SUPERIOR COURT MEDIATION TRAINING 2023

SPONSORED BY THE SUPERIOR COURT OF THE STATE OF DELAWARE
& THE DELAWARE STATE BAR ASSOCIATION

Live Seminar at the Delaware State Bar Association

Wednesday, April 19, 2023 | 8:30 a.m. – 4:10 p.m.
Thursday, April 20, 2023 | 8:30 a.m. – 4:00 p.m.
Friday, April 21, 2023 | 8:30 a.m. – 1:45 p.m.

16.25 Hours of CLE credit including 2.0 hours of Enhanced Ethics for Delaware Attorneys

16 Hours of CLE credit including 2.0 hours of Enhanced Ethics for Pennsylvania Attorneys

ABOUT THE PROGRAM

If you are interested in mediating civil cases for the Superior Court of Delaware, this is the course to take! Mediation is often considered the most effective method of Alternative Dispute Resolution. This will be your opportunity to be added to the list of certified mediators by DSBA and the Superior Court of Delaware. This training takes you through the basics of mediation, provides skills training, allows an opportunity to witness an established mediation of a case, permits trainees to practice mock mediations and roleplay, and connects new mediators with mentors during the training. Attendees will earn an official certificate after the training.

The Courts have adopted a recertification plan where your mediation certification through the Court will need a refresher course after 7 years. A refresher course is available to view online at www.dsba.org/cle.

****Note: Registrants must commit to all three days of training. Due to the nature of mediation training, we will not be able to provide a video for missed days and to be certified, one must take the full three-day training.**

Visit https://www.dsba.org/event/superior-court-mediation-training-2023/ for all the DSBA CLE seminar policies.

Please note that the attached materials are supplied by the speakers and presenters and are current as of the date of this posting.

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Live Seminar at the Delaware State Bar Association

HOST

Mark S. Vavala, Esquire
Executive Director of the Delaware State Bar Association

CLE SCHEDULE

DAY 1 – Wednesday, April 19, 2023

8:30 a.m. – 9:00 a.m.
Registration and Breakfast (provided)

9:00 a.m. – 9:05 a.m.
Welcome Remarks
The Honorable Jan R. Jurden
President Judge, Superior Court of the State of Delaware

9:05 a.m. – 11:20 a.m.
Introductions
History of ADR in Superior Court
Overview of the ADR Process

11:20 a.m. – 12:20 p.m. | Lunch

12:20 p.m. – 2:00 p.m.
Preparing for the Mediation

2:00 p.m. – 2:10 p.m. | Break

2:10 p.m. – 4:10 p.m.
Mock Mediation

Presenters
Bernard G. Conaway, Esquire
(mediator)
Conaway-Legal LLC

William Patrick Brady, Esquire
The Brady Law Firm, P.A.

Donald L. Gouge, Esquire
Donald L. Gouge, Jr. LLC

DAY 2 – Thursday, April 20, 2023

8:30 a.m. – 9:00 a.m.
Registration and Breakfast (provided)

9:00 a.m. – 10:00 a.m.
Conflict, Positions, and Values*

11:00 a.m. – 11:15 a.m. | Break

11:15 a.m. – 12:00 p.m.
Skills and Active Listening

12:00 p.m. – 1:30 p.m.
Ethics and Mediation*
The Honorable Mary M. Johnston
Judge, Superior Court of the State of Delaware

1:30 p.m. – 2:00 p.m. | Lunch (provided)

2:00 p.m. – 4:00 p.m.
Short Mediation Exercises

Mentors
Bernard G. Conaway, Esquire
Conaway-Legal LLC

Yvonne Takvorian Saville, Esquire
Wiess, Saville & Houser, P.A.

David A. White, Esquire
Office of Disciplinary Counsel

** Ethics credits during the hours indicated above.*

SUPERIOR COURT MEDIATION TRAINING 2023

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Mark S. Vavala, Esquire
Executive Director of the Delaware State Bar Association

CLE SCHEDULE

DAY 3 – Friday, April 21, 2023

8:30 a.m. – 9:00 a.m.
Registration and Breakfast (provided)

Mentors
Bernard G. Conaway, Esquire
Conaway-Legal LLC

Hon. Lynne M. Parker
Commissioner, Superior Court of the State of Delaware

David A. White, Esquire
Office of Disciplinary Counsel

9:00 a.m. – 11:00 a.m.
Role Play Mediation 1

11:00 a.m. – 11:15 a.m. | Break

11:15 a.m. – 12:00 p.m.
Role Play Mediation 2

12:15 p.m. – 12:45 p.m. | Lunch (provided)

12:45 p.m. – 1:45 p.m.
Setting up your own practice
Where to go next?

Speakers
Bernard G. Conaway, Esquire
Conaway-Legal LLC

Laura F. Browning
Laura Browning, Mediation & Arbitration

Host

Mark S. Vavala, Esquire
Executive Director of the
Delaware State Bar Association

Mark S. Vavala, Esq.

Mark Vavala has been involved with ADR (both arbitration and mediation) for several decades. In 1998, one of his duties as a Master for the court, was to assume the duties of ADR coordinator for Superior Court and scheduled mediation training for over 200 trained Superior Court mediators. As a master, he also underwent mediation training and began serving as a mediator on civil cases as assigned by the judges of the Superior Court. He continued mediating cases when he became a Commissioner in Superior Court in 2001. He has handled approximately 300 mediations, settling about 85% of them.

In 2000, Vavala obtain signatures for a petition to create the ADR Section of the Delaware State Bar Association and became the new section's first chairperson, a position he held for 2 years. In 2000, Vavala was also elected as the President of the Delaware Federation for Dispute Resolution, a community-based group focusing on the greater use of mediation.

During the first two years of the ADR Section's existence, the Court appointed Vavala and others in the section to a Superior Court steering committee to evaluate Rules 16.1 and 16.2. Independently from the steering committee, the section was tasked with making recommendations to the Superior Court as to what changes the Court should make to the two rules.

In 2016, Commissioner Vavala retired from the Superior Court and went to work as the CLE Director for DSBA, and shortly thereafter as Executive Director. In 2017, DSBA was entrusted with the duty of providing Superior Court Mediation Training and has held training sessions each year (except for 2021).

Vavala is a graduate of the University of Pennsylvania and the Widener Delaware Law School.

Day One
Wednesday, April 19, 2023

Welcome Remarks

The Honorable Jan R. Jurden
President Judge, Superior Court of the State of Delaware

Hon. Jan R. Jurden, President Judge Superior Court

The Honorable Jan R. Jurden, a Delaware native, was appointed President Judge of the Superior Court of Delaware in 2015. After proudly serving three years in the United States Army overseas following high school, PJ Jurden received her B.A. *summa cum laude* from Muhlenberg College in 1985, and her J.D. from the Dickinson School of Law in 1988, where she was an Articles Editor of the *Dickinson Law Review*. Judge Jurden joined the Superior Court bench in 2001 after practicing law for 13 years with the law firm of Young, Conaway, Stargatt & Taylor. Judge Jurden launched the first felony Mental Health Court in Delaware (which she presided over for nine years), is founder and Chair of the Sisters in Success Program, Vice-Chair of the Human Trafficking Interagency Council, Chair of the Criminal Justice Special Needs Population Committee, and a member of the Domestic Violence Coordinating Council and Criminal Justice Council. She is actively involved in criminal justice mental health, Veterans' Treatment Court and Community Court initiatives.

Introductions
History of ADR in Superior Court
Overview of the ADR Process

Rule 16. Pretrial conferences; scheduling; management.

(a) Pretrial conferences; objectives. -- In any action, the Court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:

(1) Expediting the disposition of the action;

(2) Establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) Discouraging wasteful pretrial activity;

(4) Improving the quality of the trial through more thorough preparation; and

(5) Facilitating the settlement of the case.

(b) Scheduling and planning. -- Except in categories of actions identified in this rule or any specific action exempted by the Court as inappropriate, the Court shall, at a time deemed appropriate by the Court, enter a scheduling order that either establishes or limits the time:

(1) To join other parties and to amend the pleadings;

(2) To file and hear motions;

(3) To complete discovery.

(4) To engage in compulsory alternative dispute resolution ("ADR"), the format of which is to be agreed upon by the parties. Such ADR may include, but shall not be limited to, non-binding or, if agreed to by the parties, binding arbitration, mediation or neutral case assessment. If the parties cannot agree on the format of ADR, the default format shall be mediation unless otherwise ordered by the Court.

(a) In the event the parties cannot agree on an ADR Practitioner, they shall file a joint motion with the Court within thirty (30) days of the issuance of the scheduling order requesting that the Court appoint an ADR Practitioner for the parties. The Court may impose sanctions upon a party or both parties if it determines that the parties have not attempted to agree upon an ADR Practitioner in good faith.

(b) The parties shall pay the ADR Practitioner in accordance with the allocation and amount of fees established by the ADR Practitioner and agreed to by the parties or ordered by the Court. The ADR Practitioner may apply to the Court for sanctions against any party who fails to comply with the terms of engagement established by the ADR Practitioner and agreed to by the parties including, but not limited to, dismissal of the action or default judgment.

(c) The ADR Practitioner may not be called as a witness in any aspect of the litigation, or in any proceeding relating to the litigation in which the ADR Practitioner served, unless ordered by the Court. In addition, all ADR Practitioners, when serving as an arbitrator, mediator or neutral assessor, shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in ADR, unless an act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another. Each ADR Practitioner

shall remain bound by any confidentiality agreement signed by the parties and the ADR Practitioner as part of the ADR.

(d) All memoranda, work products, and other materials contained in the case files of an ADR Practitioner or the Court related to the mediation are confidential. Any communication made in or in connection with the mediation which relates to the controversy being mediated, whether made to the ADR practitioner or a party, or to any person made at a mediation conference, is confidential. The mediation agreement shall be confidential unless the parties otherwise agree in writing. Confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding except:

(i) Where all parties to the mediation agree in writing to waive the confidentiality;

(ii) In any action between the ADR Practitioner and a party to the mediation for damages arising out of the mediation; or

(iii) Statements, memoranda, materials, or other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation conference.

(e) If a mediation is not successful, no party may use statements made during the mediation or memoranda, materials or other tangible evidence prepared for the mediation at any point in the litigation in any way, including, without limitation, to impeach the testimony of any witness.

(f) The following definitions apply to this rule:

(i) "Arbitration" is a process by which a neutral arbitrator hears both sides of a controversy and renders a fair decision based on the facts and the law. If the parties stipulate in writing the decision shall be binding, in which instance the case is removed from the Court's docket.

(ii) "Mediation" is a process by which a mediator facilitates the parties in reaching a mutually acceptable resolution of a controversy. It includes all contacts between the mediator and any party or parties until a resolution is agreed to, the parties discharge the mediator, or the mediator determines that the parties cannot agree.

(iii) "Neutral case assessment" is a process by which an experienced neutral assessor gives a non-binding, reasoned oral or written evaluation of a controversy, on its merits, to the parties. The neutral assessor may use mediation and/or arbitration techniques to aid the parties in reaching a settlement.

(iv) "ADR Practitioner" shall include the arbitrator, mediator, neutral case assessor or any other Practitioner engaged by the parties to facilitate ADR.

(g) The compulsory ADR set forth in this rule shall not apply to the following civil actions, unless otherwise ordered by the Court: matters subject to Superior Court Rules 23 and 81(a), replevin, foreign or domestic attachment, statutory penalty and mortgage foreclosure actions, and in forma pauperis actions.

(5) Scheduling order deadlines. --

(i) A party, upon reasonable notice to other parties and all persons affected thereby, who proposes a change to a deadline contained in a scheduling order entered by the Court in accordance with this Rule shall make an application to the Court for such a change pursuant to Rule 7(b) or by written stipulation and order.

Subsection (i) shall not apply to deadlines that are not contained in the scheduling order.

(ii) The Court may be promptly notified if a party does not comply with a deadline contained in a scheduling order. The Court may be notified by any party through a motion to compel, a proposal to amend the scheduling order or a request for a conference. A party may avail itself of any Rule of this Court (including but not limited to Rule 37) for a party's failure to comply with a deadline contained in a scheduling order.

(iii) Unless manifest injustice would result, a party's failure to promptly notify the Court of another party's failure to comply with a deadline contained in a scheduling order may result in a waiver of that party's right to contest any late filings by the offending party from that time forward.

(iv) This Rule shall not prevent the Court, upon motion or its own initiative, from making any orders to enforce compliance with a scheduling order.

(b) Any other deadlines or protocols appropriate in the circumstances of the case including, but not limited to, appropriate sanctions for failure to meet the deadlines and requirements established by the scheduling order to include, in the Court's discretion, dismissal of the action or default judgment.

The scheduling order may also include:

(6) The date, or dates for conferences before trial, a final pretrial conference, and trial; and

(7) Any other matters appropriate in the circumstances of the case.

