussion of the pros and cons of one or the other approach.² "Transformative" mediation is a third approach put forward in 1994 by Professors Baruch Bush and Joseph Folger.³ A fourth approach, "understanding-based" mediation, was recently suggested by Gary Friedman and Jack Himmelstein.⁴ Yet another, fifth, approach has recently been put forward by Kenneth Kressel, suggesting that mediators should focus more on the causes of conflict.⁵

This is not the place for a careful comparison of these techniques.⁶ The question, rather, is: Faced with these differing approaches, what is the responsibility of a mediator by way of obtaining meaningful buy-in by the disputants at the beginning of the mediation to the method(s) to be employed?

That question assumes increased importance in view of the 2005 revision of the Model Standards for Mediators:

A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

By way of contrast, compare the much vaguer language of Standard I of the original 1994 Standards:

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time.

Comments

The mediator may provide information about the process, raise issues, and help parties explore options

How can a mediator adequately perform this obligation? A reading of the article "Mid-stream Mediator Evaluations and Informed Consent" by Professors Cooley

and Love in this issue (see page 11) may be a useful beginning. But it should be noted that the midstream evaluation poses a much narrower problem—how to get meaningful consent to use a specific technique (evaluation) in a specific situation (typically where an impasse has been reached, and the mediator believes an evaluation might be a helpful impasse-breaker).

The most obvious point to make at the outset is that much depends on the particular circumstances:

- 1) Are the disputants unrepresented, or are there lawyers in the picture? If the latter, then the lawyers would have the responsibility for making an informed decision concerning process, but they in turn would have the obligation of discussing possible choices with their clients.
- 2) Are the disputants repeat players who have had prior experience with mediation, or is at least one of them new to the mediation process? Relatedly, have the disputants dealt previously with *this* mediator? If so, less would be needed by way of advance discussion.
- 3) Was the mediator voluntarily selected by the disputants, or was he or she assigned by a court official? If the former, what did the mediator tell the parties in premediation materials or discussions concerning his or her approach to the mediation process? If the latter, then the principle of self-determination would necessarily

be impaired to some extent (i.e., the disputants would not have full control over the process but should have final say over the acceptability of the outcome).⁷

- 4) What are the nature and circumstances of the case (e.g., simple collection case v. complex employment dispute)?

In dealing with these variables, it is helpful to keep in mind the underlying goal: to give the disputants an understanding of the various mediator approaches and how each relates to the particular case at hand so as to facilitate an informed choice among them. Thus, for example, if a mediator has made known before the mediation, either in writing or orally, that he or she utilizes solely the facilitative model, then that should be deemed informed consent to the use of that method. But, depending on the facts of the case, it would seem essential for achieving full consent that the mediator inform the disputants of some

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requires not only
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of the other techniques that could be used and how they might be utilized in the case at hand. Knowing consent requires not only buy-in to the method(s) used but also signoff concerning others that might be.

Or take the facts of the recent video “The ‘Purple’ House Conversations” put out by the Institute for the Study of Conflict Transformation. An African-American owner of a house situated in a development has painted her house purple. The Architectural Control Committee of the Development, represented by its Caucasian chair, has objected to the color of the house. In the course of a transformative mediation conducted by Baruch Bush focusing on mutual empowerment and recognition, the owner at one point asserts that the committee’s objection seems to be to *her* color, not that of the house. But when she asks, “Where do we go from here?” or asserts, “I want it solved,” the mediator responds that under the transformative approach it’s up to the parties to determine the process and the outcome. One is led to wonder whether at some prior point not shown in the video the parties were apprised of the transformative process and freely chose it, or, to put it differently, whether they were apprised, for example, of the evaluative approach, which has different costs and benefits (e.g., less focus on improving—or “transforming”—the relationship; more on looking at the legal rights of the parties).

Many mediators use not one method throughout but utilize different methods at different points in the media-

tion. Presumably, this flexible approach would be relatively easy to explain at the outset, and the parties may readily agree to such an approach, particularly if they have selected the mediator and hence have considerable trust in him or her. Still, where the mediator has mainly used one of several approaches and now seeks to shift gears, it may well be wise for the mediator (1) to remind the parties of their earlier assent to diverse approaches, and (2) to pinpoint the specific implications of the shift at this point for the case at hand.

Laying Out the Choices

Because of the variety of mediator approaches and techniques and the way in which they intersect with a range of factual situations, it is impossible to provide an all-purpose introductory paragraph that the mediator can mouth or read. Rather, the mediator must keep in mind the purpose of the consent requirement and be satisfied that he or she has clearly laid out the choices and obtained the parties’ consent to the method(s) to be employed.⁸

There may, of course, be cases in which the parties in effect defer to the judgment of the mediator as to which technique(s) would be most effective in a particular case. In such a case, the parties have essentially waived their right of process self-determination by delegating that right to the mediator.

Regardless of the style of mediation, consent is an essential issue on which parties and mediators need to focus. This topic probably deserves greater emphasis than has been the case in most training programs. ♦

Many mediators use not one method throughout but utilize different methods at different points in the mediation.



Endnotes

1. Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEG. L. REV. 7 (1996); Leonard L. Riskin, *Decision Making in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 2003.

2. See, e.g., Joseph Stulberg, *Facilitative versus Evaluative Mediation: Piercing the “Grid” Lock*, 24 FLA. ST. L. REV. 985 (1997).

3. Robert A. Baruch Bush and Joseph P. Folger, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

4. Gary Friedman and Jack Himmelstein, *Resolving Conflict Together: The Understanding-Based Model of Mediation*, 2006 J. DISP. RES. 523.

5. Kenneth Kressel, *The Strategic Style in Mediation*, 24 CONFLICT RES. Q. 251 (2007).

6. For a comparison of the three basic approaches (facilitative, evaluative, and transformative) and when they might best be employed, see Stephen B. Goldberg and Frank E.A. Sander, *Selecting a Mediator: An Alternative (Sometimes) to a Former Judge*, LITIGATION, Summer 2007, at 40.

7. The Standards, though asserted to be applicable to all mediation situations, do not make specific reference in Standard I on self-determination to the effect of court appointment of the mediator.

Midstream Mediator Evaluations and Informed Consent

By John W. Cooley and Lela P. Love

Angel and her brothers, Martin and Christophe, are engaged in the mediation of a will controversy, involving the estate of their father. They are the only beneficiaries under the will. Five years before the testator's death, he had provided his grandchild \$50,000 for the down payment on a house. At the time of the payment, he had told his grandchild and Angel, the child's mother, that the money was a gift; nonetheless, he required his grandchild to sign a promissory note for the full amount, saying the note was merely a formality to avoid gift taxes. Martin, the executor of the estate, found the promissory note among the testator's papers and has deducted the full amount due on the note, plus interest, from Angel's one-third share of the estate, giving her the note so that she can choose to collect it or not from her own daughter. Angel vehemently objected to her unequal share and to the characterization of the payment as a loan. After a heated discussion, the parties ask the mediator for his or her opinion on how the matter would be resolved in court. Both Angel and Martin feel sure they will be vindicated by the mediator; Christophe wants the mediator's opinion to guide his own conduct. What should a mediator do, assuming he or she is competent to give the sort of opinion that is being asked for?

Anyone who dares to explore the field of informed consent in alternative dispute resolution quickly comes to appreciate the quagmire of differing expert viewpoints; of conflicting or silent codes of conduct, statutes, and rules; of divergent definitions of processes; and of the complexity of the topic generally. This article explores only one facet of informed consent: what principles guide a mediator in responsibly performing the duty of ensuring that parties give their informed consent prior to a mediator providing an opinion on the merits of a question once a mediation is underway. If the mediator was chosen because he or she would provide an opinion (a former judge, for example) or the parties contracted for evaluative mediation, then the analysis here would not apply. This article focuses on a mediator giving an evaluation when that was not an agreed-upon service when the mediation began. A similar analysis should be applied to

any neutral performing a "new" service that is importantly different from what was expected: an arbitrator, for example, who takes on mediation services. There are dan-



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gers, in every case, in changing horses midstream. Both as a matter of responsible practice and to avoid liability, those dangers best be known and consciously accepted prior to undertaking the move.

In articulating principles and guidelines, we will have to answer: What are the dangers of providing an opinion or case evaluation while serving as a mediator? If there are dangers, what duties does a mediator have to warn parties? What should be said? What is informed consent in this context? Additionally, once consent is given, how careful must a mediator be in providing an opinion or professional advice?

Before proceeding, we should define what we mean by mediator evaluation that would merit warning and informed consent. We do not mean reality-testing questions (e.g., *Have you considered getting legal advice about deducting the value of the note from Angel's share of the estate? How do you think a judge might view a signed note compared to a recollection of a verbal statement?*). Nor do we include mediator role-reversal strategies to ensure that parties understand one another's perspectives and arguments (e.g., *Did you understand Angel's point about honoring the representations and intentions of your father? Do you appreciate that Martin is more persuaded by a signed note than by your report about a statement made many years ago?*) Despite an evaluative component in these questions, the questions call for party evaluation. If the mediator's tone is consistent with that call—as opposed to a tone that asserts a mediator's conclusion—such questions do not comprise mediator evaluation as the term is used here. A facilitative mediator regularly asks for party analysis about applicable law, leads a discussion about the strengths and weaknesses of their cases, and probes for alternatives and options. Examples of evaluative mediator behavior that would require informed consent include:

- Advising parties about their legal rights and responsibilities by applying legal rules and precedents to the specific facts of the dispute. (E.g., *Angel is not liable on her adult daughter's promissory note. The testator's granddaughter will probably be found liable on the written promissory note despite parole evidence to the contrary.*)
- Offering a personal or professional opinion on how the court will resolve the dispute. (E.g., *You will not win this case in court. You have a very slim chance of prevailing with that argument.*)

In these examples, the mediator is stepping into the decisional role of a neutral expert. While this article focuses on legal opinions, the same analysis would apply

to other situations. For example, if the mediator comes from a different professional background (e.g., psychology, accounting), rendering evaluations based on expert knowledge would require the same treatment.