(c) Subjects to be discussed at pretrial conferences. -- The participants at any conference under this Rule may consider and take action with respect to:

(1) The formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the Court on the admissibility of evidence;

(4) The avoidance of unnecessary proof and of cumulative evidence;

(5) The identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6) The advisability of referring matters to a master;

(7) The possibility of settlement or the use of extra-judicial procedures to resolve the dispute;

(8) The form and substance of the pretrial order;

(9) The disposition of pending motions;

(10) The need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) Such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) Final pretrial conference. -- A final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at this conference shall formulate a plan for trial, including the presentation of a pretrial stipulation which substantially complies with the pretrial stipulation form approved by this Court. See Form 46. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial orders. -- After any conference held pursuant to this Rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions. -- If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party, or both, to pay the reasonable expenses incurred because of any noncompliance with this Rule, including attorneys' fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

SUPERIOR COURT
OF THE
STATE OF DELAWARE

JAMES T. VAUGHN, JR.
PRESIDENT JUDGE

KENT COUNTY COURT HOUSE
38 THE GREEN
DOVER, DELAWARE 19901

ADMINISTRATIVE DIRECTIVE OF THE PRESIDENT JUDGE OF THE SUPERIOR COURT OF THE STATE OF DELAWARE

NO. 2009-2

MEDIATION TRAINING

This 13th day of August, 2009,

WHEREAS, Superior Court Civil Rule 16(b)(4) provides that Mediation shall be one of the forms of Compulsory Alternative Dispute Resolution, and that it shall be the default format where the parties cannot agree on the format; and

WHEREAS, as a service to the Bar and litigants, in order to promote effective mediation, the Court should offer a voluntary training program for those persons who wish to obtain specialized training in mediation;

IT IS DIRECTED that the Court shall maintain a program of Mediation Training in conflict resolution techniques. The program shall explain the role of the mediator, the Court's rules concerning the conduct of a mediation, effective conflict resolution techniques, and such other matters pertaining to effective mediation as the coordinators of the program shall deem appropriate. Upon successful completion of the program, a participant shall receive a certificate that the participant has completed the program; and

IT IS FURTHER DIRECTED that the Prothonotary for each County and the Court's Web site shall maintain lists of certified Mediators who have completed the

ADMINISTRATIVE DIRECTIVE NO. 2009-2
MEDIATION TRAINING
AUGUST 13, 2009

Court's Mediation Training Course.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotaries
cc: Superior Court Judges
Superior Court Commissioners
Court Administrator
Law Libraries
Margaret Derrickson
File

Superior Court
of the
State of Delaware

Jan R. Jurden
President Judge

New Castle County Courthouse
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
Telephone (302) 255-0665

ADMINISTRATIVE DIRECTIVE OF THE PRESIDENT JUDGE OF THE SUPERIOR COURT OF THE STATE OF DELAWARE

NO. 2017-3

MEDIATION TRAINING/RECERTIFICATION

This 7th day of March, 2017,

WHEREAS, on August 13, 2009, this Court, as a service to the Bar and litigants, issued Administrative Directive 2009-2 which established a voluntary training program to promote effective mediation for those persons who wished to obtain specialized training in mediation; and

WHEREAS, Superior Court Civil Rule 16(b)(4) provides that Mediation shall be one of the forms of Compulsory Alternative Dispute Resolution, and that it shall be the default format where the parties cannot agree on the format; and

WHEREAS, the Court recognizes the benefits of continued mediation training;

NOW, THEREFORE, IT IS DIRECTED that Administrative Directive 2017-3 supersedes Administrative Directive 2009-2, which is hereby amended and restated in full, as follows:

The Court shall maintain a program of Mediation Training in conflict resolution techniques. The program shall explain the role of the mediator, the Court's rules concerning the conduct of a mediation, effective conflict resolution

techniques, and such other matters pertaining to effective mediation as the coordinators of the program shall deem appropriate. Upon successful completion of the program, a participant shall receive a certificate that the participant has completed the program.

IT IS FURTHER DIRECTED that the Court shall establish a recertification plan which requires a mediator to recertify every seven (7) years to maintain a Superior Court Mediation Certification. Certified mediators may recertify by successfully completing the Court's Refresher Mediation Course or by successfully completing the Court's Mediation Program. Mediators who were certified prior to January 1, 2014 must recertify before January 1, 2020 to maintain a Superior Court Mediation Certification. All others must recertify within seven years of successfully completing Superior Court's Mediation Program to maintain a Superior Court Mediation Certification.

The Prothonotary for each County and the Court's Web site shall maintain lists of certified Mediators who have completed the Court's Mediation Training Program and those that have timely recertified.

/s/Jan R. Jurden
President Judge

oc: Prothonotaries
cc: Superior Court Judges
Superior Court Commissioners
Matthew P. Denn, Attorney General
J. Brendan O'Neill, Chief Defender
Court Administrators
Law Libraries
Michael Ferry, MA III
File

Ground Rules for a Successful Mediation Meeting

[*] Sample Ground Rules for a Facilitated Discussion (The HR Toolkit)

- One Person speaks at a time and identifies the issues that are important for him or her to discuss as well as what he or she views the conflict to be.
- Each person should also be prepared with some ideas for solutions to the problem.
- Listen to what others say about the situation as well as how they felt about it and what they thought about it.
- If you have something you feel you must say, make a note and wait your turn.
- PLEASE DON'T INTERRUPT. Each person has a right to be heard completely. You will get your turn.
- Work hard to understand what the other person is saying even if you need to take notes.
- Remember that when we are very emotional, our IQ can temporarily drop 10 to 20 points, so be aware that you may be misunderstanding something if you are extremely emotional about the conflict.
- Be prepared to explain the other person's point of view if you were asked to.
- Be prepared to explain your feelings, thoughts and needs.
- Be prepared to try to understand the other person's feelings, thoughts and needs.
- Be prepared to try to understand the other person's feelings, thoughts and needs both now and in relation to any previous interchange you may be discussing.
- Be prepared to consider that you may have been mistaken about something, have been missing information, or may have made an incorrect assumption.
- Follow the instructions of the facilitator/ mediator
- Be aware of time limits
- Be willing to make some adjustments in your behavior if any are requested.
- Be ready to request behavioral changes from the other person
  - More of something
  - Less of something
  - Something entirely new or instead of something

BUSINESS DAY

Study Finds Settling Is Better Than Going to Trial

By JONATHAN D. GLATER AUG. 7, 2008

Note to victims of accidents, medical malpractice, broken contracts and the like: When you sue, make a deal.

That is the clear lesson of a soon-to-be-released study of civil lawsuits that has found that most of the plaintiffs who decided to pass up a settlement offer and went to trial ended up getting less money than if they had taken that offer.

“The lesson for plaintiffs is, in the vast majority of cases, they are perceiving the defendant’s offer to be half a loaf when in fact it is an entire loaf or more,” said Randall L. Kiser, a co-author of the study and principal analyst at DecisionSet, a consulting firm that advises clients on litigation decisions.

Defendants made the wrong decision by proceeding to trial far less often, in 24 percent of cases, according to the study; plaintiffs were wrong in 61 percent of cases. In just 15 percent of cases, both sides were right to go to trial — meaning that the defendant paid less than the plaintiff had wanted but the plaintiff got more than the defendant had offered.

The vast majority of cases do settle — from 80 to 92 percent by some estimates, Mr. Kiser said — and there is no way to know whether either side in those cases could have done better at trial. But the findings, based on a study of 2,054 cases that went to trial from 2002 to 2005, raise provocative questions about how lawyers and clients make decisions, the quality of legal advice and lawyers’ motives.

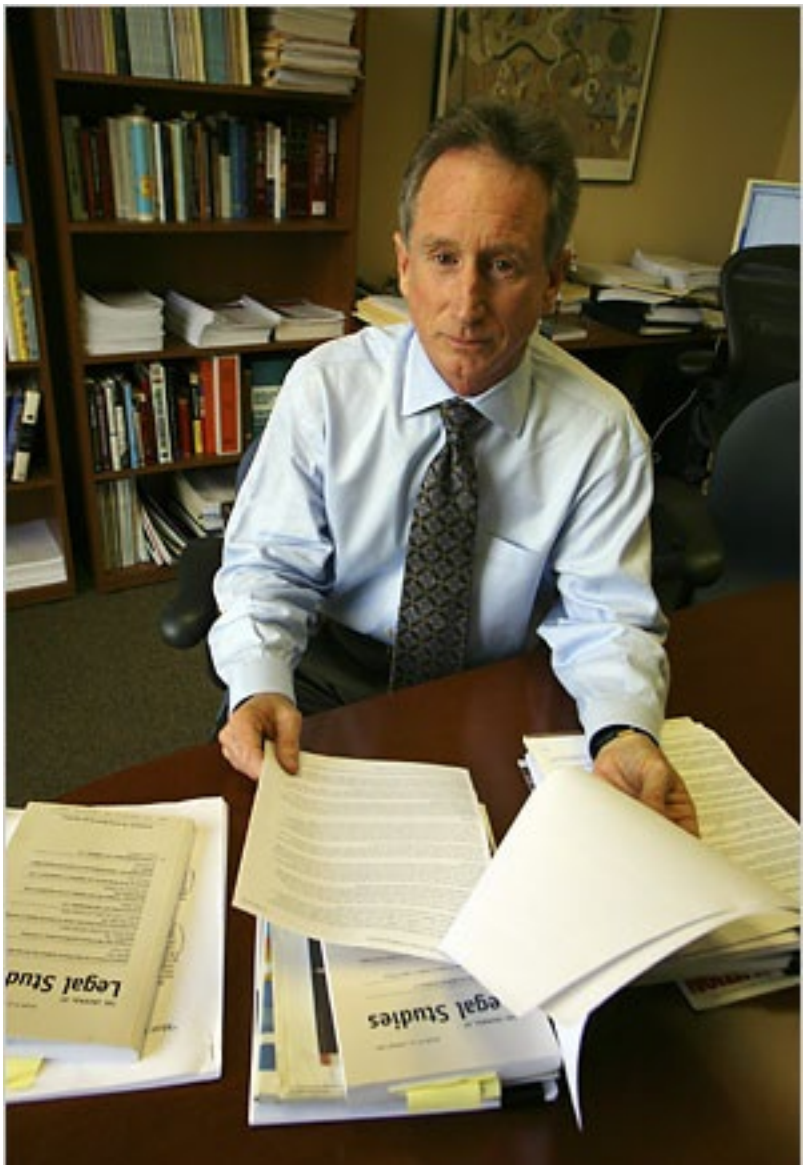
Critics of the profession have long argued that lawyers have an incentive to try to collect fees that are contingent on winning in court or simply to bill for all the hours required to prepare and go to trial.

“What I would want them to look at was whether or not the lawyers had a strong financial incentive to go to trial,” said Cristina C. Arguedas, a criminal defense lawyer in Berkeley, Calif., when told of the study. “I’m not suggesting the answer, because I don’t know, but that would be my question.”

The study, which is to be published in the September issue of the Journal of Empirical Legal Studies, does not directly answer Ms. Arguedas, but it does

find that the mistakes were made more often in cases in which lawyers are typically paid a share of whatever is won at trial.

On average, getting it wrong cost plaintiffs at about $43,000; the total could be more because information on legal costs was not available in every case. For defendants, who were less often wrong about going to trial, the cost was much greater: $1.1 million.



1 Avoid a trial, Randall Kiser advises. CreditJim Wilson/The New York Times

"Most of the time, one of the parties has made some kind of miscalculation or mistake," said Jeffrey J. Rachlinski, a law professor at Cornell who has studied how lawyers and clients decide to go to trial and who is co-editor of the journal. "The interesting thing about it is the errors the defendants make are much more costly."The study's authors have analyzed some data from New York and, after a review of 554 state court trials in 2005, have found parties to lawsuits making the wrong decision at comparable rates.

The findings suggest that lawyers may not be explaining the odds to their clients — or that clients are not listening to their lawyers.
"It's entirely possible that the attorneys are not giving adequate advice," said Mr. Kiser, who is also a lawyer but is not practicing. "An attorney could advise a client that they have a strong defense to enforcement of a contract, but that is not the same thing as forecasting what the likely outcome at trial would be."

As part of the study, which is the biggest of its kind to date, the authors surveyed trial outcomes over 40 years until 2004. They found that over time, poor decisions to go to trial have actually become more frequent.

"It's peculiar if any field is not improving its performance over a 40-year period," Mr. Kiser said. "That's a troubling finding."

Law schools do not teach how to handicap trials, nor do they help develop the important skill of telling a client that a case is not a winner. Clients do not like to hear such news.

"Most clients think they are completely right," Michael Shepard, a lawyer at Heller Ehrman in San Francisco. A good lawyer has to be able to tell clients that a judge or jury might see them differently, he continued. "Part of it is judgment and part of it is diplomacy."

Several lawyers were dismissive of the study, noting that the statistics mean nothing when contemplating a particular case, with its specific facts and legal issues, before a specific judge. They stressed the importance of a lawyer's experience.

But the study tried to account for that possibility and found that factors like the years of experience, rank of a lawyer's law school and the size of a law firm were less helpful in predicting the decision to go to trial. More significant was the type of case.

For example, poor decisions by plaintiffs to go to trial "are associated with cases in which contingency fee arrangements are common," according to the report. "On the defense side, high error rates are noted in cases where insurance coverage is generally unavailable."

The findings are consistent with research on human behavior and responses to risk, said Martin A. Asher, an economist at the University of Pennsylvania and a co-author. For example, psychologists have found that people are more averse to taking a risk when they are expecting to gain something, and more willing to take a risk when they have something to lose.

"If you approach a class of students and say, I'll either write you a check for $200, or we can flip a coin and I will pay you nothing or $500," most students will take the $200 rather than risk getting nothing, Mr. Asher said.

But reverse the situation, so that students have to write the check, and they will choose to flip the coin, risking a bigger loss because they hope to pay nothing at all, he continued. "They'll take the gamble."

The third co-author of the study was Blakeley B. McShane, a graduate student at the Wharton School of the University of Pennsylvania.

Whether to take diligent notes or not is of debate when acting as a mediator.

Elisan Ali & Alnoor Maherali

"To Jot or Not to Jot – Taking notes during a mediation.

Like with most aspects of mediation, we give our clients the same information: that is their choice. If jotting your thoughts and responses down so you don't miss them, or having something to do with your hands, is helpful, that's great! You should feel free to take notes.

Some people, however, find that writing everything down obstructs them from listening, thinking, or responding honestly. They may be able to repeat back what they just heard but did not actually process it. You should feel comfortable jotting down what you need without letting it keep you from listening. Mediation is not about capturing testimony but being able to share your side of the story, and understanding the other side as well.

The desire to take notes can be further complicated by our requirement of confidentiality - for mediation to work, it must be confidential. That gives the parties the space and comfort to share their concerns without fear that they will be used against them in court. That's why clients of Venn Mediation are provided a confidentiality agreement specifying that we protect our clients' information to the maximum extent allowable by law. And our clients agree ahead of time to destroy any notes as Venn Mediation provides them with any final agreement or Memorandum of Understanding for their records.

A word on online mediation: teleconferencing can add an extra layer of complexity to regular meetings. In Venn Mediation's online mediations, we encourage parties to take notes on their reactions and points. Particularly when the conflict is heated and there are strong feelings at stake. Why is that? Mediation requires us to hear both sides – which can be more difficult online when people are talking over each other, and internet lag disrupts what otherwise would be a normal conversation.

This requires creativity on the part of the mediator(s) managing the process. In our experience, when an online mediation gets heated, a mediator can serve the parties well by adding a little more structure to the process to make sure the parties can hear each other. When parties jot notes down rather than interjecting and interrupting each other, everyone is able to hear and understand what everyone else is saying. With those additions, the mediation process can continue as seamlessly as if everyone is in the same room.

In summary, whether you're a jotter or not, you should do what makes you comfortable. But if mediating online, maybe keep some paper close by. Disputes are never easy, but dispute resolution does not have to be. We'd love to help you with that.

See also: HOW TAKING NOTES BY HAND INSTILLS GREATER TRUST IN MEDIATION, by Taylor C. E. Eagan, October 2018, Dispute Resolution Journal, Vol. 73, No. 2.


FIVE TYPES OF ADR
CONCILIATION
NEUTRAL THIRD PARTY TO COMMUNICATE WITH THE PARTIES IN THE EXCHANGE OF INFORMATION AND SETTLEMENT OPTIONS
NEGOTIATION
TRADITIONALLY OCCURS DIRECTLY BETWEEN THE PARTIES AND THEIR COUNSEL AND DOES NOT INVOLVE A NEUTRAL THIRD PARTY
ARBITRATION
A NEUTRAL ARBITRATOR RENDERS A DECISION, CALLED AN AWARD, AFTER THERE HAS BEEN A PRESENTATION OF EVIDENCE
MEDIATION
A VERY FLEXIBLE PROCESS THAT CAN B EFFECTIVELY USED AT ANY TIME DURING THE COURSE OF THE DISPUTE
COLLABORATIVE LAW
BOTH PARTIES ARE REPRESENTED BY A COLLABORATIVE ATTORNEY AND BOTH PARTIES AGREE NOT TO LITIGATE

CONCILIATION

- ADR PRACTIONER = 'CONCILIATOR'
- PARTIES SEEK RESOLUTION OF A DISPUTE
- DIFFERENT FROM ARBITRATION – ARBITRATOR MAKES RULINGS, HANDLES EVIDENCE
- DIFFERENT FROM MEDIATION – IN CONCILIATION, PARTIES ARE TRYING TO REPAIR A RELATIONSHIP
- COMMONLY USED: JAPAN, FAMILIAL RELATIONSHIPS, QUAKERS

NEGOTIATION

- ADR PRACTIONER = NONE
- PARTIES SEEK RESOLUTION OF A DISPUTE
- DIFFERENT FROM MEDIATION – PARTIES THEMSELVES LISTEN AND WORK OUT THEIR PROBLEMS.

COLLABORATIVE LAW

- ADR PRACTIONER(S) = COLLABORATIVE LAWYER(S)
- PARTIES SEEK RESOLUTION OF A DISPUTE
- MAKE AGREEMENT NOT TO GO TO COURT

ARBITRATION

- ADR PRACTIONER = ARBITRATOR
- PARTIES SEEK RESOLUTION OF A DISPUTE
- 3RD PARTY NEUTRAL CAN MAKE RULINGS, EVALUATE EVIDENCE, HEAR TESTIMONY AND MAKE A DECISION AT THE END OF THE ADR HEARING.

MEDIATION

- ADR PRACTIONER = MEDIATOR
- PARTIES SEEK RESOLUTION OF A DISPUTE
- 3RD PARTY NEUTRAL DOES NOT MAKE A RULING OR HEAR EVIDENCE
- LISTENS TO EACH PART AND FACILITATES AN OUTCOME BASED ON QUESTIONS AND ANSWERS.

Preparing for the Mediation

Mock Mediation

Presenters

Bernard G. Conaway, Esquire (mediator)
Conaway-Legal LLC

William Patrick Brady, Esquire
The Brady Law Firm, P.A.

Donald L. Gouge, Esquire
Donald L. Gouge, Jr. LLC

Bernard G. Conaway, Esq., Conaway-Legal LLC

BERNARD G. CONAWAY is the founding member of Conaway-Legal LLC. Over the course of his 27 year career he's served as a law clerk to former Clarence Taylor, of the Superior Court of Delaware, was appointed and served for 10 years on the Superior Court of Delaware as a Special Mater in Complex Litigation, and was a partner in very large and small law firms.

His practice focuses on ADR, bankruptcy, practice before the Delaware Court of Chancery, corporate and alternate entity governance under Delaware law and complex civil litigation. In twenty-seven years of practice, Mr. Conaway has been involved in every facet of complex civil litigation serving a lead and local counsel, as Special Master, as a mediator and party selected arbitrator.

Mr. Conaway frequently appears in Delaware's Court of Chancery on matters involving director/officer indemnification and advancement pursuant to Section 145 of the Delaware General Corporate Law, for books and records demands under Section 220, served as corporate custodian under authority of Section 226, Section 275/276 regarding dissolutions, director and officer demands for indemnification and advancement, injunctive relief, specific performance, quiet title actions, guardianship, trust and estate litigation and other equitable claims. In his bankruptcy practice.

Mr. Conaway has served as lead and local counsel on every side of the bankruptcy process including representing creditors, debtors, directors against preference and insider claims, landlords, and other parties seeking to lift the automatic stay.

Since 1994, Mr. Conaway served as an arbitrator and mediator. Since then he has sucessfuly mediated thousands of cases, including hundreds of large complex, multi-party, multi-level insurance, construction, bankruptcy, environmental, and commercial cases. He has mediated law firm break-ups, intra-company disputes, governance and financial disputes between alternate entity members and personal injury claims. Mr. Conaway has served for over thirteen years as a mentor in the Delaware Superior Court's mediation training program. He formerly served as adjunct instructor at the National Judicial College in Reno, Nevada teaching civil mediation.

Mr. Conaway volunteers his time to a number of boards and committees. Over the past fifteen years he has served on numerous board and committees including the Widener University School of Law Alumni Association (board member), the York College of

Pennsylvania Collegiate Counsel (board member), St. Thomas More Society of the Archdiocese of Wilmington (past president), Caesar Rodney Rotary Club (member), Colin J. Seitz Bankruptcy Inn of Court (barrister) Wilmington, Richard S. Rodney Inn of Court (Executive Committee) Wilmington, and Superior Court Committee on Complex Litigation (member). He serves as a volunteer attorney *Guardian Ad Litem* for Delaware children and has continiously done so since 2003.

EVENTS

• Ethical Considerations in Alternative Dispute Resolution

• “Expert” Advise From Successful Arbitrators

• ADR in Practice: A Lawyer Roundtable

EXPERIENCE

• Represented a corporate client opposing a director’s 220 action involving an onerous demand for books and records. The Chancery Court dismissed the matter without production of any records and without answering the complaint.

• Appointed and/or selected to serve as a Special Discovery Master in 9 complex civil cases involving insurance coverage, products liability, construction, mass tort, and environmental cases.

• Represented a corporate client opposing a director’s 220 action involving an onerous demand for books and records. The Chancery Court dismissed the matter without production of any records and without answering the complaint.•Settled a multi-million dollar bankruptcy preference claim asserted against one of the world’s largest aluminum suppliers. The case was complicated by the interplay between US and INCO maritime conventions as well as US, UK and Bahrain law.

• Successfully secured liquidation of a client’s LLC interest in the face of vigorous opposition involving protracted discovery, trial, and appeal to the Supreme Court of Delaware.

• Following a year long effort, successfully mediated virtually all of the pending state court abuse claims brought against multiple religious order entities affiliated/working with the Diocese of Wilmington. The mediation was complicated by the number of claims, multiple insurers’ reservations of rights, unresolved and novel legal questions, funding issues, and the Diocese’s then pending bankruptcy.

• Served as local counsel for an ad hoc consortium of preferred security holders in the Chapter 11 of Washington Mutual, Inc.

• Served as local counsel to an indentured trustee and an Ad Hoc Committee of bondholders in an expedited Delaware Chancery Court trial and successfully appealed the matter to the Supreme Court of Delaware resolving a dispute over Calpine's use of $700 million subject to lien indenture restrictions.

• Served as local counsel to bondholders holding $2 billion in Countrywide Series B May 2007 bonds in an action seeking a determination whether the acquisition of Countrywide constituted a "change of control" and therefore triggered bondholder put rights. The matter was settled and the bondholders were paid nearly $2 billion (i.e., close to par) for their bonds.

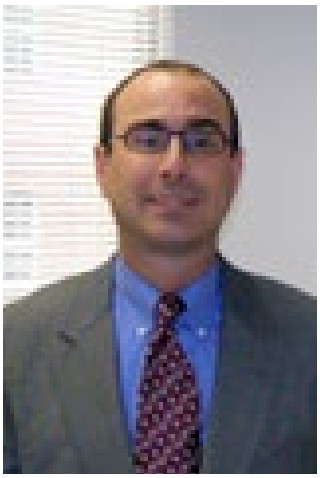
• Successfully defended the former CEO of a major imaging company against preference, fraudulent transfer, and insider trading claims.

• Frequently draft LLC and Series LLC organizational documents for Delaware real estate investors including completion of client tailored limited liability agreements.

• Often represent *pro bono*, minor children in actions where the state is seeking to terminate parental rights.

AWARDS Mr. Conaway has achieved an AV Preeminent Peer Review Rating for professional ethical standards and legal ability by Martindale-Hubbell. Martindale-Hubbell Ratings provides reviews of lawyers and law firms for consumers and professionals.

Donald L. Gouge, Esq., Donald L. Gouge, Jr., LLC



Donald L. Gouge, Jr., LLC is located in downtown Wilmington, Delaware within blocks of all Courts. This is a small firm which concentrates on general civil litigation specializing in real estate litigation including but not limited to landlord-tenant cases, sellers' disclosure, specific performance, quiet title and petition for partition.

Mr. Gouge brings more than 35 years of experience to deal directly and individually with legal matters and is committed to serving his clients' needs. Mr. Gouge also serves as local counsel for attorneys in matters brought before Delaware Courts.

William Patrick Brady, Esq., The Brady Law Firm P.A.

William P. Brady (Bill) is the founder and Managing Attorney of the Brady Law Firm, P.A. He was born and raised in Wilmington, Delaware and is a graduate of St. Mark's High School (1984), Goldey-Beacom College (1991) and Widener University School of Law (1994).

Bill has 25 years' experience as a Delaware attorney and his areas of practice include residential and commercial landlord/tenant law, real estate purchase and refinance settlements, representation of homeowners' and condominium associations, real property litigation and transactional matters, general civil litigation and estate planning and probate.

Bill is a member of the Delaware State Bar Association, for which he is the Association's President for 2019-20, a member of the Litigation and Alternative Dispute Resolution (ADR) Sections and a member of the Richard S. Rodney Inn of Court, as well as a past Chair of the Real and Personal Property Section and Small Firms and Solo Practitioners Section.

Bill has extensive experience before all Delaware State trial Courts, including the Superior Court, Court of Chancery, Court of Common Pleas and Justice of the Peace Courts. He is also admitted to practice in New Jersey and Pennsylvania, as well as before the United States Supreme Court. Bill has achieved the AV Preeminent Rating by Martindale Hubbell, which is the highest rating an attorney can receive for legal ability and ethics. He is a frequent speaker at Real Estate related Continuing Legal Education seminars in Delaware and was named one of Delaware's top Real Estate Attorneys for 2019 in Delaware Today Magazine.

Bill serves on the Board of Directors of the Goldey-Beacom College Alumni Association and the Board of Directors for New Castle County Head Start. He is also one of two attorneys on the State of Delaware Common Interest Community Advisory Council, which assists the State Ombudsman for Common Interest Communities throughout Delaware.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SUSAN CAROL JENKINS,	)	
Plaintiff	)	
	)	
v.	)	C.A. No. N21C-04-190
	)	
BRYTNEE SILVERMAN,	)	
Defendant	)	

PLAINTIFF'S MEDIATION STATEMENT

I. Facts

In August 2020, Defendant signed a lease with Plaintiff Lauren Jenkins, the owner of the property at 144 Elkton Road, Newark, Delaware (half of a duplex) for a term of one year beginning September 3, 2020 and ending on September 2, 2021. Payment for each month's rent ($1200/mo) was to be paid on the 3rd of each month. No other parties signed this lease.