The Dangers of Mediator Evaluations

The benefits of a neutral (particularly expert) evaluation may be more intuitively obvious than the dangers. The benefits, from a party's perspective, might include enhancing the information base for decision making; reality-checking the overconfidence of the other side; using the trusted neutral mediator instead of needing to hire another neutral for an evaluation; and bringing public norms (the law) into the conversation to provide an acceptable basis for a resolution.

Those possible benefits must be weighed, however, against dangers that may not be as obvious, particularly to inexperienced parties. Unsolicited opinions often provoke defensive, even hostile, reactions, particularly if the opinion is unfavorable. Even solicited opinions can be unwelcome if they importantly differ from what is expected. Consider the following list of potential dangers in mediator evaluation:

- An evaluation might jeopardize the actual or perceived neutrality of the mediator, which in turn jeopardizes a mediator's continued usefulness;
- An evaluation might interfere with party self-determination (insofar as parties bow to a neutral's expertise and opinion rather than exercising their own judgment), detracting from the focus on party responsibility for critical analysis and creative problem-solving;
- An evaluation made on the basis

of incomplete or limited information or based on inadequate research can be highly speculative and more likely wrong compared to an evaluation of a neutral specifically hired for that purpose; even if the evaluator is right, a subsequent arbitrator, judge or jury may not reach the same conclusion;

- Evaluation focuses the outcome on the criteria used by a third party (e.g., legal norms) when other norms—such as family or religious values—may be more important to the parties;
- An evaluation based in some part on information obtained in caucuses, without the opportunity for rebuttal by the other side, rests on inferior—or at least different—evidence than the evidence that an arbitrator, judge, or jury would have;
- An evaluation may end negotiations by polarizing the parties and entrenching their positions, in effect prolonging rather than shortening disputes where the party favored by the evaluation becomes more entrenched and the disfavored party loses confidence in the mediator;

Unsolicited opinions often provoke defensive, even hostile, reactions, particularly if the opinion is unfavorable.

- An anticipated evaluation will importantly affect mediation representation and party negotiation, making it less likely that parties will be candid with one another and the mediator.

In light of these dangers, one might imagine a mediator's opinion that disfavored Angel or her daughter, for example, ending negotiations, perhaps further damaging the already fragile family, and leading to litigation costs for the estate and parties that might exceed the \$50,000 that Angel, Martin, and Christophe are arguing about.

The Mediator's Duty to Warn and Informed Consent

These significant dangers suggest a duty to warn. Under both torts and contract theories, a mediator's failure to warn might be actionable. In torts, the parties' reasonable expectation that the mediator will not change the agreed-upon or expected process absent meaningful disclosure and consent arguably creates a duty to warn. Negligence or malpractice liability could arise from a breach of this duty where there are damaging repercussions on the disputants' lives. Under contract theory, a failure to warn about a change in the agreed-upon process and its potential repercussions and to gain party consent might be a breach of either an express or implied term in the mediation contract.

With respect to a party's *informed* understanding of what evaluation by a mediator means, informed consent is a relatively straightforward concept. Simply put, parties are entitled to understand what they are requesting, or what is being proposed by the mediator, and to be forewarned of dangers they might face prior to their consenting to the mediator's provision of an evaluation. Once adequately warned, parties are deemed to have assumed the risk voluntarily if they consent and hence be responsible for the consequences of their choice.

What, then, constitutes *consent* to engage in an evaluative process? Any definition of informed consent should be carefully crafted to describe the precise scope of the consent to an evaluative process. At a minimum, a party's consent should cover elements that current mediation court rules generally require when an evaluation is contemplated, requested, or proffered. The scope of a party's consent should encompass a freely made, voluntary decision: (1) to participate in a specific type of evaluative process based on a clear understanding of the benefits, limitations, and risks associated with the process; (2) to be satisfied with the specifically described role of the neutral and the neutral's related ethical responsibilities in the evaluative process; and (3) to be satisfied with the nature and amount of any additional fees and costs charged by the neutral in conducting the evaluative process.

Principles for Adequate Disclosure

So we arrive back at the questions: What principles guide mediators in providing parties with information relevant to the parties' consent to a mediator's changing role? When must a mediator obtain consent to step near (or over) the line into a decisional, evaluative role into what

Responding to a Request for an Evaluation

You have asked me to give an opinion on the likely court outcome of this matter, and I am willing to do that if you both agree to my providing that service. However, you should understand that at least one of you may not like my opinion and may feel I am no longer impartial. If that happens, I may be unable to assist you further or may be less effective as a mediator. Also, particularly if you think my opinion is wrong, you may be disadvantaged by it in subsequent negotiations.

While I will do my best to give you a thoughtful opinion, you should understand I might be wrong—different lawyers come to different conclusions—and my analysis will be based on information that is different from what a judge, arbitrator, or jury would hear. While I have practiced in the area of trusts and estates, I do not consider myself a specialist. Also, my opinion will be based on more limited evidence than the evidence available in adjudication, since you have not completed discovery. In addition, because I have learned information in caucus and from confidential submissions that you have not heard or seen and hence cannot rebut, you must rely on me to separate that out from information I hear in joint session.

In any case, it is very speculative to predict what a particular judge might do. I advise you to listen to your own counsel (or to get legal counsel) to inform you and protect your legal rights.

Also, to the degree we focus on legal rights and the likely court outcome, it may distract you from looking for more creative solutions that might serve your interests better. This situation involves three generations of your family, and your family's values might be a more important basis for decisions than the likely legal outcome.

Are you sure you want me to give an evaluation?

has become known as “evaluative mediation”?

No Surprises

No one likes bad surprises. When expectations are lowered by thoughtful warnings, one tends to appreciate what is provided and take precautions against what might cause problems. Furthermore, disclosure and consent pass the burden of responsibility to the person who assumes the risk. Adequate warning will enhance a mediator's credibility in that candor, and disclosure garners trust. In addition, accurate expectations will allow attorneys to prepare appropriate representation plans and allow clients to make appropriate disclosures.

A Clear Description

Any warning must indicate, with precision, the service being proffered and the various dangers to the mediation that are entailed. A mediator who begins in a facilitative mode and subsequently agrees to provide an evaluation might obtain informed consent by a statement similar to the boxed statement. (See Sidebar, “Responding to a Request for an Evaluation.”)

Early Warning

Because the caucus strategy of the mediator, the advocacy approach of any attorneys, and the willingness to share certain types of information of parties may depend on their expectations regarding the role of the neutral, that role should be clarified at the earliest point possible. Often, however, it is at “final” impasse that mediators offer an evaluation as a last-resort impasse-breaking device. If the evaluation was not anticipated, then the mediator would simply give appropriate warnings before the evaluation is made—as early as possible under these circumstances.

Two points need to be made about “final” impasse. First, it’s not over until it’s over. Determining what constitutes final impasse is a tricky—and perhaps illusory—affair. Parties can always recommence negotiations and mediation after a particular session fails to achieve resolution. Consequently, the warnings are in order despite the feeling that the mediator may not be needed again. Second, parties frequently want an evaluation because they believe it will be favorable to them. Attorneys want an evaluation because they believe it will make their clients more flexible or will benefit their clients. Evaluations, however, are likely to disappoint one (or sometimes all) of the players. Parties need clear, accurate, and reasonable expectations or a disservice can be rendered. A mediator does not want the final act, if it is the final act, of the mediation to do harm.

Standard of Care in Providing Opinions

How careful must a mediator be in providing an opinion or professional advice? If there is general disagreement and confusion about the required scope and content of informed consent relative to mediator evaluation, the question of what standard of care applies to the evaluation mirrors that disagreement and confusion. Some of the various theories that apply to informed consent are relevant to the degree of care that must be exercised in providing an evaluation. These include tort and contract law, as discussed above. Under any theory, one would expect the provision of an opinion to be done with care. Negligence law would apply a “reasonableness” standard. Contract law would ask about the agreement or reasonable expectation of the parties. We add to these points some principles:

- Always provide the basis and context of the evaluation. What information will the evaluation be based upon? What expertise does the mediator have? What research is being undertaken?
- Always urge parties to get independent evaluations, listen to their own lawyers (if applicable), and consult their own judgment.

- Go to the library or its electronic equivalent. That is, base the evaluation on a mode of thinking and conduct that an evaluator or opinion-giver would engage in. No lawyer, for example, should give an off-the-cuff opinion without research unless he identifies it as such and warns about its potential fallibility.

For Angel, Martin, and Christophe, the evaluation and its quality might have a dramatic impact on their relationships going forward. Their sense of entitlement, their ability to live with or be influenced by a certain conclusion, and their confidence in the neutral providing the opinion will all depend on the care that is displayed in the rendering of the evaluation.

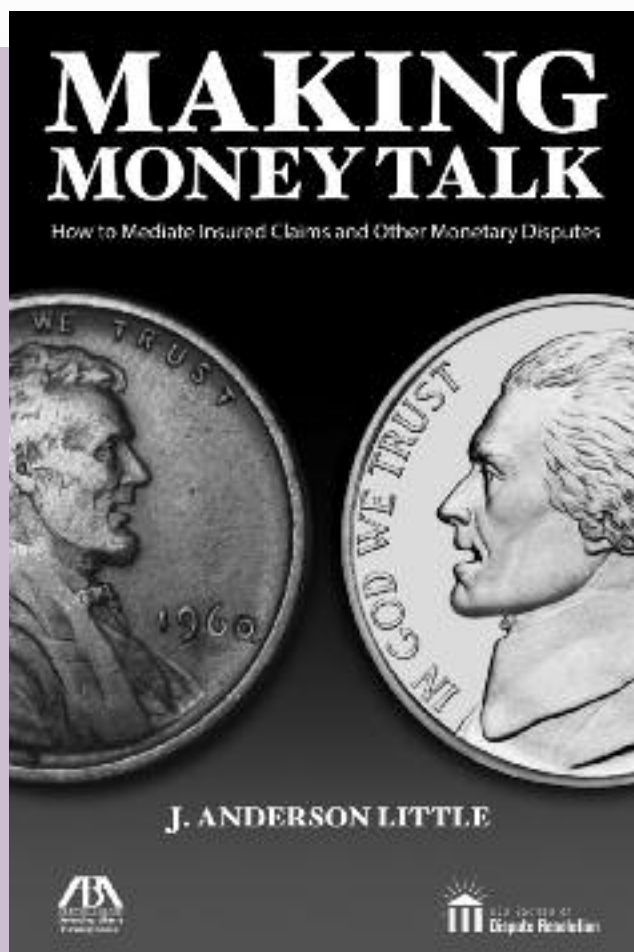
Minimizing the Risks of Evaluation

Evaluation can be a risky move, and mediators should, as a baseline, do no harm in their practice. They should foster—and not undermine—party self-determination. Ensuring informed consent for mediator evaluation both minimizes the possibility of harm and maximizes the possibility of self-determination. Put another way, parties should have a meaningful choice regarding whether their mediator uses the tool of opinion-giving and should be aware of the dangers involved when they make that choice.

When mediators do provide requested opinions, they should do so with care. They should consider what information they are basing their opinion on. Is some of the “evidence” unreliable? That is, was it offered in a caucus where the other side had no opportunity to respond? Opinions based on such information are more likely to be unfair. Mediators should, metaphorically speaking, “go to the library” before giving advice. They should review, take time, and consult professional resources that would normally be double-checked before a professional opinion is provided. At the very least, the parties should understand what the decision is based on and its qualitative difference from an opinion a judge, arbitrator, or neutral expert would make.

Ideally, Angel, Martin, and Christophe—and other parties in mediation—will come away from the mediation process with a better understanding of one another and of the values that each brings to the dispute. They will feel that their expectations regarding the mediation process were honored and that the outcome of the process is a result of decisions that each freely made. If they requested a mediator evaluation, they will have no regrets because they understood the downside of that process before the evaluation. In short, they will have given informed consent based on adequate disclosures, and the evaluation will enhance, rather than compromise, party self-determination. ♦

Note: This article is a condensed version of an article that appeared in the *Ohio State Journal of Dispute Resolution* in 2005: Lela P. Love and John W. Cooley, *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary*, 21 OHIO ST. J. ON DISP. RESOL. 45 (2005).



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Informed Consent in Public Sector Dispute Resolution

By Patrick Field



Informed consent is a basic premise of civil society in general. A free, civil society functions when individual autonomy is respected and protected under the law, self-determination is supported, and actions are entered into with full (or at least sufficient) information as to the rights, responsibilities, and risks those actions entail. In public sector dispute resolution, with its claims of advancing and deepening democracy, transparency, and inclusiveness, informed consent is absolutely essential. The stakes are perhaps even greater than in more common two-party, court-sponsored mediation: not only are the rights of individuals at stake, as might be the case in a bilateral, court-annexed mediation, but the very functioning of government and civil society writ large may be at stake.

However, the notion of informed consent in the multi-party, political, usually highly complex arena of public sector mediation is challenging for several reasons. For the purposes of this article, the focus is on procedural, process, or participation consent, rather than on what it means to consent to a final outcome or agreement (a subject for another day). Four key challenges to procedural consent are:

- *Informed consent about alternatives to mediation.* In two-party mediation under the auspices of a court, the informed consent of the parties' alternatives, in broad terms at least, is relatively clear: seek to reach a consensual, voluntary settlement agreement in mediation or take your chances under law before the court. In public sector mediation, the parties' alternatives or BATNA are rarely so clear. Should the party sue or consent to participate in mediation? Should the party seek to influence the agency/board in authority through political means? Should the party seek to engage in some kind of media or political organizing effort to influence the outcome and meet their interests better? How might the party undertake multiple and coordinated efforts among these strategies to advance their interests?

Each party has so many possible alternatives, it is difficult for a mediator to clearly explain, "Here is what mediation has to offer, and here is the alternative to mediation." Given this complexity, assuming a mediator's role is to help a party consider the pros and cons of her choices, to what degree should the mediator help the parties explore these alternatives? Can the mediator even speak to the general outlines of what an advocacy campaign might look like without exceeding her role? What role does the mediator have in ensuring the various parties—of different skills and knowledge—have sufficiently considered the risks of these multiple choices?

- *Informed consent about agents or representatives.* In a simple, two-party mediation (though agents may complicate the equation), the parties know who they are or who might represent them. In a multistakeholder public dispute, all of the public cannot practically sit at "the settlement table." Thus, who can represent

large numbers of individuals or constituents? Is it enough that a board or organizational head signs off on a representative for an organization representing potentially hundreds or thousands? What if some minority of the membership states that this choice is illegitimate? How do you represent diffuse stakeholder interests, such as "beach users" or "national park visitors" or the public in general? Is it informed consent if a general membership has no direct or active say in how its interests might be or are represented in public sector mediation? On the other hand, would any process ever get underway if informed consent of all affected parties was thoroughly sought first and foremost?

- *Informed consent and government parties.*

Administrative agencies or bodies often consent to be "influenced" or to allow their decisions to be "shaped" by the process. In some cases, that consent is spelled out by law such as in the Negotiated Rulemaking Act. Nonetheless, they retain their full legal authority and are often, in reality, quite ambivalent about how much to defer to stakeholder consensus at the end of the day, not to mention that at the highest level decision makers often engage only at key points and are certainly known to chart a different course than their staff at the 11th hour. So, how does a mediator adequately and accurately explain this "first among equals" role of the sponsoring or convening government agency or body? How does the mediator ensure that "consent" to participate in full good faith has really been given by the agency?

- *Informed consent about highly complicated technical, legal, regulatory, political, and administrative matters.* No one assumes that informed consent requires a detailed knowledge of the law for parties, though a vigorous and deserved debate regarding pro se cases and informed consent is underway. But informed consent does assume the parties have at least a general sense of the outlines of the legal issues at stake, the process and role of the courts, and the use of mediation in that light. But for public sector dispute resolution processes, the cases are often enormously complex. Numerous legal issues and matters are at stake. Complex legislation and regulation shapes and constrains the bargaining space. Many issues involve highly technical matters ranging from ecosystem management to risk assessment for toxic chemicals. And all of these public processes take place in the relatively free-form and dynamic space



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of politics. Therefore, how informed do 10 or 20 or 30 lead negotiators, and their hundreds to thousands of constituents, need to be regarding these matters? And whose responsibility is it to “sufficiently” inform them?

To address these challenges, the field of public sector dispute resolution has developed various tools and techniques, though rarely are they explicitly described as seeking to provide informed consent. While imperfect, they do provide a basis for determining informed consent in public sector dispute resolution.

- *Stakeholder and Issues Assessment.* In simple, two-party mediation, the mediator often enters the mediation with limited knowledge of the case and interaction with the parties. However, in a public sector mediation, who the parties are, what issues might be under negotiation, who might represent those parties, and what knowledge parties have about the range of rules and regulations is often uncertain. Thus, either informally or very formally, mediators often undertake an assessment based on numerous confidential interviews. The assessment provides a tool for seeking the parties’ views on who the full range of parties to the dispute are, who might represent them, and what issues are of most importance. Importantly, it also provides an opportunity to explain the process of mediation, negotiated rule making, joint fact-finding, or whatever process may be under consideration. The assessment process also provides a means for the mediator to test with the sponsoring agency or government body if it has the sufficient will, resources, and commitment for a mediation effort. The process of assessment, if done thoroughly and well, helps increase the likelihood of informed consent to a mediation process by engaging the parties before any process is designed, let alone initiated, to allow them to shape and learn about the mediation process. One in fact might argue that for public sector mediation efforts, if at least an informal assessment is not done, the parties reasonably cannot be expected to offer their informed consent.

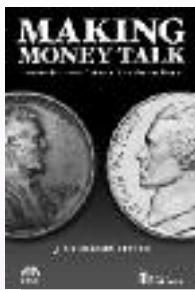
- *Process Protocols or Ground Rules.* Assuming a mediation process is convened, public sector dispute resolution has developed another tool to ensure the informed consent of the diverse parties. Such protocols usually cover the mission or scope of the process, and the rights and responsibilities of the stakeholders, agencies, and mediators. The protocols then prescribe basic codes of conduct for civil discourse. In short-

term, simpler public processes, these protocols might be no more than a one-page set of ground rules. In complex processes such as regulatory negotiation, the protocols are often quite lengthy.

Usually, the parties engage the mediators in reviewing a draft of ground rules and (as a first test of the group’s ability to work together) negotiate these terms. Though often not explicitly stated as such, this effort seeks to obtain the informed consent of the parties to the dynamic process in which they are about to participate. The very dialogue and debate about the ground rules helps the parties to consider the shape, form, risks, and responsibilities of the process, increasing the likelihood of informed consent.

- *Education.* Because the matters and context in most public sector mediation are so complex, the field of dispute resolution often advocates for a learning or education period at the start of the process. Numerous and diverse parties usually come to the negotiating table with a range of knowledge and skill. One cannot expect these parties to enter into a process sufficiently informed without a review of the legal issues at stake. Such laws as the Federal Advisory Committee Act, the Administrative Procedure Act, and other statutes often inform federal public sector mediation, for instance. Also important to consider are the regulatory context, which may range from regulations to enabling legislation to executive orders to agency policy guidance documents, and the technical context, which include processes that usually involve consideration of numerous complex and often contradictory technical studies, reports, and data. Though the assessment process can increase informed consent about representation, and the process and establishing protocols can bring clarity and detail to that informed consent, without an initial lesson on the context itself, it is difficult to imagine that fully informed consent can be obtained.

These three requirements—assessment, ground rules, and education—serve as the basis in public sector dispute resolution for garnering sufficient informed consent to public sector alternative dispute resolution processes. At the same time, the problematic nature of informed consent in these public processes is addressed but not fully resolved. Representation, ratification, and the powerful role of government agencies all remain challenges to the field and to fully informed consent. ♦



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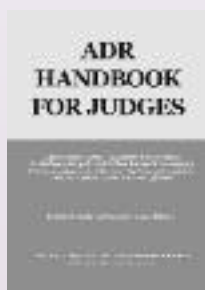
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Consent in International Mediation

By Melanie Greenberg

Consent is an exceptionally important component of public international mediation and serves as a touchstone of the mediation process from the premediation phase through the implementation of the mediated agreement. The importance of consent attaches not only to ideals of democratic engagement in a problem-solving process, but also to more technical issues of choosing appropriate mediators, attracting potential spoilers to the table, forging connections between mediation parties and their constituencies on the ground, and drafting agreements that cannot be negated by intentionally ambiguous language. The stakes of consent are high because losing the consent of a party at any time during the mediation can lead to an unraveling of the mediation process and a reversion to bloody civil or interstate violence.