The lease has a provision which indicates, "LESSEE acknowledges that LESSEE is liable for any damages to the LEASED PROPERTY that are not covered by the initial security deposit." Additionally, there is a provision in the lease that "If LESSEE causes damage to the property which has a value greater than the value of the security deposit, LESSOR shall give LESSEE a reasonable amount of time to submit an additional security deposit upon showing of the cost of the repairs less the deposit." Finally, after a showing by the LESSOR as to the amounts of the repairs and after a reasonable time if LESSEE fails to provide a further security deposit within a reasonable time, LESSOR may terminate the LEASE with cause." Additionally, there is a clause in the lease that Ms. Jenkins may immediately terminate the lease if there is evidence of ongoing illegal activity or significant egregious behavior of the LESSEE which threatens the safety of the community or the economic value of the property.

Defendant held multiple parties on the leased property both in the leased apartment and on the grounds immediately surrounding the property. The following are dates that Ms. Jenkins has documented:

September 4, 2020, Ms. Jenkins informed Defendant that neighbors had complained and police were called. Damage to property mostly excess garbage. Lamppost top unscrewed but later found and repaired. (Handyman paid $35 to re-attach).

September 30, 2020, after another party, involving 75 guests, mostly college students, the kitchen window had broken glass. Ms. Jenkins informed Defendant that the cost of the repair would be deducted from the security deposit if Defendant did not repair. Not repaired yet.

November 11, 2020, Defendant had 40 persons in the apartment and around the grounds. Ms. Jenkins visited the apartment the next day and noticed woodwork missing from two door frames and a large crack in the drywall in the living room area (immediately across from the entrance). To the right of the crack was what looked like a fist impression about six inches in diameter. The neighbor who lived in the other half of the duplex, Ms. Kravitz (146 Elkton Rd) informed Ms. Jenkins that she heard a loud party and what sounded like a punch to the wall which was adjacent to her own living room. When Ms. Jenkins saw this damage, while speaking to Defendant from her doorway, Defendant restricted her ability to look around the apartment for other damages. Defendant said she would pay for any damages that were caused by her guests. Ms. Jenkins asked Defendant to stop having large parties on the premises.

December 20, 2020, Defendant held a Christmas party in which nearly 100 people gathered during a day-long "open house" party. Guests were permitted to arrive as early as 7 a.m. and could stop in and out during the entire day, partaking in food and alcoholic drinks served by a professional bar tender. The drunken guests ultimately left for Christmas break which provided her an opportunity to inspect the property while Defendant was with her parents in New Jersey.

According to the lease, Ms. Jenkins, as landlord, could not routinely enter the property without permission of the lessee unless she had "exceptional circumstances," which included entering the apartment to inspect for security issues, for suspected illegal activity which could hold the landlord liable, or to repair any requested matters submitted by the tenant. Specifically excluded from the illegal activity exception was suspicion of underage drinking or use of marijuana. Ms. Jenkins exercised her right as a landlord to inspect the property for structural damage which she believed was caused on the night of December 20 when someone or something cracked the living room wall. Moreover, she had cause to enter the apartment because a neighbor stated she heard someone talking about "Blow" which is a colloquial term for cocaine, and she was seeking evidence of illegal use of cocaine on her property. Finally, Defendant had filed a claim in September that the air-conditioning was not working properly. Ms. Jenkins was exercising her right to respond to a tenant complaint for needed repairs.

When Ms. Jenkins entered the property on December 22, just after Defendant had left for New Jersey, she discovered trash all over each room of the apartment. Ms. Jenkins described the appearance as if "a garbage bomb had exploded." She found several large cracks in the drywall and several more "punch" impressions or holes. Two doorframes had had all their woodwork removed and stacked in the kitchen area. The stove had a thick black sticky substance all over it and there was a smell of burnt food and marijuana in the kitchen and living room areas. In Defendant's bedroom, there was more garbage, open food containers covered in ants, a loaf of moldy bread, and the word "REDRUM" written in lipstick across one wall.

Ms. Jenkins had a drywall specialist and carpenter visit the apartment on December 23 who gave her an estimate in early January of repairs needed in the amount of $1400, which was $200 more than the initial security deposit.

Ms. Jenkins initially thought to evict Defendant immediately and changed the locks on the door to the building and apartment. She believed the lease permitted her to do this under an "egregious conduct" clause mentioned above.

On January 3, Defendant returned, found the doors locked and demanded that Ms. Jenkins allow her access to the apartment. Ms. Jenkins informed Defendant that she was evicted due to the damage to the property and the fact that she was permitting people to use illegal drugs in the apartment. Defendant cried and begged Ms. Jenkins to allow her time to remedy the damage. She claimed she had no other place to live and that she could not afford to move back home to New Jersey and still take classes in Delaware. Ms. Jenkins, against her better judgment, permitted Defendant to live there for two more months, during which time she told Defendant she needed to fix the property and hold no further parties. Defendant agreed and Ms. Jenkins gave her the new lock keys.

Between January 3 and February 15, Defendant held no parties and informed Ms. Jenkins that she was seeking a repairman for the damage.

However, on February 16, Defendant held a Valentine's Rave in her front yard and porch in which several students broke branches off the 100 year old oak tree when they tried to climb it. Ms. Jenkins arrived during the rave with police officers who made everyone leave. Ms. Jenkins demanded that Defendant allow her to enter the property to inspect how the damage repair was proceeding and Defendant told police they could not enter without a warrant.

On February 17, Ms. Jenkins once more returned with the police who had a warrant only to find the door locks had been changed. After paying a locksmith $135, Ms. Jenkins entered her own property to find all of Defendant's belongings were removed during the night and all the damage still remained. She did not notice any new damage other than the broken tree branches and more garbage scattered about.

II. Strengths and Weaknesses of Plaintiff's Case

Ms. Jenkins feels she has a strong case. Defendant abandoned the property without paying the required rents for March through August. She damaged the property beyond the amount paid in the security deposit. The damages above the security deposit were $1000 in drywall repair and replacement, $750 in replacement of broken door moldings, $900 in cleaning fees, $135 in locksmith fees, and lost rent from March to August amounting to $1200/mo or $7200.

If there are any weaknesses in Ms. Jenkins case, it is the fact that she permitted Defendant to remain on the property after she had clear reason to no longer trust she would keep the property maintained. Additionally, she acknowledges that the reasoning leading up to her decision to enter the apartment without permission probably has some argument that she should not have done so. However, Ms. Jenkins believes a jury would excuse her due to the behavior of Defendant.

III. Settlement Position

Ms. Jenkins is interested in settling this case because the current apartment market has made it difficult to find a new tenant unless she can provide an updated air-conditioning and heating unit, which will cost her a considerable amount of money. She needs to recover the rent that is owed under the lease as

well as the out-of-pocket expenses for repairs. She has also suffered significant stress due to this lease, including a recent heart attack she attributes to Defendant's behavior. She is suing Defendant for emotional distress in the amount of $30,000.

Plaintiff's initial demand will be $45,000.

Respectfully submitted,

Donald L. Gouge, Esquire
Donald L. Gouge, Jr. LLC

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SUSAN CAROL JENKINS,	)	
Plaintiff	)	
	)	
v.	)	C.A. No. N21C-04-190
	)	
BRYTNEE SILVERMAN,	)	
Defendant	)	

DEFENDANT'S MEDIATION STATEMENT

I. Facts

Brytnee Silverman is a college junior at the University of Pennsylvania. At the start of her sophomore year, at age 19, she signed a lease to rent a small house as her off-campus housing, property at 144 Elkton Road, Newark Delaware which was owned by Plaintiff. The lease was drafted by the owner without the help of legal counsel and was to take effect between September 3, 2020 and September 2, 2021. Ms. Silverman agreed to provide the first month's rent of $1200 and a security deposit in the same amount as a month's rent ($1200).

Immediately upon moving in, Ms. Silverman noticed that the air conditioning was not working. September 2020 had unusually hot days and no fans or open windows made living in the sultry town of Newark any easier. She contacted Plaintiff and asked for it to be repaired. Plaintiff said she would "definitely fix it." Ms. Silverman called several times during September but gave up as the colder October days started making the room more comfortable. She made a note to contact Plaintiff in early spring before it became too hot. At no time during this difficult hot six weeks did Ms. Silverman fail to pay her rent.

Ms. Silverman had concerns that Plaintiff was "spying" on her from the beginning of the lease, recounting several times that Plaintiff knocked on her door to complain about loud parties. Ms. Silverman acknowledges that neighbors did call the police on one occasion but that, after that incident, Ms. Silverman held only get-togethers with friends, similar to what most college sophomores at the University of Delaware engaged in.

Ms. Silverman also acknowledges that some of these get-togethers with friends involved persons drinking, but that no one underage had consumed alcohol, including herself. There was one incident where a guest at her party smoked marijuana, but Ms. Silverman asked her to put it away and the guest obliged.

Ms. Silverman is aware that there was some damage to the dry wall during one of the get-togethers. She had been planning to repair the damage prior to moving out in September 2021 but once Plaintiff began harassing her, invading her privacy, and taking her security deposit, she felt she had

no reason to do so. The damage to the oak tree, according to Ms. Silverman was not due to any action by her or her guests, but that the tree was 100 years old and branches routinely fell off during storms due to its age.

Ms. Silverman held a Christmas party at the leased property on December 20, 2022 and left for her parents' home in New Jersey on December 22, 2020 at 2:00 PM. At 3:45 PM, Ms. Silverman was texted by her friend, Ms. Kendall Savoire, who lived across the street, that "OLD LADY JENKINS IS CHANGING THE LOCKS!"

Ms. Silverman returned to campus on January 3 and found the locks changed. She demanded that Plaintiff allow her access by providing a new key. Plaintiff attempted to evict Ms. Silverman illegally but realized she would have to permit Ms. Silverman to fix any damage. Ms. Silverman received a new key and moved back onto the property. No other documents were signed by the parties and no other agreements were made other than the original lease.

Ms. Silverman did not hold any other parties until February 16 which was proceeding the way "any other party on campus" normally went. Unfortunately, Plaintiff arrived with the police demanding that Ms. Silverman permit them to enter the apartment. Ms. Silverman exercised her right to demand a warrant and police left, presumably to get one.

Exhausted by this behavior by Plaintiff, Ms. Silverman had a friend change the locks so she could gather her belongings without being further harassed by Plaintiff. Most of Ms. Silverman's classes were still remote and she felt that she could leave Newark and Plaintiff's annoying behavior and still attend her classes virtually from New Jersey. She had intended to leave the new key with Plaintiff but forgot to do so.

Ms. Silverman, a 19 year-old student, made the best choice she could for her own mental health. She had committed no illegal acts and had fulfilled her obligations under the lease up to that point. She had intended on repairing any damaging and removing any trash by the end of the lease and understood that her security deposit could cover what she did not repair. However, behavior by Plaintiff made living on this property unreasonable. Nearly six months had passed and Plaintiff had still not repaired the air-conditioning and Ms. Silverman felt that once May arrived, the apartment would once more be uninhabitable. Furthermore, Plaintiff's strange behavior and harassment which now involved calling the police to enter her home made it no longer reasonable for her to remain on the property. In Ms. Silverman's opinion, Plaintiff had voided their lease by these actions and Ms. Silverman's abandonment of the property left Plaintiff able to use her security deposit to repair anything she needed before renting the property out to a new tenant.

II. Strengths and Weaknesses of Defendant's Case

Ms. Silverman believes she has a strong case justifying her breaking of the lease. Not having air-conditioning for the first six weeks and no prospect of having it fixed when hotter weather arrived were sufficient reasons for her to leave. But, more importantly, she believed Plaintiff broke the lease by entering the property without cause and attempting to evict her by changing the locks.

Ms. Silverman does acknowledge that Plaintiff ultimately let her return to the property but she felt she could not properly enjoy the benefit of her "home" when constantly in fear of Plaintiff's harassing behavior.

She also acknowledges that she failed to provide Plaintiff with a new key before she left for New Jersey and is willing to pay the locksmith cost associated with that mistake.

III. Settlement Position

Plaintiff received $9,600 in rent and security deposit before Ms. Silverman left. Ms. Silverman feels this more than compensates Plaintiff for use of the property and repair of any damages. She will pay to have Plaintiff made whole with regards to the locksmith in February, 2021.

Defendant's opening offer, therefore, will be $135.

Respectfully submitted,

William Patrick Brady, Esquire
The Brady Law Firm, P.A.

Day Two
Thursday, April 20, 2023

Skills and Active Listening

ACTIVE LISTENING

- IMPORTANT because it engages you with the person to whom you are speaking and **creates a positive bond.**
- **Listening not hearing**. It is easy to mimic listening without really listening.
- The parties/lawyers **feel heard and valued.**

ACTIVE LISTENING

Applications beyond court cases

WORK – for supervisors, great for handling HR issues; leading teams

RELATIONSHIPS – in difficult times, being able to listen and get the big picture can reduce the times you just try to fix things. You can help your partner or friend know the situation is more than about you.