Two examples highlight the key role consent plays in the mediation process. In a situation managed exceptionally well, George Mitchell obtained consent from all key

players in the mediation leading up to the Good Friday Accords in Northern Ireland. All key political parties—even extremists—took part in the talks and took great pains to bring their constituencies along. The populace, though deeply divided, was tired of war and ready for a mediated settlement. The final agreement was strong enough to withstand even the Omagh bombing in 1998, an event that could have unraveled the entire deal had consent been lacking. By contrast, the Arusha Accords, which were negotiated to end the civil conflict in Rwanda, had so little consent among extreme parties in Rwanda that their signing was the opening salvo of the 1994 genocide.

Public international mediation—the process of bringing in a third-party mediator to help parties resolve a (usually violent) civil or interstate dispute—takes place in the shadow of weak international law. Unlike mediation in American court systems and other domestic arenas, parties to public international mediation have little recourse to legal protections or to an alternative form of justice. The wheels of international law move slowly. The United Nations Security Council can issue edicts, but it lacks enforcement power, and peacekeepers cannot work effectively until there is a peace to keep. The International Criminal Court can indict war criminals, but this rarely stops a conflict in its tracks. The International Court of



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Justice can rule on territorial disputes, but, again, it lacks enforcement power and cannot provide timely relief. Therefore, combatants and potential peacemakers must put their faith in a mediation process—considering the conflict is ripe for such intervention—without being able to fall back on an alternative legal process if they feel the mediation process is unfair.

Ideally, all parties to a public international mediation would give consent to a fair, balanced mediation process that would proceed with full procedural justice and democratic decision making, leading to a clear peace agreement with straight-forward implementation.¹ Unfortunately, this smooth process rarely occurs in the real world, and the issue of consent is one of the stumbling blocks during all phases of a public international mediation. Consent, once given, does not simply “stick” to the participants and mediator throughout the process. Consent must be hard-won before the mediation even begins and is constantly tested and reformulated throughout the mediation process, reaching even into the end stages of the peace agreement’s implementation.

While a study of consent in public international mediation could fill many academic journals, here I focus on three key issues involving consent: (1) the choice of the mediator, including consent to the mediator’s relative coercive power; (2) the choice of parties, including potential spoilers; and (3) consent to a final agreement.

Consent and the Choice of Mediator

Mediators in public international disputes fall along a wide spectrum of coercive power in their mediation efforts. At one end of the spectrum, “neutral low-power” mediators² such as Mitchell in Northern Ireland or Harold Saunders in Tajikistan rely solely on their reputations, their neutrality, and their skills in gaining the parties’ trust; they wield no sticks, sanctions, or other forms of coercion. On the other end of the spectrum, mediators such as Richard Holbrooke in the Dayton Accords in Bosnia carry tremendous muscle, making good on threats to carry out air strikes and other punitive measures if parties fail to cooperate.

The role of consent changes with varying levels of coercive mediator power. In a situation like Bosnia, in which the mediator holds many of the important cards, consent exists only at the most superficial level. Parties come to the table under duress and make short-term compromises that lead to an immediate cease-fire. The danger in this sort of mediation by coercion is that long-term peacebuilding is sacrificed to the construction of short-term cease-fires or a “freezing” of the conflict. Building a lasting peace requires a deep commitment from all parties, and a true weariness of war. The kind of consent necessary for a true peacebuilding process is rarely present in short-term coercive mediation.

At the other end of the spectrum, a neutral mediator who brings little in the way of carrots or sticks to the table must depend on the good will and true consent of the parties. The Northern Ireland talks mediated by

Mitchell represent true consent on the part of all participants. Mitchell brought only his good offices and a sense that the time was ripe for intervention. While the parties were certainly recalcitrant, and occasionally left the bargaining table, they brought with them consent for deep political change and a good faith effort to represent their constituencies in a way that could guarantee long-term success in the talks.

Unfortunately, consent to a noncoercive mediation process does not always present itself in such benevolent forms. Often, parties consent publicly to mediation, only to use it as a “fig leaf” to cover up illicit activities on the ground. For example, during the Vance-Owen mediations in Bosnia, which carried no enforcement action or coercion, Serbian and Croatian leaders used the positive publicity they received at the mediation table to cover vicious acts of ethnic cleansing that changed the map of the conflict in their favor.

Consent and the Choice of Parties

Dangerous violence can erupt when some, but not all, relevant parties give consent to mediation. Parties that feel threatened by mediation can easily become spoilers to a mediation process in which some stakeholders negotiate and others stay away from the table. For example, the Arusha Accords in the Rwanda conflict posed a great threat to *Interahamwe* activists, who did not give their consent to mediation and felt they would lose clout in the power-sharing arrangement contemplated by the accords. Once the agreement was signed, these *Interahamwe* forces may have shot down President Habyarimana’s plane,³ and they became the *génocidaires* responsible for hundreds of thousands of deaths.

Similarly, in the run-up to the current mediation in Darfur, a powerful rebel group with strong ties to the refugees in camps throughout Darfur has refused to take part in or give its consent to the October 2007 talks in Libya until the Khartoum government creates a secure environment on the ground. Without the participation of this group, any agreement forged at the talks would leave out a key constituency for peace in the region and would risk further fighting and bloodshed.

While the consent-building process leading up to a major public international mediation can be long and painstaking, the risks of alienating key parties is far greater than the extra time and effort it takes to get as many parties as possible on board the process.

Consent and the Final Agreement

The importance of consent does not stop once the parties approach the end of the mediation process. Often the bloodiest time of conflict takes place immediately after the signing of the peace agreement. For example, in Sierra Leone, the Lome agreements, which brought the Revolutionary United Front (RUF) into a power-sharing agreement, gave the violent faction the platform it needed to consolidate power. Once in power, the faction cut a

bloody swath through Sierra Leone, chopping off limbs of children and commandeering diamond mines. Consent lies at the heart of this unstable phase, but this time the consent issue lies with the constituencies on the ground rather than the principals at the mediation table. When participants in the mediation process move too far ahead of their own constituencies and agree to concessions that are unacceptable to the public at large, violence can erupt just as peace seems to be at hand. This was certainly true in the Oslo Accords, when an ultra-Orthodox Israeli Jew felt Israeli Prime Minister Yitzhak Rabin was moving too far toward peace and assassinated him.

In an effort to gain broad consent across many constituencies, final peace agreements are often crafted with a large dose of “constructive ambiguity,” allowing parties to represent to their constituencies very mixed interpretations of the actual agreement. Without a clear understanding of the actual concessions, parties on the ground can be confused and return to war. In the Good Friday Agreement in Northern Ireland, for example, requirements for decommissioning and police reform were left very vague, allowing each side to sell the agreement to its constituencies without seeming to have caved in to pressure. However, when it came time to implement the agreement, conflict arose over whether or not each side

was complying with the vague requirements, leading to political crisis and an eventual (though temporary) dismantlement of the power-sharing arrangement. Mediators and parties must balance on a very fine line between gaining broad consent for an ambitious and difficult document, and making the document so vague that true consent is impossible, and parties return to war.

These are just three examples of the role consent plays in public international mediation. Consent lies at the very heart of the mediation process, representing the most fundamental democratic values in solving complex, deeply rooted conflicts. Failure to gain consent at many levels—for the mediator, for the parties, for constituencies outside the mediation, or for the final agreement—can lead to weak agreements and, ultimately, bloodshed on the ground. ♦

Endnotes

1. For more on the relationship between self-determination and consent in public international mediation, see Jacqueline Nolan-Haley, *Self-Determination in International Mediation: Some Preliminary Reflections*, 7 CARDOZO J. OF DISP. RESOL. 701 (forthcoming 2007).
2. Melanie Greenberg, *Mediating Massacres: When “Neutral, Low-Power” Models of Mediation Cannot and Should Not Work*, 19 OHIO ST. J. ON DISP. RESOL. 185 (2003).
3. For a detailed discussion of the ambiguous circumstances of Habyarimana’s death, see Gérard Prunier, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE 222–25* (Columbia University Press, 1995).