SOCIALLY – understanding new people, asking questions, learn more. Active listening often means you will talk longer and thus, develop stronger bonds.

ACTIVE LISTENING

- Be patient
- Make eye contact regularly (about 6070% of time)
- Give both verbal and nonverbal feedback. (nodding, sounds of understanding, appropriate smiling)
- Ask questions; ask for clarification
- Be neutral/nonjudgmental
- Reflect back what is said.
- Summarize.

NOTE: This is a mediation skill. Some or all of this may not be a "practical skill" depending on your situation.

QUESTIONS for active listening

- Tell me more.
- Why is that?
- What does that look like? Or In practice, what might that look like?
- How did you come to that opinion or conclusion?
- What does that mean to you?
- When you said (quote them word for word) – what did that mean exactly?
- Are you saying (paraphrase what you think they said)?
- Did that greatly impact you? Did that hurt you?

LISTENING STYLES

People-oriented

–

You ask yourself, "What motivates the speaker?" (more interested in the musician than the music)

Action/Task-oriented

–

You ask yourself, "What does the speaker want?" (more interested in purpose rather than statements)

Content-oriented

–

You ask yourself, "Does this make sense?" (more interested in global truth rather than individual truth)

Time-oriented

–

You ask yourself, "Can you get to the point?"

Mediation style

–

You ask yourself, "What is this person saying both factually and internally?" (all of the above)

SKILLS OF A MEDIATOR

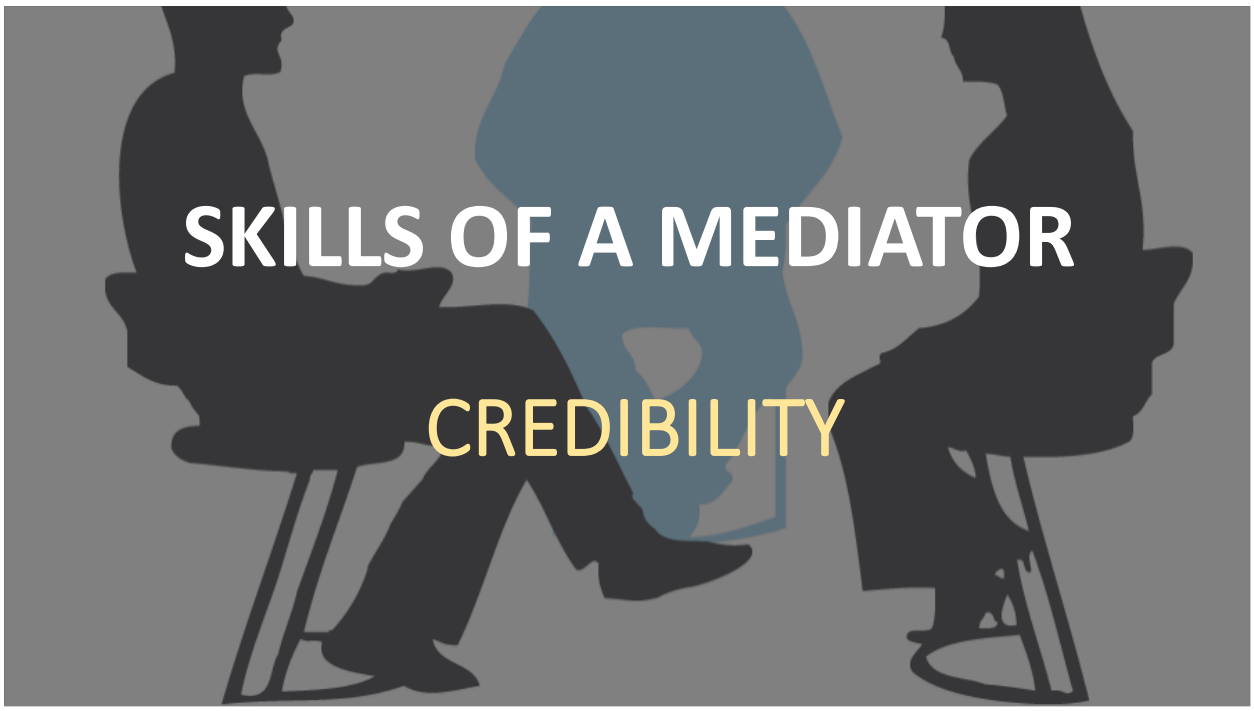
BEING EMPATHETIC

DEVELOPING EMPATHY

- Sometimes, it's difficult to listen to someone who has a different perspective than you. Sometimes you bring to the table certain prejudices that you've developed. How do you mediate a case for someone who has different opinions/thoughts/perspectives than you?
- E.g. Do you like plaintiffs in soft-tissue cases? What about law enforcement? People who are very religious? Insurance adjustors? Vegans? Democrats? Republicans?

DEVELOPING EMPATHY

- Respect
- Mediation does not require agreeing with them.
- Empathy is not Evangelism. Focus on getting to understand them not you.
- Temporarily suspend your own opinions/beliefs. Try to focus only on their opinions and how they feel.
- Suspend your perceived opinions about what they believe to find what they ACTUALLY BELIEVE.

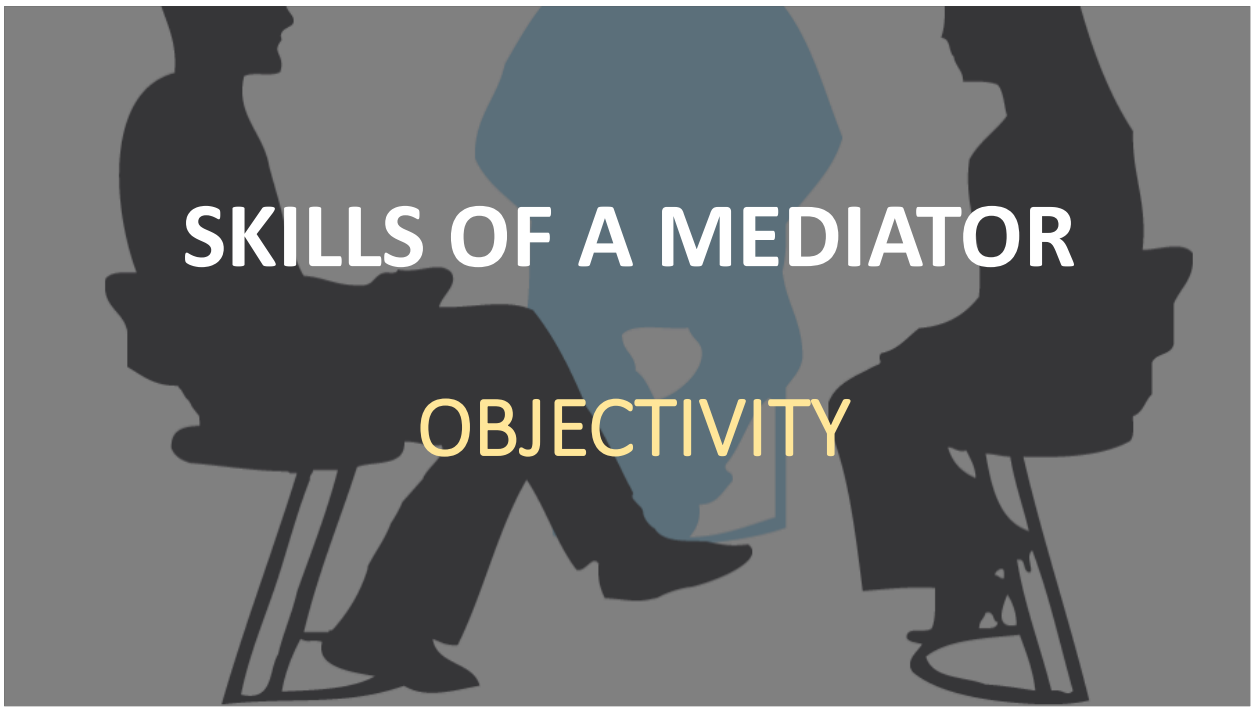


SKILLS OF A MEDIATOR

CREDIBILITY

CREDIBILITY

- Be believable and consistent.
- Disputants are often looking for signs you are not neutral. So far, their experience with the case has shown them this.
- Disputants often have been forced to try this mediation thing.
- The more the mediator looks prepared, intelligent and neutral, the more the credibility grows.

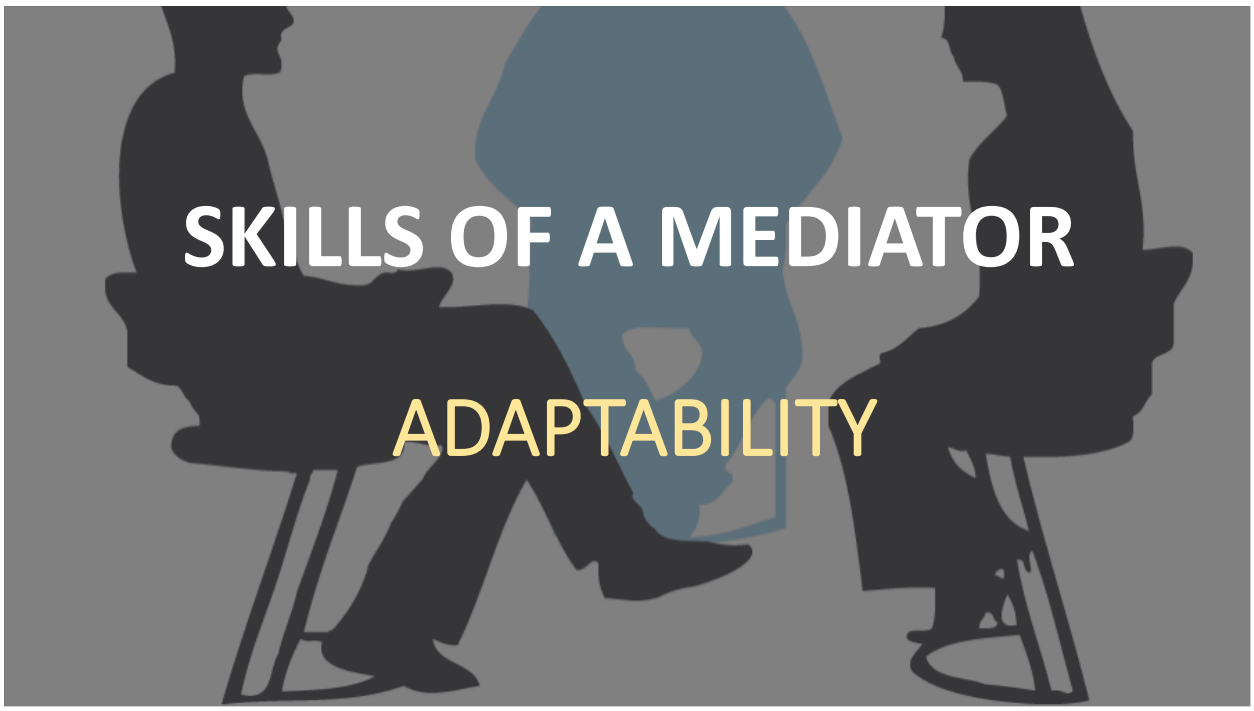


SKILLS OF A MEDIATOR

OBJECTIVITY

OBJECTIVITY

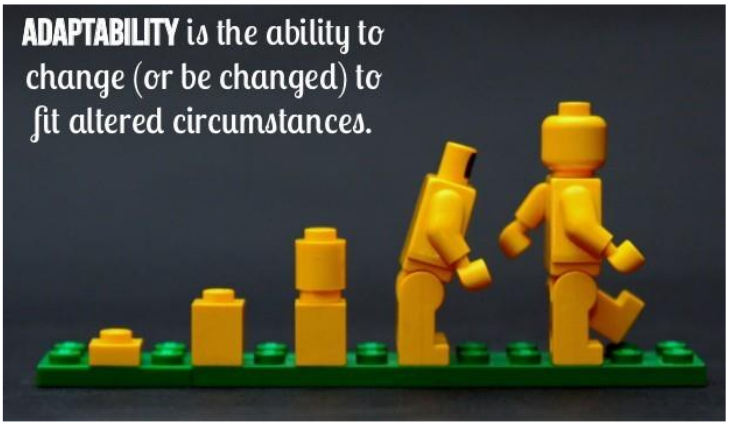
- No personal relationships. Can't mediate a friend's case.
- You must be unaffected by the outcome.