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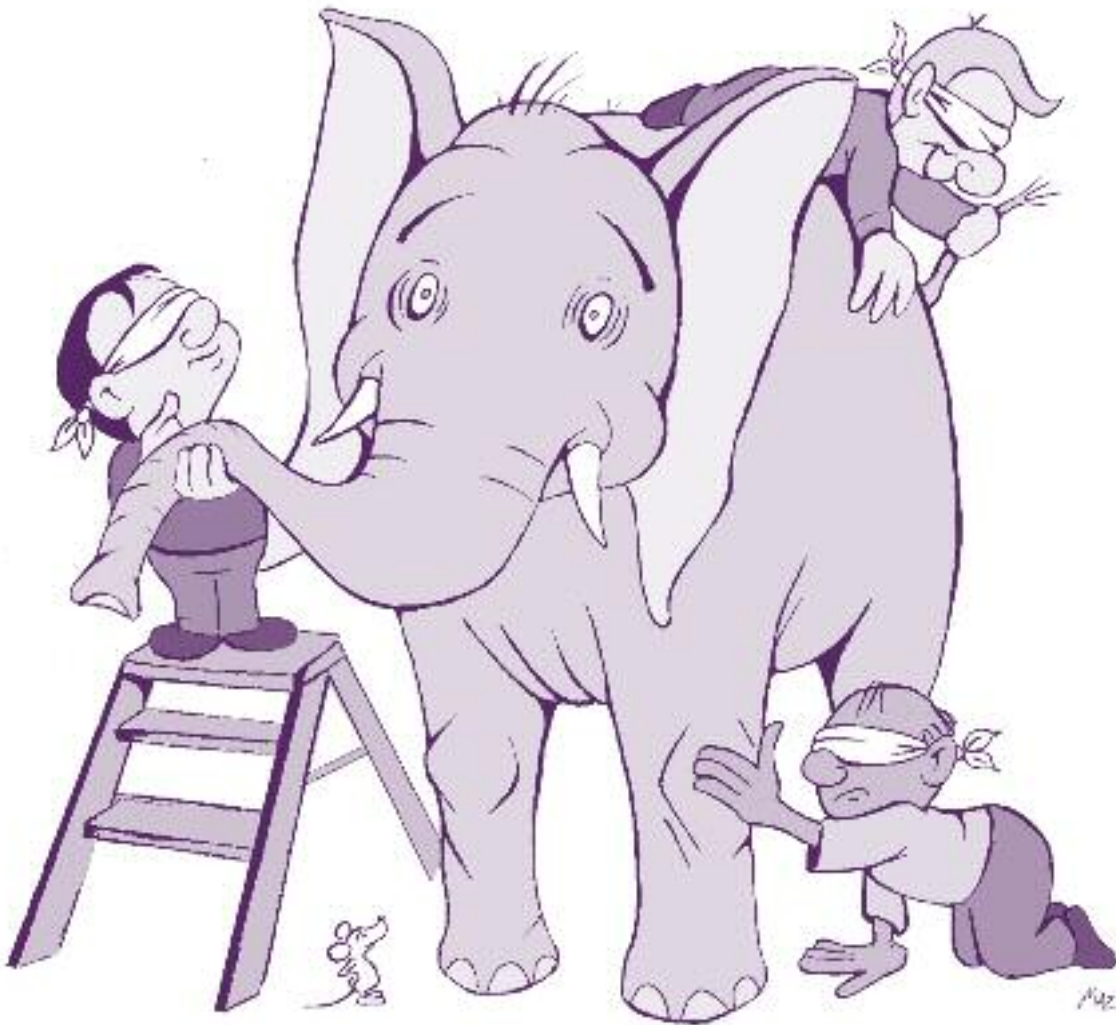


Illustration by Dan Mazanec

The (New) Ethics of Collaborative Law

By Scott R. Peppet

In an ancient parable—sometimes Hindu, sometimes Buddhist, sometimes Sufi—a group of blind men examines an elephant. One touches the trunk and says that an elephant is like a snake. One touches the legs and says that an elephant is like a tree. One touches the tail and says that an elephant is like a rope.

None is wrong, but none is right.

This article argues that we have subjected collaborative law to a similar process, with a similar result.¹ There are radically different understandings of what collaborative law is, and therefore there remain fundamentally opposed beliefs about whether it can comply with the legal ethics rules. In February 2007, for example, the State of Colorado's legal ethics committee issued Opinion 115, which for the first time held that collaborative law creates a per se impermissible and unwaivable conflict of interest for lawyers. Then, in August, the American Bar Association's ethics committee issued Opinion 447, which attempted to rebut Colorado's understanding and argued that collaborative law creates no ethical problems.

In my view, neither of these opinions has it right—but neither has it entirely wrong either. To understand why, we must examine how these opinions *characterize* the collaborative law process—what part of the elephant they were examining. I argue that these committees understood the process quite differently and thus reached very different conclusions about its ethical implications. To help clean up the mess they've left, I provide a *taxonomy of contractual arrangements* that collaborative lawyers use in effecting their practice and show that these different contractual setups have different ethical consequences.

Most fundamentally, my goal is to warn collaborative law practitioners against rejoicing prematurely about the



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ABA's Opinion 447 or assuming that it completely vindicates their practice and frees them from ethical scrutiny. Just the opposite. Careful analysis of both Opinion 115 and Opinion 447 underscores the need for collaborative law practitioners to deepen their understanding of the ethical complications of collaborative law and to make modifications to lessen the ethical risks. The lesson of 2007 should be that in undertaking this ingenious experiment, we need to be cautious, not careless, in order to prevent more tumult and confusion.

Conflicting Opinions: Colorado's Opinion 115 and the ABA's Opinion 447

Prior to 2007, the ethics committees of five states—Kentucky, Minnesota, New Jersey, North Carolina, and Pennsylvania—had addressed the propriety of collaborative law, and all had found it in compliance with their legal ethics codes. Three states—California, North Carolina, and Texas—had passed statutes codifying the practice.² At the same time, some practitioners and collaborative law scholars—myself included—have expressed reservations about whether the practice complies fully with the existing rules of ethics.³

In February, however, the sense of an emerging permissive consensus came to an abrupt end. The Colorado Bar Association's Ethics Committee issued Opinion 115, holding that collaborative law creates a per se conflict of interest under Colorado's Rule 1.7.⁴ The opinion focused on the "four-way agreement" that is often signed at the start of collaborative law

between the two lawyers and the two clients:

[t]he touchstone of Collaborative Law is an advance agreement, often referred to as a "Four-Way Agreement" or "Participation Agreement," entered into by the parties and the lawyers in their individual capacities, which requires the lawyers to terminate their representations in the event the process is unsuccessful and the matter must proceed to litigation.⁵

Because of this contract, the committee found, "Collaborative Law, by definition, involves an agreement between the lawyer and a 'third person' (i.e., the opposing party) whereby the lawyer agrees to impair his or her ability to represent the client."⁶ This necessarily implicates Colorado's conflict of interest rules, in particular Rule 1.7(b), which states that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to . . . a third person," unless the lawyer reasonably believes that the representation will not be adversely affected and the client consents after consultation.⁷ Opinion 115 then found that

the limitation on the lawyer's ability to go to court:

inevitably interferes with the lawyer's independent professional judgment in considering the alternative of litigation in a material way. Indeed, this course of action that "reasonably should be pursued on behalf of the client," or at least considered, is foreclosed to the lawyer.⁸

It therefore found a per se violation of Rule 1.7.

The dispute resolution community erupted in dissent, arguing in print, on the Internet, and in conferences that Opinion 115 was fundamentally misguided. Practitioners feared that this was the beginning of a cascade of such decisions.

Just six months after Opinion 115 was released, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued a response—its own Formal Opinion 447, titled "Ethical Considerations in Collaborative Law Practice." Opinion 447

rejected the Colorado committee's conclusions and held that the practice creates no impermissible conflict.

Instead, Opinion 447 argued that although a four-way agreement *does* create obligations to a third person on the part of each lawyer, such obligations create no conflict if they do not "materially limit the lawyer's representation of the client."⁹ It then concluded that a collaborative law four-way agreement disqualifying each lawyer in the event either client proceeds to litigation does not so "materially limit" the lawyers' service because each collaborative lawyer's representation is *already* limited in scope to settlement, and thus the four-

way does not further limit that representation:

When a client has given informed consent to a representation limited to collaborative negotiation toward settlement, the lawyer's agreement to withdraw if the collaboration fails is not an agreement that impairs her ability to represent the client, but rather is consistent with the client's limited goals for the representation.¹⁰

In other words, "no conflict arises" under Rule 1.7: "there is no foreclosing of alternatives . . . otherwise available to the client *because the client has specifically limited the scope of the lawyer's representation to the collaborative negotiation of a settlement.*"¹¹

This is a very different understanding of the process from that of the Colorado committee. Colorado's Opinion 115 is premised on one understanding of the collaborative law process—that the process is effected by a four-way contract, signed by both lawyers and both clients, that includes disqualification; that the lawyers enter that contract in their "individual capacities" (that they are, in short, in privity); and that this four-way contract is the

What is the process of collaborative law, and, thus, which opinion got it right?

only effecting document. In other words, what the Colorado opinion found suspect was a situation in which the *only* agreement in play was a four-way contract.

The ABA, on the other hand, describes a different elephant. Its analysis turns on the assumption that *in addition* to the four-way agreement, there is a separate limited retention or limited scope agreement in place between each lawyer and his or her client. As understood by the ABA, in other words, collaborative lawyers get informed consent from their clients to limit the scope of their representation to settlement, and *then* sign a four-way document that simply reaffirms that preexisting commitment. It thus found no ethical problem—because it was looking at a very different contractual scenario from that considered by Colorado’s committee.

A Taxonomy of Contractual Arrangements

So, which is it? What *is* the process of collaborative law, and, thus, which opinion got it right? The answer to this question is surprisingly complicated. Although many scholars and practitioners have long assumed that we understood the elephant accurately, I am now convinced that we have all been recognizing only parts of the whole.

As the collaborative law process has evolved, collaborative lawyers have created a disparate array of contractual arrangements to give it force. To understand the conflict between these competing ethics opinions—and to bring clarity to how collaborative lawyers should practice going forward—I believe we must begin to see these very different arrangements distinctly. Here I lay out three fundamentally different scenarios, some with multiple variations, which are all currently called “collaborative law.”

First, in a *Retention Agreements Only* scenario, the two lawyer-client pairs reach limited retention agreements that include a provision making attorney withdrawal mandatory in the event that *either* party proceeds to court. They do not sign a four-way agreement, however. Thus, if one party litigates, both lawyers can (and should) withdraw. Note, however, that if Lawyer B and Client B decide to go to court together anyway, there is nothing that Lawyer A or Client A can do. They have reached only “behind the table” lawyer-client agreements; there is no enforceable “across the table” contract that the “A” side could use to enforce the collaborative law commitment to withdrawal.

Second, in a *Retention Agreements Plus Four-Way* scenario, the lawyers and clients create limited retention agreements similar to those in a Retention Agreements

Only situation, but they also sign a four-way document. There are, however, several variations in practice of this four-way:

- It may be a *process* four-way, containing only process terms such as commitments to disclosure, honesty, communication norms, etc., or a *disqualification* four-way, containing the mandatory attorney withdrawal language.
- It may be *contractual*, clearly intended as a binding set of contractual obligations giving rise to the possibility of liability or injunction, or *hortative*, intended instead as a statement of non-binding principle or belief, rather than legal obligation.
- *If and only if* it is contractual in nature, it may represent an intent to bind the *clients only*, where only the clients and not their lawyers are contracting parties, or to include *lawyers in privity*, where the attorneys are in privity either with each other or with the opposing client, or both, and thus contractually bound by the agreement.