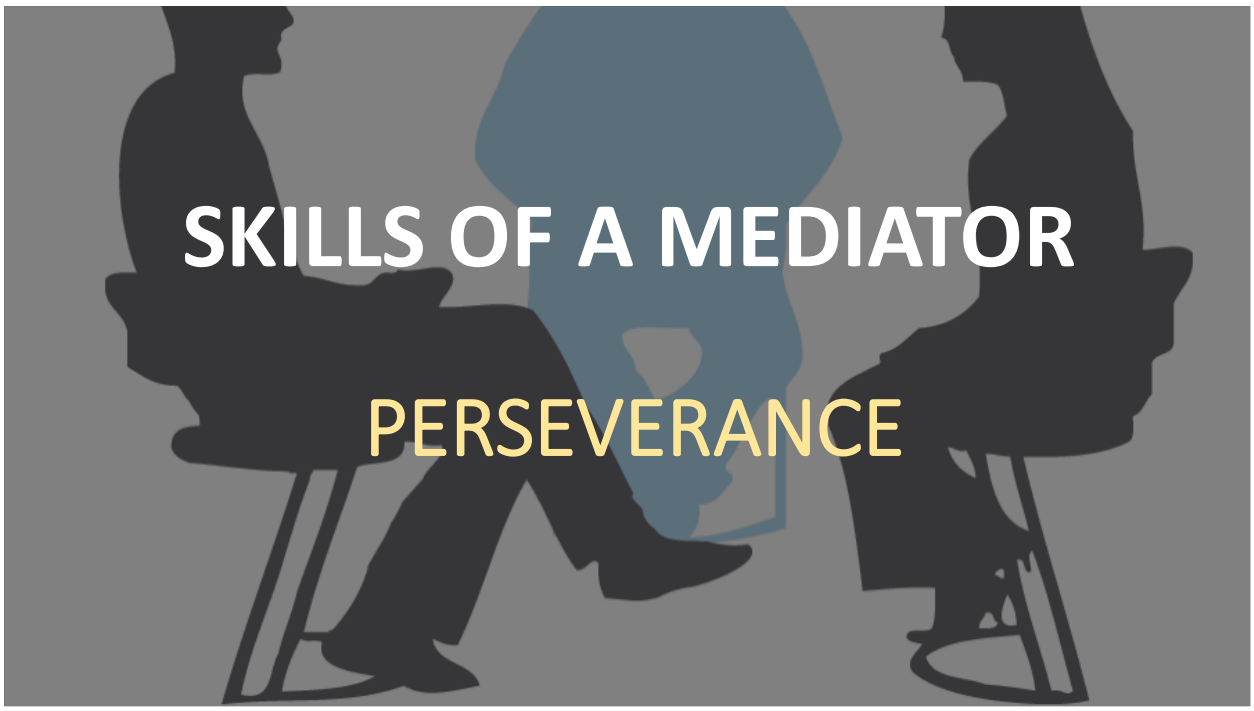
SKILLS OF A MEDIATOR

ADAPTABILITY

Adaptability



- Must be able to adapt to:
  - Situations
  - Personalities
- In order to:
  - Shift questioning
  - Shift techniques for managing the parties/case



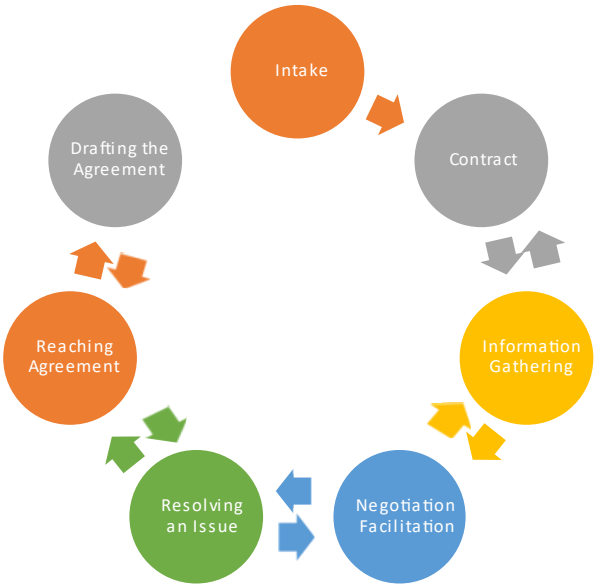
SKILLS OF A MEDIATOR

PERSEVERANCE

Perseverance:

- Sometimes a deal doesn't happen if the mediator doesn't push.
- Never assume what someone *says* is what they *mean*.
  - i.e. "if they don't x, we'll walk."
- Remember - your job is to help people see things differently.
  - Sometimes they are in the "here and now" and need to be reminded of the consequences of their actions.

Stages of Mediation



Intake Goals

Develop procedures to bring in clients

- - advertising?
- - seek referrals?
- - network thru community organizations, etc?
- - volunteer services?

Encourage potential clients to use your services

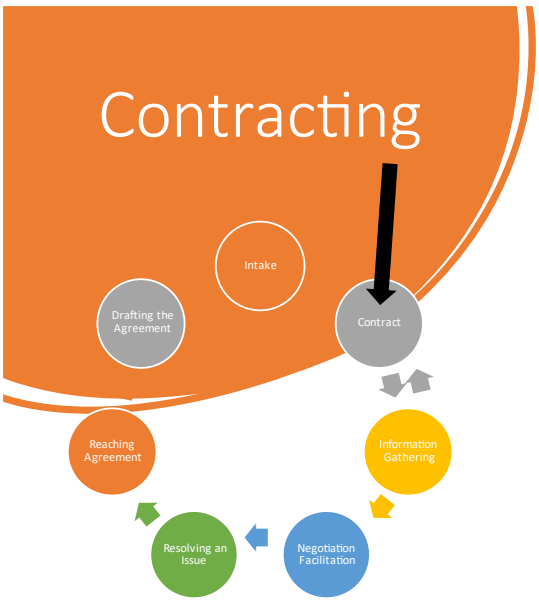
- - Build up resume
- - Convey confidence
- - Convey empathy without losing neutrality

Intake Procedures

- Understand the undertaking
  - Who are the parties? Who are the attorneys?
  - Do you have a conflict of interest?
  - What are the relationships between the parties?
  - Are there barriers to settlement?
  - Is the subject matter beyond your capabilities?
  - How will the other party be contacted, brought into the mediation?
  - Where should the mediation be held?

Intake CAUTIONS

- Avoid appearing that you are not neutral
  - If this is a one-sided discussion, make it clear you are not their voice or solely their mediator
- Avoid a conflict of interest
  - Are they seeking legal assistance? If you are going to represent them even in the future, you shouldn't be the mediator.
- Avoid practicing law
  - Mediation is NOT the practice of law. Avoid giving legal advice. Guide them as a mediator and not a lawyer.



SOMETIMES THIS HAPPENS AT MEDIATION (often court-ordered ones)

Explain YOUR Expectations:

- Time, location, fees & how paid
- Your preferred process

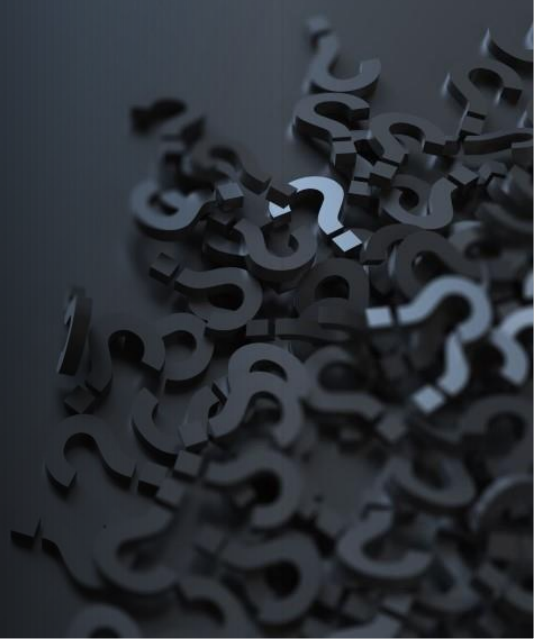
How Does a Mediator Prepare Before the Mediation?

Start with looking at how the lawyers should prepare:

- 1. Identify key interests in the dispute.
- 2. Be ready to make an offer or a demand.
- 3. Reality check.
- 4. Obtain the best estimate of the cost of litigation.
- 5. Know what you are going to say and say it at the opening of mediation.
- 6. Consider whether there is something preventing the deal.
- 7. Prepare for face-to-face confrontation.
- 8. Know what you are going to say after the opening…how to present the case.
- 9. Treat the mediator as a colleague.

1. Identify key interests in the dispute.

- The claims. Of course.
- What else might be important?
  - - reputation
  - - business relationships
  - - ANYTHING ELSE?



2. Be ready to make an offer or a demand.

- The party making the first move in a negotiation tends to be HAPPIER with the final settlement than the other party, according to research.
- Why? "Anchoring." First number sets the stage for what will follow.

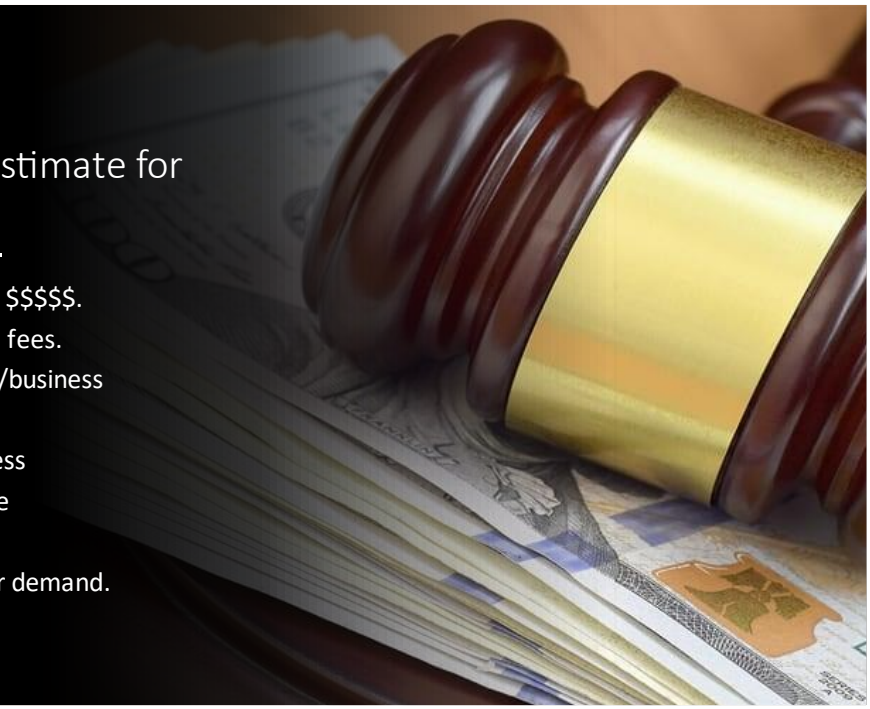
3. Reality check your case.

- Know what the prospects are for trial. What are the juries doing in your county? How are the facts of your case received by a neutral?
- Is the client living in reality?

4. Obtain the best estimate for litigation costs

- The price of going to trial is $$$$$.
- More than just the lawyers' fees.
  - Time off from work/business
  - Effects of publicity
  - Mental anguish/stress
  - Potentials for failure

FACTOR this into your offer or demand.



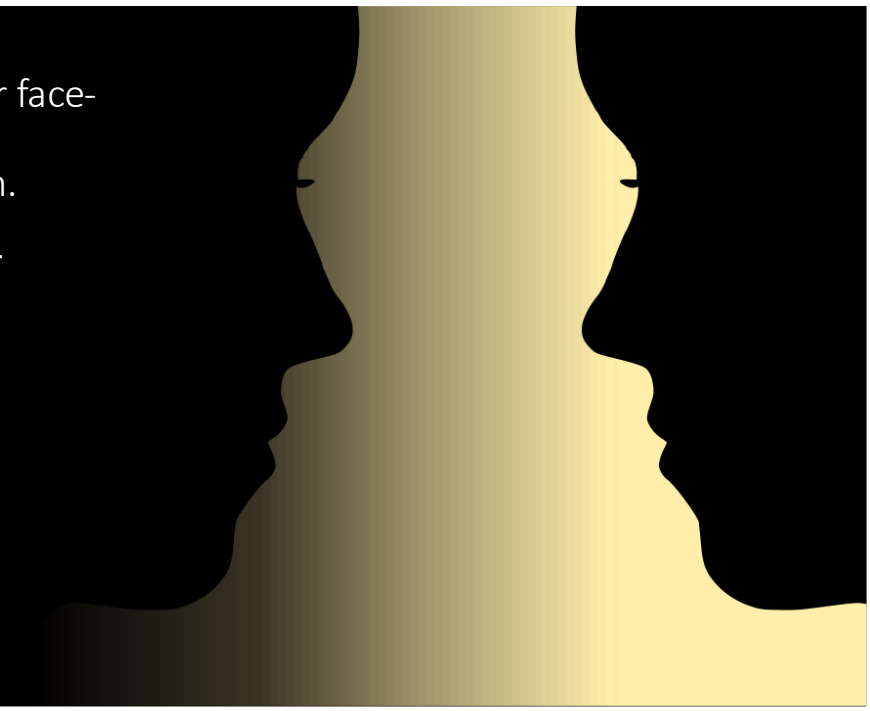
5. Know what you are going to say and say it at the opening of mediation.

- Who speaks is important.
  - Only lawyers?
  - Parties?
  - How authentic is it?
  - Are real emotions being considered?

6. Consider whether there is something preventing the deal.

- Are all the important parties going to be present
  - - Insurance adjustor
  - - Spouse?
- Are ONLY the important parties going to be present?
  - -will a non-party be disruptive?
- Are there outstanding liens, unresolved matters, things which would make an easy resolution much harder?

7. Prepare for face-to-face confrontation.



- Parties are often uncomfortable with this.
- Yet, don't they need to do this at trial?

8. Know what you are going to say after the opening…how to present the case.

- Demands without reason are often disregarded. Be prepared to show your thought process. Mediation is successful when the parties understand, even if they don't agree.

9. Treat the mediator as a colleague

- Be willing to use the mediator to assist you and don't treat them as an opposing party or someone to leave in the dark. They can be a sounding board.