These three variables give rise to very different documents, with very different consequences. Many collaborative

lawyers, for example, seem to practice in a “Retention Agreements Plus Hortative Disqualification Four-Way” arrangement. They sign limited retention agreements with their respective clients and then a four-way with the other side, but the four-way does not use contractual language. These four-ways are often titled “Principles and Guidelines for the Practice of Collaborative Law” and are phrased as such rather than as contracts.¹² These hortative four-ways do not contain various terms one would expect in a contract—such as choice of law, jurisdiction-

Are the attorneys truly contractual parties in privity? This is an intriguing, and vexing, question.

al, damages, or dispute resolution provisions—nor do they *sound* like contracts.

Neither the ABA’s nor Colorado’s analysis applies squarely to this form of collaborative law practice. If the parties sign a *hortative* four-way, then no formal contractual conflict of interest arises—the lawyers have not taken on contractual obligations to the other side. Instead, the process rests entirely on the limited retention agreements. The relevant ethical question is whether those limited retention agreements have complied with Model Rule 1.2’s requirements for scope reduction agreements—whether, in short, there is true informed consent. Conflicts of interest are not the salient issue. Unfortunately, neither Colorado’s Opinion 115 nor the ABA’s Opinion 447 discussed compliance with Rule 1.2 in detail.

Other collaborative lawyers, however, *do* seem to intend their four-way agreements as contractual, and some may even intend for both the lawyers and clients to be in privity to those contracts. The Collaborative Law

Alliance of New Hampshire's model four-way form, for example, is titled "Agreement to the Principles and Guidelines of Collaborative Law," and it contains more contractual language than the four-ways discussed above.¹³ The Cincinnati Academy of Collaborative Professionals uses a form titled "Collaboration Contract," which states that "[t]he Participants agree to be bound by the terms of this Contract."¹⁴ Although I have not completed my search, I have also found other agreements that seem clearly intended to be contractual rather than hortative.

What difference does it make? First, a contractual four-way gives rise to the ability for Lawyer A or Client A to *force* Lawyer B and Client B to live up to their collaborative commitments. If Lawyer B and Client B decide to revise their understanding and go to court together, the "A" side can sue on the four-way contract. Gaining this feature, however, comes with increased ethical risk—by signing an agreement with the other side, the lawyers create the possibility of a formal conflict of interest if the lawyers are in privity.

Are the attorneys truly contractual parties in privity? This is an intriguing, and vexing, question. I have found only one collaborative law four-way agreement that explicitly discusses lawyer privity, and it states that "[t]his Collaboration Contract does not create any legal rights or privity of contract between the non-client Participant and the other attorney."¹⁵ Note, however, that this does not disclaim the possibility of privity between the lawyers—just that there is no privity between a lawyer and the client on the other side. Most four-way agreements appear to be silent on this question.¹⁶

To the extent that the lawyers *are* in privity to a contractual four-way disqualification agreement, that suggests the somewhat bizarre possibility that a lawyer could sue on the contract—even *without his or her client's support*—to disqualify the other lawyer. If Lawyer B and Client B decided to break the four-way agreement and go to court together, and even if Client A found this acceptable, Lawyer A would have an independent contractual right against the "B" side. Although the notion of a lawyer having such power independent of her client is unsettling, it is a real possibility if collaborative lawyers use a contractual, lawyer-privity four-way document—and one that those lawyers should be disclosing to their clients as part of getting their clients' informed consent to the process.

This brings us to a third distinct understanding of collaborative law, which I call a *Four-Way Only* scenario. Here, no separate limited retention agreements exist—

the parties *only* sign a four-way. Again, that four-way may concern *only* process or also disqualification, may be hortative or contractual, and may be clients-only or include lawyers in privity. These distinctions matter a great deal for the ethical analysis. As already stated, the Colorado committee characterized the collaborative law process as involving *only* a four-way document, and it assumed both that such an agreement was *contractual* and that the lawyers would be parties to it. It found this a *per se* conflict of interest. At the same time, Colorado's Opinion 115 also stated clearly that a *process*—rather than disqualification—four-way only scenario, otherwise known as "Cooperative Law," complies with the ethics rules. It also stated that a client-only (no lawyers) agreement for disqualification also raises no ethical problem.¹⁷ It thus acknowledged that the issue is attorneys binding themselves to disqualification four-ways—not the remainder of these contractual structures.

Neither Colorado nor the ABA considered the ethics of a "retention agreements only" structure. Instead, both focused on four-way agreements. Collaborative law certainly can be practiced in this form, however, and with less ethical risk than with a contractual four-way.

What's Next?

This taxonomy of contractual arrangements—all commonly understood as "collaborative law"—reveals the source of our confusion about the ethics of this process. Both the Colorado ethics committee and the American Bar Association looked at one *type* of contractual arrangement and pro-

nounced it acceptable or unacceptable. Each, however, missed the complex reality that exists in practice. Neither opinion therefore provides complete guidance for collaborative lawyers, nor should either be considered the "last word" on the ethics of this dispute resolution process.

One can glean certain things from the two opinions taken together, however, that should help collaborative lawyers going forward.

First, collaborative lawyers need to reconsider which contractual structure they have employed and whether it best suits their goals and their clients' needs. Many collaborative lawyers seem not to have thought about whether their disqualification or withdrawal provision is in a robust lawyer-client limited retention agreement or in a four-way, and why. Few seem to have consciously chosen a hortative or contractual four-way, or dealt explicitly with the issue of lawyer privity. *These differences matter.* Until the collaborative law community addresses these variations head-on and practitioners decide which arrangements they really *need* in

Neither Colorado nor the ABA considered the ethics of a "retention agreements only" structure. Instead, both focused on four-way agreements.

order to effect their goals, they run the risk of landing in ethical trouble unnecessarily.

Second, I believe that Opinion 115 and Opinion 447 each had it partly right. Colorado's committee was clearly correct in saying that a client-to-client agreement (with separate lawyer-client limited retention agreements) presents fewer ethical risks than a "four-way only" scenario in which the four-way is a disqualification, contractual, lawyer-privity document. The latter is, in my view, a terrible structure, and one that I would avoid. Why the Colorado committee focused on that structure exclusively, I cannot say, but it doesn't much matter: some collaborative lawyers *are* practicing using a "four-way only" arrangement, and that is unwise.

The ABA's Opinion 447 also provides useful hints of the way forward. The opinion clarifies that the ABA believes even a contractual four-way document is permissible so long as the disqualification language within it parallels identical language already agreed upon by each lawyer and her client in a limited retention contract. In short, a limited retention document can moot the conflict of interest problems presented by the "four-way only" arrangement considered by the Colorado committee.

Unfortunately, the ABA's Opinion 447 is unnecessarily confusing about just what is required for this "solution" to work properly. It does not discuss limited retention agreements in any detail and leaves unanswered such basic questions as (1) whether agreements must be in writing in the collaborative law context; (2) whether a four-way document can *itself* constitute the limited retention agreement, or whether separate documents are needed; and (3) whether a disqualifying limited retention agreement must be in place *prior* to the signing of a contractual four-way in order to ameliorate conflict of interest concerns. I cannot address all of these shortcomings here. It must suffice to say that while I agree with Opinion 447's general argument, I would urge collaborative law practitioners to carefully review their limited retention agreements and to focus on whether they have *documented* informed consent to those important lawyer-client arrangements. If nothing else, the conflict between Opinion 115 and Opinion 447 teaches us that collaborative law is a creature of contract, and that it is ultimately dependent on the validity of these limited retention agreements.

Third, and finally, 2007 teaches us that collaborative law is neither dead nor completely in the ethical clear. The practice is innovative and ingenious, and provides great benefits. It is also complex, and in some instances I believe that its practitioners have "let the car outrun the headlights." As shown, some of the contractual structures in use should be reconsidered and revised to make the practice more consistent, and more clearly compliant, with the legal ethics rules. ♦

Endnotes

1. This article is a shortened version of a more complete analysis in law review form. See Scott R. Peppet, *The (New) Ethics of Collaborative Law*, J. DISP. RESOL. (forthcoming 2008).

2. For a convenient listing of these opinions and statutes, see www.abanet.org/dch/committee.cfm?com=DR035000.

3. See Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and*

Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism, 90 IOWA L. REV. 475, 489 (2005) ("I have my doubts about whether mandatory mutual withdrawal provisions can be squared with Rule 1.2"). See also John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1375-78 (2003).

4. I was not on the Colorado committee, nor did I testify before it or have anything to do with its result.

5. Colorado Bar Association Ethics Committee, Ethics Opinion 115, p.1 (Feb. 24, 2007).

6. *Id.* at 4.

7. COLO. RULES OF PROF'L CONDUCT, Rule 1.7(b). This rule is essentially identical to MODEL RULE OF PROFESSIONAL CONDUCT RULE 1.7.

8. Opinion 115, p.4.

9. American Bar Association, Comm on Ethics and Prof'l Resp., Formal Opinion 07-447 (Aug. 9, 2007), at p.4.

10. *Id.*

11. *Id.* at 5 (emphasis added).

12. See, for example, the sample forms in SHEILA M. GUTTERMAN, *COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION* 390-393 (2004); PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 137-145 (2001).

13. Collaborative Law Alliance of New Hampshire, Agreement to the Principles and Guidelines of Collaborative Law, available at www.collaborativelawnh.org/agreement.pdf.

14. Cincinnati Academy of Collaborative Professionals, Collaborative Contract, available at www.collaborativelaw.com/4-1_Participation-Agreements.cfm.

15. See *Id.*

16. I continue to search for evidence of collaborative documents that do address this question, and would be grateful to any who have additional examples.