SO WHAT DO THOSE RULES TELL US ABOUT HOW THE MEDIATOR SHOULD PREPARE?

- 1. Identify key interests in the dispute.
- 2. Be ready to make an offer or a demand
- 3. Reality check.
- 4. Obtain the best estimate of the cost of litigation
- 5. Know what you are going to say and say it at the opening of mediation.
- 6. Consider whether there is something preventing the deal.
- 7. Prepare for face to face confrontation.
- 8. Know what you are going to say after the opening…how to present the case. 9. Treat the mediator as a colleague.

- **1. KNOW THE ISSUES/PARTIES**
- **2. KNOW WHERE THE $ DISCUSSION HAS GONE**
- **3. KNOW WHO IS BEING REASONABLE**
- **4. KNOW WHAT LITIGATION COSTS/KNOW WHAT OTHER MATTERS MIGHT AFFECT THE PARTIES**
- **5. KNOW WHAT THE MEDIATOR IS GOING TO SAY**
- **6. KNOW ANY OBSTACLES**
- **7. CONTEMPLATE HOW THE PARTIES WILL INTERFACE**
- **8. FIND OUT WHAT YOU CAN ABOUT WHAT THEY WILL BE ARGUING**
- **9. EXPECT TO BE TREATED AS A COLLEAGUE AND VICE VERSA**

1. PRE-MEDIATION COMMUNICATION

HAVE AN EX-PARTE CONVERSATIONS WITH EACH ATTORNEY

LEARN ABOUT THE CASE. ASK ABOUT THE ISSUES, HOW THE PARTIES SEE THE CASE, WHAT PROBLEMS MIGHT ARISE. TALK. LISTEN. ASK QUESTIONS.

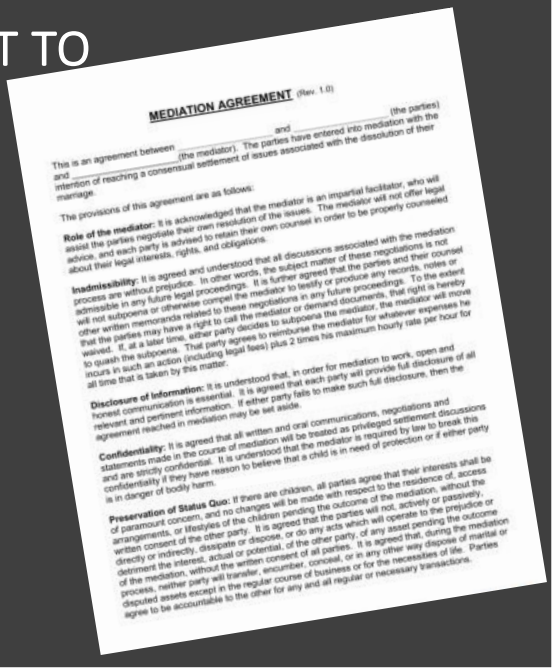
THE ENEMY OF SUCCESS AT MEDIATION IS SURPRISE.

2. PREPARE A MEDIATOR'S CHECK LIST

- **What are the key facts of the case?**
- **What are the issues of law which might arise?**
- **What don't you know about these things?**
- **Who could you talk to about them? What could you read?**

3. PREPARE AN AGREEMENT TO SERVE AS MEDIATOR

- What should you include (other than a fee?)
- Have parties sign the agreement to begin the business relationship.
- *Note*: if appointed by the court, you may not need this.



MEDIATION AGREEMENT (Rev. 1.0)

This is an agreement between _____ and _____ (the parties) and _____ (the mediator). The parties have entered into mediation with the intention of reaching a consensual settlement of issues associated with the dissolution of their marriage.

The provisions of this agreement are as follows:

Role of the mediator: It is acknowledged that the mediator is an impartial facilitator, who will assist the parties negotiate their own resolution of the issues. The mediator will not offer legal advice, and each party is advised to retain their own counsel in order to be properly counseled about their legal interests, rights, and obligations.

Inadmissibility: It is agreed and understood that all discussions associated with the mediation process are without prejudice. In other words, the subject matter of these negotiations is not admissible in any future legal proceedings. It is further agreed that the parties and their counsel will not subpoena or otherwise compel the mediator to testify or produce any records, notes or other written memoranda related to these negotiations in any future proceedings. To the extent that the parties may have a right to call the mediator or demand documents, that right is hereby waived. If, at a later time, either party decides to subpoena the mediator, that party agrees to reimburse the mediator for whatever expenses he incurs in such an action (including legal fees) plus 2 times his maximum hourly rate per hour for all time that is taken by this matter.

Disclosure of Information: It is understood that, in order for mediation to work, open and honest communication is essential. It is agreed that each party will provide full disclosure of all relevant and pertinent information. If either party fails to make such full disclosure, then the agreement reached in mediation may be set aside.

Confidentiality: It is agreed that all written and oral communications, negotiations and statements made in the course of mediation will be treated as privileged settlement discussions and are strictly confidential. It is understood that the mediator is required by law to break this confidentiality if they have reason to believe that a child is in need of protection or if either party is in danger of bodily harm.

Preservation of Status Quo: If there are children, all parties agree that their interests shall be of paramount concern, and no changes will be made with respect to the residence of, access arrangements, or lifestyles of the children pending the outcome of the mediation, without the written consent of the other party. It is agreed that the parties will not, actively or passively, directly or indirectly, dissipate or dispose, or do any acts which will operate to the prejudice or detriment the interest, actual or potential, of the other party, of any asset pending the outcome of the mediation, without the written consent of all parties. It is agreed that, during the mediation process, neither party will transfer, encumber, conceal, or in any other way dispose of marital or disputed assets except in the regular course of business or for the necessities of life. Parties agree to be accountable to the other for any and all regular or necessary transactions.

REQUEST MEDIATION STATEMENTS

- **CONFIDENTIAL unless shared by party.**
- **Detail the facts, issues, concerns of their case.**
- **Identifies the Last Known Position of each party.**

Explain the RULES of mediation

- Establish what the process will be
- Set a positive tone
- Require an AGREEMENT to Mediate

Contracting Procedures

- Introductions
- How will people be addressed?
- OBTAIN signed agreement to mediate if not yet done.

Setting the Stage

What is said here, can be determinative of the outcome of the mediation. Just like an opening argument, it creates a series of thoughts in the listeners which are hard to challenge later.

- Goals:
  - SET THEM UP FOR SETTLEMENT
  - LET THEM KNOW YOU ARE NEUTRAL & GAIN THEIR CONFIDENCE
  - CALM THEIR FEARS
  - ESTABLISH PRIVACY/CONFIDENTIALITY
  - DISCUSS THE IMPORTANCE OF LISTENING TO EACH OTHER

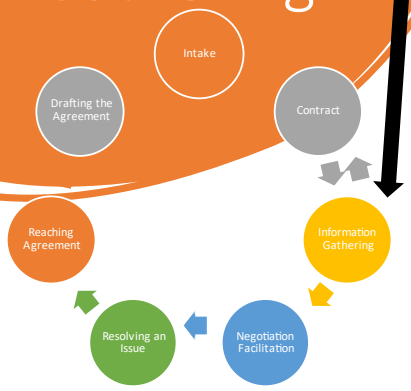
Setting the Stage – things to convey:

- Who are you, the mediator; what is your background?
- Impartiality of mediator
- Who is in charge of the decision to settle. (the parties)
- Need for civility
- Description of the process…

How to describe the process:

- Initial joint session discussing the case
  - One side has to go first…how to decide
  - Respectfully listen without interrupting
  - Hear from parties rather than lawyers
- Discuss whether you will break into a “caucus” session and what that means.

Information Gathering



Goals

- Get a first-hand story
- Give parties a chance to hear each other
- Give parties a chance to express some info privately (caucus)

WHO SHOULD TALK?

- **THE PARTIES**

Some attorneys want to talk for their clients.

But, if this were a trial, is that possible? Try to have the parties put the matters in their own words. Why?

It gives them the ability to see how they will do explaining their case.

It give the opposing party a chance to evaluate their believability, clarity, etc.

What should they talk about?

- **THE CASE**
- **THEIR EMOTIONS**
- **THEIR PERSPECTIVE**

You are looking for information. Try to keep them on track, but don't be afraid of extraneous info if it could lead to potentially important info to help resolve this. (Think of this as the 'DISCOVERY' phase of the mediation or a rule of evidence on relevancy.)

How to deal with interruptions…

- **Be firm but polite.**
- **Explain the process has value and the not -interrupting rule helps you get a clear picture of their cases**
- **Let the interrupting party know they will absolutely have an opportunity to be heard.**
- **And make sure that happens.**

"Mr. Jones, I need to ask you to be aware of the rules. Please give Mrs. Smith an opportunity to finish her comments and then I will definitely return to ask you to give your comments."

How to deal with a talker…

- **Decide if it is necessary to interrupt. Sometimes a story is complex, but if you aren't getting details and just emotions that have been discussed a few times, you might need to step in.**
- **Be firm but polite.**
- **Explain that you need to make sure everyone has an opportunity to be heard.**
- **Tell them you will return for more info after the other party has a chance to speak.**
- **And make sure that happens.**

"Mr. Jones, I need to stop you temporarily so we can hear from Mrs. Smith. Then we will come back to you to hear more."

How to deal with a non-talker…

- **Ask open ended questions to get something as to the party's concerns or thoughts on the case.**

Pay attention to agreement

- **Make sure you note everything the parties can agree on. It helps the process to whittle away the conflict by focusing on what they agree on.**

- **Otherwise, note:**
  - **What is still in conflict**
  - **What the underlying issues are**
  - **What needs to be resolved**
  - **How this might move forward to settlement**

Control the process even when listening:

- **Cut people off politely if they are talking about "bottom lines."**
  - **'I KNOW YOU HAVE GIVEN THIS A LOT OF THOUGHT, BUT LET'S SAVE RESOLUTIONS FOR A LATER POINT IN THIS PROCESS. RIGHT NOW, WE ARE FOCUSING ON THE ISSUES AND FACTS'**
- **Encourage civil behavior and discourage uncivil behavior.**
  - **Ask them to pay attention if they are looking on their phones or showing disrespect in some way.**
- **If things start looking like they can't be in the same room…caucus.**

Goals

- Identify issues
- Revise issues to neutral language
- Present issues in order of importance*
- Work with parties to seek solutions to their issues

Working with Parties to Solve Issues

SEEK WAYS TO RESOLVE

MEDIATOR CAN SUGGEST WAYS

AVOID RIDICULOUS

HAGGLING

Resolving issues – Task List for Mediator:

- Elicit more facts/feelings about each issue
- Help identify underlying interests
- Help parties identify underlying needs
- Assist in generating solutions
- Emphasize focus of desired Outcome…acceptable to ALL
- Help parties understand options and their consequences/implications
- Help parties understand each other's positions
- Remember mediation is about the parties resolving on their OWN.

"Can you see their point?"
"Why is this important to you?"
"Why do you think it's important to them?
"Is this action FAIR?"
"You said one goal was x, how does this solution advance that goal?"

Ethics and Mediation

The Honorable Mary M. Johnston
Judge, Superior Court of the State of Delaware

Hon. Mary M. Johnston, Superior Court of Delaware

The Honorable Mary Miller Johnston was appointed to the Superior Court of Delaware on September 25, 2003.

Judge Johnston received her J.D. *cum laude* from Washington & Lee University School of Law where she served as Lead Article's Editor of the *Law Review.* She also has B.A. *magna cum laude* in music from Wittenberg University, and an M.A. in music from Northwestern University.

Before coming to the bench, Judge Johnston served as Chief Counsel of the Delaware Supreme Court's Office of Disciplinary Counsel, prosecuting attorney discipline cases and unauthorized practice of law matters. She formerly was a partner with Morris James, LLP practicing primarily in the areas of corporate and commercial litigation. She currently is assigned as a member of the Court's Complex Commercial Litigation Division.

Judge Johnston is past chair of the Delaware State Bar Association's Women and the Law Section; a recipient of the Bar Association's Women's Leadership Award; and was a member of the Pro Se Litigation Assistance Committee. She is a member of the Delaware Supreme Court's Permanent Advisory Committee on the Delaware Lawyers' Rules of Professional Conduct, the Professionalism Committee, the Court's Commission on Continuing Legal Education, and the Richard S. Rodney Inn of Court. Her past service includes the Judicial Ethics Advisory Committee and Judicial Liaison to the Executive Committee of the Delaware State Bar Association. Judge Johnston serves as a member of the Washington & Lee School of Law Council and member of the Board of Governors of Wesley Theological Seminary. She is past president of the Board of Children & Families First.

HOMEWORK ASSIGNMENTS

SUPERIOR COURT MEDIATION TRAINING AT THE DSBA
APRIL 6, 2022

APRIL 6, 2022

11:15 AM – 12:15 PM – Judge Mary M. Johnston

Ethics Hypotheticals - Be prepared to discuss the following hypotheticals.

MEDIATION ETHICS HYPOTHETICALS –

Do these situations trigger any ethics issues that you as A) A MEDIATOR or B) AN ATTORNEY should consider?

1. Plaintiff Ackerby is self-represented and unfamiliar with the law, but he is adamant that he doesn't want to waste money on an attorney. He is suing Defendant Big Box Corp for a routine slip and fall at the warehouse. You know Big Box is willing to settle the claim for $40,000. Ackerby asks you to request $5,000 to settle the claim.

a. Does anything change if Ackerby is represented by an attorney?