17. See Opinion 115, footnote 11.

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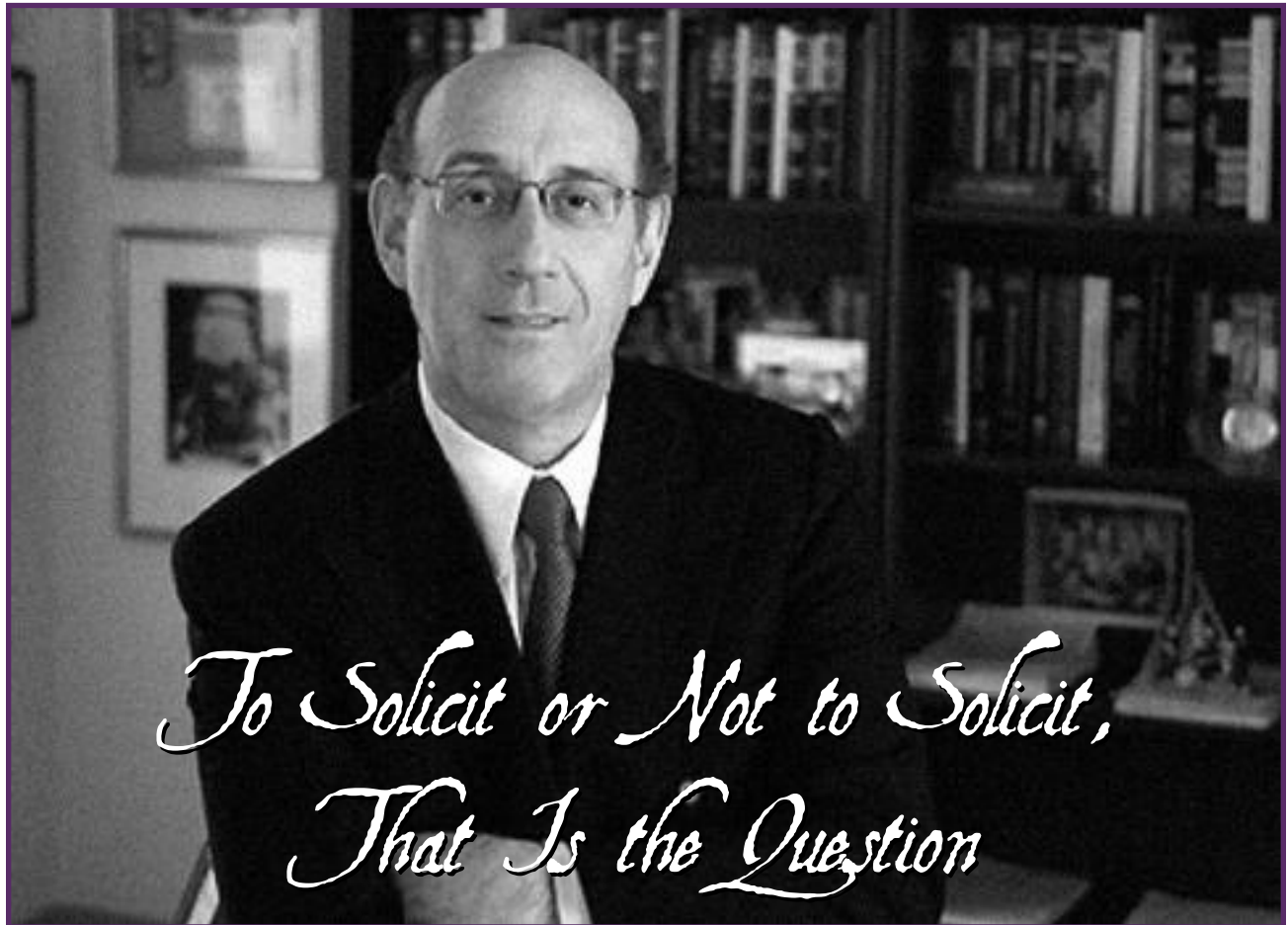
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Editor's note: From time to time in *Dispute Resolution Magazine*, we will be offering interviews with important figures in the ADR community about important topics of the day. In this installment, Margaret Shaw, a mediator and an adjunct professor at the New York University School of Law, interviews Ken Feinberg, mediator and founder of The Feinberg Group, LLP, about the propriety of mediators offering to intervene in disputes that have arisen.

Shaw: Ken, there seems to be a fair amount of controversy in our field about the propriety of a mediator hearing about a particular case, and then calling one or both parties to suggest they use him or her as a mediator. What is your view?

Feinberg: It depends upon the circumstances and the environment surrounding the call. For example, I would be reluctant to telephone parties and offer my services as a mediator if the parties were unsophisticated, which might be so in a family dispute, a landlord-tenant case, or a small claims matter. In such cases, the parties may not understand or appreciate the advantages and disadvantages of mediation or may not be able to bear the costs. I would have less trouble with the concept if I were dealing

with Fortune 500 parties or major litigation counsel who understand the dynamics of mediation and its pros and cons. So with the caveat that you are calling sophisticated parties, with whom you have had prior dealings, or lawyers you know or have previously mediated before, I would say that practice is okay, though I would be reluctant to go around counsel and contact a party directly unless that party were the in-house counsel.

Shaw: So how would you go about making such a call? Would you call just one side in the case, or would you think it best to contact both sides?

Feinberg: Assuming I knew one of the lawyers, I would be comfortable calling that lawyer and suggesting, "If you are interested, I can call the other side, or if you want to consult with them yourself, that's fine; what do you think is the best way to advance the effort and get you to the table for what, remember, is a nonbinding negotiation?"

Shaw: How often have you yourself done this kind of solicitation in the past?

Feinberg: Not that often, though I certainly have made this kind of call in the past, particularly earlier in my career when my time was not so limited. However, even where a party is sophisticated, I have never contacted that party cold. I have always had some prior relationship with them.

Shaw: The times you have made such calls, what, typically, is the response? Have people been surprised that you have called?

Feinberg: I have gotten one of two responses. Either they are interested or they are not. There has never been a time that I have been criticized for promoting mediation.

Shaw: Although in this kind of situation you are not only promoting mediation, you are also promoting yourself.

Feinberg: I have always said to the parties, "Have you thought about mediation? I would be glad to do the case, though the schedules might not work out, or one party might not want me or would prefer another mediator, that would be fine, but have you thought about mediation?"

Shaw: How do you find out about cases you might want to pursue, and how do you decide whether or not to make the call? Is it the nature of the case? Whether you know the lawyers involved?

Feinberg: All of the above. In reading various publications pertaining to current visible lawsuits, I might note a suit of particular interest where I believe mediation might be useful. Or I might learn through the grapevine about particular lawsuits involving well-known lawyers who have been involved in some of my previous mediations. There's no one avenue. It might be the nature of the case, the lawyers involved, the judge presiding over the dispute, whatever works to trigger my interest.

Shaw: Is this a practice that is totally risk-free? Are there any reasons you would caution against it becoming more widely used by the mediation community?

Feinberg: As I said before, I am cautious about promoting mediation among unsophisticated parties or people who might see this as a threat to the traditional justice system, and I would limit the types of approaches I would make to people who are sophisticated about dispute resolution and with whom I have had a prior relationship.

Shaw: What about calling just one side to a dispute? How is the other side going to react?

Feinberg: If you call plaintiffs' counsel, who in turn calls defense counsel and says, "I just got a call from Ken Feinberg who has offered to mediate the case; what do

you think?" defense counsel will react in one of three ways. One is to say, "I know Ken Feinberg. I could work with him; that's fine." Another more narrow-minded reaction is to say, "If plaintiffs' counsel knows Ken Feinberg, we don't want him. Let's mediate but get someone else." A more sophisticated approach would be to say, "We know Ken Feinberg has approached plaintiffs' counsel. This is a nonbinding process. We will use that to our advantage. Let's go to mediation, and if Ken Feinberg makes a proposal we like and the other side doesn't, our response is going to be 'you recommended him; how dare you be the ones to undercut what we view as a favorable way to get the deal done?'" Sophisticated players know the advantage of readily accepting a mediator recommended by the other side when they know of and have

respect for that mediator and think that mediator can help them settle the case. This is all about the nuances surrounding the sophisticated choice of a mediator.

Shaw: When you think about this practice, then, what you are suggesting is that it is one that is limited to experienced people who have mediated a great deal. It's not one for newer mediators.

Feinberg: Yes, that's right; an additional variable, when you discuss the pros and cons of soliciting

mediation, is the credibility and experience of the mediator. If one side proposes the name of a well-known mediator, the other side might not want to use that particular mediator but will recognize that an independent, credible mediator is being recommended.

Shaw: Any other "dos" or "don'ts" to soliciting mediations?

Feinberg: I want to emphasize that when you solicit or suggest mediation, it is wise to recognize that there are two issues: whether the parties want to mediate, and whether they want to use the solicitor as the mediator. The first is the most important.

Also, even the most sophisticated parties you solicit will want to know your fee structure and *how* you mediate. You have to address early on as part of your pitch not only whether the parties want to mediate but also the way you would go about the process in that particular case and whether you would charge by the hour or a flat rate. These are also issues you need to discuss early on.

Shaw: Thanks, Ken. ♦

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promoting mediation.*



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Moving Forward: Using Ancient Wisdom in Our Modern World to Heal the Wounds of Divorce

Rituals are . . . bridges—reliable doings carrying people across dangerous waters. It is no accident that many rituals are also rites of passage.

—Richard Schechner, *The Future of Ritual*

We participate in many rituals, but when we face the profound death of a marriage, we offer no ritual for the divorcing couple to grieve. The individual experience of becoming a single person after being part of a couple is a deeply solitary one. When the process becomes too much to handle, individuals turn to consolation of friends and family or, if necessary, seek professional legal or therapeutic services, mediation, or collaborative practice as a way to cope.

As professionals working with divorcing couples, we put our arms metaphorically around the entire family. However, we fall short of the final support. Often, the “divorced” person is left seething with resentment and, tragically, the children too often become the recipients of the pain that adults have had no way to discharge together.

What can we learn from the ancient sages? Ritual and rites of passage can heal, transform, and change the internal experience of the ritual participants, both instantaneously and permanently. Archetypal ritual and rites of passage can support us through the most difficult and meaningful transitions in life.

The ancient Jewish sages knew that divorce, although a great tragedy, is a sacred obligation and not just a remedy when a couple has lost the sacredness of their marriage. The ancient Jewish divorce ritual (the *Get*) involves elders and witnesses as essential components of the process.

The ancient wisdom found in all mystical traditions also teaches us that it is only through death that rebirth can occur and that we may find transformation through suffering. Of course, in order to heal and transform, we require loving support and a safe space in which to suffer and move through it to the other side.

Most important to note is that it is exposure to conflict, not parents’ marital status, that causes the most difficulty for children. Both children and their divorcing

parents require clear boundaries, a greater degree of closure, clear role definition, release from guilt, and forgiveness of the self and others in order to let go and move forward.

By combining the information and understanding gleaned from the present with the wisdom mined from the past, we may become the ritual alchemists of the future. As the new “elders,” we may begin to create rituals for families going through the turbulent waters of divorce.

Several factors would be helpful to consider when creating new, healing rituals of divorce with our clients:

- *Intention* is the most significant part of the process: set the conscious intention to create and enter the process with a loving heart, being fully present, for all participants of the ritual, in order for spouses to release and be released.
- Create a safe, sacred space in which the divorcing spouses can mourn their loss and move forward.
- Involve elders and witnesses who are well known by, supportive of, and share the pain involved with the necessary ending of the marriage.
- Incorporate tradition, symbols and ritual embellishments that are meaningful for each person.
- Focus on redefinition of the boundaries and roles in the newly formed relationship.
- Consider vows for continuing coparenting.
- Have participants share what they have honored in the marriage.
- Make use of music, poetry, prayer, dance, or reading that will bring participants fully into the moment.

Imagine, as the concluding piece of our mediation or collaborative work, guiding our clients as they create their own healing divorce rituals. Imagine gathering, in silence, lighting candles, or intentionally placing meaningful items within a peaceful garden or in a private setting by the sea. Imagine taking your place as the “elder” along with witnesses made up of significant family members and friends. Imagine witnessing as the divorcing spouses share “letters of truth” about what went wrong as well as what was honored in the marriage. Imagine standing alongside the divorcing spouses as they enact the end of their marriage, through words and symbolic enactments such as removing wedding rings and burying them. Imagine divorcing parents reciting vows of continuing parenting or speaking directly to their children the reassuring words that so badly need to be heard. Imagine joining with other witnesses in community as they share words of a poem, prayer or personal wishes for the future, releasing them to be free to fully love again. ♦



Marilyn Beloff, Ph.D., lives and works in Vancouver, British Columbia, Canada. She writes and offers training in the creation and use of divorce ritual. She can be reached at marilyn.beloff@gmail.com.

ADR Calendar

Arbitrating the Mega-Case: Surviving and Succeeding in the Mega-Arbitration

February 8, 2008

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Compiled by Thomas J. Campbell. Forward information about your organization's regional, national, or international conferences to campbelt@staff.abanet for possible publication in a future issue.

Reversal in Uniform Mediation Act Case

In November, the Court of Appeals of Washington found in a test of the state's Uniform Mediation Act that the judgment in a difficult mediation involving a family dispute should be reversed and remanded the case for trial because the intent of the parties to be bound by an oral agreement was not established.

In *Pryde v. Pryde* (2007 Wash. App. Lexis 3039), appellant Harry Pryde, a real estate developer who went into business with his sons, Marc and Curt, was accused of financial improprieties and mismanagement. The court appointed a special master and ordered mediation with former judge Gerard Shellan. Mandatory mediation occurred in early 2006 but ended without a settlement. Further negotiations ensued but stalled. On March 22, 2006, the attorneys for the parties held a telephone mediation with Shellan. At the conclusion of the mediation, all participants believed they had reached an agreement.

However, in an email exchange over the next few days, it became clear that the appellants did not find the agreement suitable: they made a counteroffer, which the respondents rejected. Curt and his wife filed a motion to enforce the agreement reached on March 22, and the court ordered an evidentiary hearing on Civil Rule 2A, which requires that agreements meet certain written requirements. Shellan was allowed to testify under the UMA, and he asserted that an oral agreement had indeed been reached. The court found that the agreement was enforceable.

The Court of Appeals of Washington found that the trial court was in error because the intent of the parties to be bound prior to signing a formal contract had not been established. Civil Rule 2A was not met because it states that "No agreement or consent between two parties . . . the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same." Because this rule applied to the alleged agreement and barred its enforcement, the appeals court ruled that the trial court's decision was in error, and the evidentiary hearing should not have happened.

Arbitration Administrator Has Immunity from Lawsuit

Arbitration administrators as well as arbitrators are protected from lawsuits by arbitral immunity, according to Third Circuit Court of Appeals September decision. In *Sathianathan v. Pacific Exchange, Inc.*, the court affirmed

the finding of the district court that it was right to dismiss a complaint on the grounds of arbitral immunity.

Sathianathan was the losing party in an arbitration sponsored by Pacific Exchange, Inc. After he failed in his effort to challenge the arbitration award, Sathianathan filed suit, alleging that the defendants injured him by suspending arbitration proceedings for a period of a few months in 2003; correcting a copy of the arbitration award after their jurisdiction had expired; and attempting to collect their fees.

The court found that the suspended arbitration did not single out Sathianathan (it was a suspension of all arbitrations), the correction of the award was the result of a clerical error, and that the fees were a proper part of the arbitration award. In fact, the court held that all claims against Pacific Exchange were "barred by the doctrine of arbitral immunity," which exists to shield arbitrators from liability for acts done while exercising their responsibilities.

Mediation Provision Inapplicable If Contract Has Been Terminated

USA Flea Market and EVMC entered a written contract for the sale of real property in August 2005. In November, EVMC failed to appear at the closing. USA Flea Market sent a notice of default to EVMC. EVMC did not cure the default within the time period specified in the contract, after which USA Flea Market served EVMC with a demand for payment of the earnest money, which was \$500,000.

USA Flea Market filed a complaint, but EVMC moved to dismiss because USA Flea Market had not abided by an agreement to mediate disputes before commencing litigation. The district court granted summary judgment in favor of EVMC.

In September, in *USA Flea Market, LLC v. EVMC Real Estate Consultants, Inc.*, WL 2615887, the Eleventh Circuit Court of Appeals held that the district court erred when it overlooked a material fact, that is, that the agreement, including the mediation provision, automatically terminated if any default was not cured within a ten-day period. The mediation provision therefore did not remain in force. ♦

Thomas J. Campbell is the managing editor of *Dispute Resolution Magazine*. He can be reached at campbell@staff.abanet.org.

Supreme Court to Hear Arguments in Case Involving Compelled Arbitration

The U.S. Supreme Court is considering whether the Federal Arbitration Act preempts California's exhaustion of remedies requirement. The court granted certiorari in November.

In *Ferrer (Alex E.) v. Preston (Arnold M.)*, 145 Cal. App. 4th 440, a case involving television judge Alex Ferrer, Preston claimed that the plaintiff, Ferrer, failed to pay him certain fees. Ferrer is a former Florida superior court judge who arbitrates legal disputes on the television program Judge Alex. Preston initiated an arbitration proceeding against Ferrer, and Ferrer filed a motion to stay the arbitration with an arbitrator. He also filed a motion with the Labor Commissioner to stay the arbitration. The trial court denied the motion to compel arbitration and granted the motion for a preliminary injunction, finding that Preston needed to exhaust his administrative remedies before the Labor Commissioner. The Court of Appeals affirmed, rejecting the argument that the validity of the contract first had to be validated by an arbitrator.

The Supreme Court was scheduled to hear arguments in January.

Supreme Court Hears Arguments in Hall Street Associates

In November, the Supreme Court heard arguments in *Hall Street Associates LLC v. Mattel, Inc.*, a case involving environmental cleanup and an indemnification clause in a lease agreement. The issue before the court concerned whether the FAA precludes federal courts from reviewing arbitration awards for errors even if the contractual parties have stipulated in their agreement that more extensive review than is called for in the FAA would be allowable.

The court is weighing whether an arbitrator or the courts have ultimate jurisdiction over such an agreement, and is considering setting a uniform national standard regarding arbitration awards.

Illinois Supreme Court OKs Mandatory Mediation for Medical Malpractice

Madison County in Illinois recently proposed rules that would call for mandatory mediation of all medical malpractice cases. These rules were approved in September by the Illinois Supreme Court. The rules would allow parties to choose whether judges or lawyers acted as mediators in their cases. A panel of circuit judges will meet

monthly to review medical malpractice cases with the goal of referring all applicable cases to mediation.

Fulbright & Jaworski Litigation Survey Notes International Arbitration Trends

The Fourth Annual Litigation Trends Survey was released to the public on October 15. Among many findings, it indicated that respondents were less likely to see international arbitration as offering significant cost benefits over litigation. In 2005, 32 percent of respondents felt that it did; in 2006, 26 percent; and in 2007, only 9 percent did.

Moreover, fewer respondents believe that international mediation saves time when compared with litigation. In 2006, 43 percent of respondents believed that international arbitration is quicker than litigation; in 2007, that proportion fell to 11 percent of respondents.

The full report is available from Fulbright & Jaworski at www.fulbright.com/litigationtrends. ♦

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By John Barkai

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Fall 2007 Winners

"Genie, I know you like to separate the people from the problem, but honestly, a deserted island may be taking it a little far!"

—*Tiffany Morgan*

"What do you mean you want to discuss the 'wishes' of the other party?"

—*John Anderson II*

"Three wishes? Dream on. I granted three wishes back in the days before I learned negotiation."

—*Malorie Estep*

"Is this the transformative approach of mediation?"

—*Patrick Casstevens*

"Sorry, buddy, that's not how it works in the real world. If you had wanted three wishes, you should have negotiated for them before you let me out of the bottle."

—*Robert Black*

"I apologize for rubbing you the wrong way during mediation."

—*Adriana A. Ramirez*

"Tell me your position, and I will grant you one wish. Tell me your interests and I can make all your wishes come true."

—*Jessica Johnson*

"Oops. I expected a woman comedian based on the name on the roster."

—*Paula Young*



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