2. During the course of mediation involving a negligence dispute, you learn from the Defendant Baker that he operates a counterfeit DVD business in his basement. Plaintiff Allen did not slip on a DVD.

a. Does anything change if Baker is storing illegal munitions devices and Allen was injured by a dynamite blast? Assume BOTH that Baker has not disclosed this fact and does not wish to disclose it to Allen AND that you are concerned about public safety.

b. Does anything change if you learn that Baker has disclosed to you that he is running a child pornography studio in his basement? Assume that this has nothing to do with the alleged injuries to Allen.

3. Lawyer Charles represents Plaintiff Abbott. Plaintiff Abbott does not wish to attend the mediation but gives Lawyer Charles full authority to settle his case as low as $40,000. During mediation, Defendant Bradford states she is willing to go "as high as $39,500, but only for the day. Lawyer Charles believes this case is really worth $20,000 and if Defendant's attorney has the extra day to do more discovery, will drop Defendant's offer drastically. When Charles calls Abbott on his cellphone to communicate the offer, Abbott does not pick up.

a. Does anything change if you, the mediator, received word that the Court would like you to settle this case today? Or else.

4. You, the mediator, learn during the mediation that Plaintiff's Attorney Cimino has failed to name an at-fault party before the statute of limitations ran. Cimino tells you that he knows he should have done so and that if he doesn't settle, his case could be in "big trouble." He also tells you that he has no intention of informing his client.

5. During the mediation, Defense Attorney Davis tells you, the mediator, that he has no intention of settling this case for a high figure because he is aware that Plaintiff Andrews is has immigrated to America illegally and he knows he can pressure Andrews to settle or face deportation. Assume the immigration status is not related to the case.

a. Any difference if Plaintiff American Bank threatens to turn Defendant Baldwin over to police/prosecutors unless Baldwin accepts settlement amount? Baldwin had embezzled funds from American Bank.

6. Attorney for Plaintiff Aziz tells you, the mediator, that there is a witness who has identified a different potential defendant, not the named defendant, Butterfield, but Attorney does not believe the witness is believable. He tells you he has "no intention" of letting Plaintiff know about this witness, especially because "even the police didn't include her in the police report."

7. Defense counsel, Davidson, asks Plaintiff's counsel, Callahan, to sign a confidential settlement agreement which will offer Plaintiff Amalfitano almost twice the demand, provided Callahan agrees to refrain from taking on other potential plaintiffs in similar lawsuits against Defendant Brown Industries.

8. Plaintiff's counsel, Carmichael, pulls you aside and says, "My client is crazy. She needs you to tell her how bad her case is and to settle the case." Do you do that?

9. Plaintiff's lawyer, Cameron, represents husband plaintiff Arnold. Defendant Bleufontain was Arnold's wife and their divorce was amicable. Bleufontain has fired her attorney and wishes that Cameron represent her, as well as her husband because they can settle the lawsuit between them easily.

10. You have been asked to mediate a dispute between Goliath Bank and Titan Bank. Your spouse is also an attorney whose firm has represented Goliath more than once. Your spouse has never represented Goliath, however.

11. You have been asked to mediate a case in which one of the attorneys who attends the mediation (a different attorney in the firm had contacted you) turns out to be your former high school classmate and very good friend.

Delaware Lawyers Rules of Professional Conduct

Rules Discussed During Superior Court Mediation Training 2022

Rule 1.6. Confidentiality of Information.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
(6) to comply with other law or a court order.

Rule 1.10. Imputation of conflicts of interest: General rule.

(a) Except as otherwise provided in this rule, while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.
(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a client in a matter in which that lawyer is disqualified under Rule 1.9 unless:

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

(2) written notice is promptly given to the affected former client.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Rule 1.12. Former judge, arbitrator, mediator or other third-party neutral.

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

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

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

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

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

Rule 2.4. Lawyer serving as third-party neutral.

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

Rule 8.3. Reporting professional misconduct.

(a) A lawyer who knows that another lawyer has committed a violation of the rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
(c) This Rule does not require disclosure of information otherwise protected by rule 1.6.
(d) Notwithstanding anything in this or other of the rules to the contrary, the relationship between members of either (i) the Lawyers Assistance Committee of the Delaware State Bar Association and counselors retained by the Bar Association, or (ii)the Professional Ethics Committee of the Delaware State Bar Association, or (iii) the Fee dispute Conciliation and Mediation Committee of the Delaware State Bar Association, or(iv) the Professional Guidance Committee of the Delaware State Bar Association, and a lawyer or a judge shall be the same as that of attorney and client.

Superior Court Mediation Training at the DSBA
2022

DAY 2

MEDIATION ETHICS

Sample Guidelines from National Organizations

MODEL STANDARDS OF CONDUCT FOR MEDIATORS

AMERICAN BAR ASSOCIATION

AMERICAN ARBITRATION ASSOCIATION

ASSOCIATION FOR CONFLICT RESOLUTION

AUGUST 2005

The Model Standards of Conduct for Mediators
August 2005

The *Model Standards of Conduct for Mediators* was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution[1]. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.[2] Both the original 1994 version and the 2005 revision have been approved by each participating organization.[3]

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term "shall" in a Standard indicates that the mediator must follow the practice described. The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term "mediator" is understood to be inclusive so that it applies to co-mediator models.

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[1] The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

[2] Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

[3] Proposed language. No organization as of April 10, 2005 has reviewed or approved the 2005 Revision.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

A. 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.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

2. A mediator's fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

JAMS Mediators Ethics Guidelines (JAMS, Judicial Arbitration & Mediation Services, 1979)

INTRODUCTION

The purpose of these Ethics Guidelines is to provide basic guidance to JAMS mediators regarding ethical issues that may arise during or related to the mediation process. Mediation is a voluntary, non-binding process using a neutral third party to help the parties reach a mutually beneficial resolution of their dispute. A mediator helps the parties reach a resolution by facilitating communication, promoting understanding, assisting them in identifying and exploring issues, interests and possible bases for agreement, and in some matters, helping parties evaluate the likely outcome in court or arbitration if they cannot reach settlement through mediation.

Mediation is by its nature a fluid and flexible process. JAMS mediators are not expected to adhere to any one process or approach, and are encouraged to rely on their creativity and experience to tailor each mediation as much as appropriate to meet the needs of the participants.

Many other sets of guidelines exist; such as those issued by the Society of Professionals in Dispute Resolution (SPIDR), The Joint AAA/ABA/SPIDR Committee on Standards of Conduct, the ABA Family Law Section and various state and local programs. JAMS mediators may wish to review these for informational purposes. Copies of each, as well as other relevant reference materials, are kept in each JAMS office.

These Guidelines are national in scope and are necessarily general. They are not intended to supplant applicable state or local laws or rules. All JAMS mediators should be aware of applicable state statutes or court rules that may apply to the mediations they are conducting. In the event that these Guidelines are inconsistent with such statutes or rules, the mediators must comply with the applicable law.

Attorney mediators in particular should also be aware of state-specific rulings or guidance as to whether and in what circumstances mediation may be considered the practice of law. These rulings may have an impact on a mediator's practice in such respects as advertising and co-mediating with non-attorneys. In addition, mediators who are former judges should be aware of any state ethical standards or canons of judicial conduct regulating or guiding their efforts as mediators. Other professionals, such as licensed psychologists, also may have similar standards of conduct that may affect their mediation practice.

JAMS strongly encourages its mediators to confront directly any ethical issues that arise in their cases as soon as the issue becomes apparent, and to seek advice on how to resolve such issues from the Regional Management Team.

GUIDELINES

I. A MEDIATOR SHOULD ENSURE THAT ALL PARTIES ARE INFORMED ABOUT THE MEDIATOR'S ROLE AND NATURE OF THE MEDIATION PROCESS, AND THAT ALL PARTIES UNDERSTAND THE TERMS OF SETTLEMENT.

A mediator should ensure that all parties understand and agree to mediation as a process, the mediator's role in that process and all parties' relationship to the mediator. The parties should also understand the particular procedures the mediator intends to employ, including whether and in what manner the mediator may help the parties evaluate the likely outcome of the dispute in court or arbitration if they cannot reach settlement through mediation. In addition, a mediator should be satisfied that the parties have considered and understood the terms of any settlement, and should, if appropriate, advise the parties to seek legal or other specialized advice.

If the mediator perceives that a party is unable to give informed consent to participation in the process or to the terms of settlement due to, for example, the impact of a physical or mental impairment, the process should not continue until the mediator is satisfied that such informed consent has been obtained from the party or the party's duly authorized representative.

In the event that, prior to or during a mediation session, it becomes appropriate to discuss the possibility of combining mediation with binding arbitration, the mediator should explain how a mediator's role and relationship to the parties may be altered, as well as the impact such a shift may have on the disclosure of information to the mediator. The parties should be given the opportunity to select another neutral to conduct the arbitration procedure.

II. A MEDIATOR SHOULD PROTECT THE VOLUNTARY PARTICIPATION OF EACH PARTY.

The right of the parties to reach a voluntary agreement is central to the mediation process. Consequently, a mediator should act and conduct the process in ways that maximize its voluntariness.

In most cases that are not court-ordered, parties to the mediation process arrive willing and able to engage in assisted negotiation. On infrequent occasions, however, a mediator may perceive that a party is being forced into and/or through the process, for example, by a family member or representative. In that event, a mediator should explore carefully with that party and the other parties, within the bounds of discretion and confidentiality, whether the mediation process should proceed, and, in any case, strive to ensure that the concerns of the reluctant party regarding the process are fully addressed.

Court-ordered mediation often carries an aspect of involuntariness into the process. A mediator should be sensitive to this dynamic and assure the parties that although they have been ordered to attend the mediation, a settlement can be reached only if it is to their mutual satisfaction.

III. A MEDIATOR SHOULD BE COMPETENT TO MEDIATE THE PARTICULAR MATTER.

A mediator should have sufficient knowledge of relevant procedural and substantive issues to be effective. It is the mediator's responsibility to prepare before the mediation session by reviewing any statements or documents submitted by the parties. A mediator should refuse to serve or withdraw from the mediation if the mediator becomes physically or mentally unable to meet the reasonable expectations of the parties.

IV. A MEDIATOR SHOULD MAINTAIN THE CONFIDENTIALITY OF THE PROCESS.

It is crucial that the mediator and all parties have a clear understanding as to confidentiality before the mediation begins. Before a mediation session begins, a mediator should explain to all parties (a) any applicable laws, rules or agreements prohibiting disclosure in subsequent legal proceedings of offers and statements made and documents produced during the session, and (b) the mediator's role in maintaining confidences within the mediation and as to third parties.

A mediator should not disclose confidential information without permission of all parties or unless required by law, court rule or other legal authority. A mediator must not use confidential information acquired during the mediation to gain personal advantage or advantage for others, or to affect adversely the interests of others. If the mediation is being conducted under rules or laws that require disclosure of certain information, a mediator should so notify the parties prior to beginning the mediation session. In addition, a mediator's notes, the parties' submissions and other documents containing confidential or otherwise sensitive information should be stored in a reasonably secure location and may be destroyed 90 days after the mediation has been completed or sooner if all parties so request or consent.

V. A MEDIATOR SHOULD CONDUCT THE PROCESS IMPARTIALLY.

A mediator should remain impartial throughout the course of the mediation. A mediator should be aware of and avoid the potential for bias based on the parties' backgrounds, personal attributes, or conduct during the session, or based on any pre-existing knowledge of or opinion about the merits of the dispute being mediated. A mediator should endeavor to provide a procedurally fair process in which each party is given an adequate opportunity to participate. If a mediator becomes incapable of maintaining impartiality, the mediator should withdraw promptly.

A mediator should disclose any information that reasonably could lead a party to question the mediator's impartiality. A mediator may proceed with the process unless a party objects to continuing service. A mediator should withdraw if a conflict of interest exists that casts serious doubt on the integrity of the process.

After a mediation is completed, a mediator should refrain from any conduct involving a party, insurer or counsel to the mediation that reasonably would cast doubt on the integrity of the mediation process, absent disclosure to and consent by all parties to the mediation. This does not preclude the mediator from serving as a mediator or in another dispute resolution capacity with a party, insurer or counsel involved in the prior mediation.

A mediator should exercise caution in accepting items of value, including gifts or payments for meals, from a party, insurer or counsel to a mediation during or after a mediation, particularly if the items are accepted at such a time and in such a manner as to cast doubt on the integrity of the mediation process.

A mediator should also avoid conflicts of interest in recommending the services of other professionals. If a mediator is unable to make a personal recommendation without

creating a potential or actual conflict of interest, the mediator should so advise the parties and refer them to a professional referral service or association.

The JAMS Conflict Of Interest Policy provides additional information regarding restricted conduct and should be adhered to by a JAMS mediator.

VI. A MEDIATOR SHOULD REFRAIN FROM PROVIDING LEGAL ADVICE.

A mediator should ensure that the parties understand that the mediator's role is that of neutral intermediary, not that of representative of or advocate for any party. A mediator should not offer legal advice to a party. If a mediator offers an evaluation of a party's position or of the likely outcome in court or arbitration, or offers a recommendation with regard to settlement, the mediator should ensure that the parties understand that the mediator is not acting as an attorney for any party and is not providing legal advice.

A mediator should be particularly sensitive to role differences if any party is unrepresented by counsel at the mediation, and should explain carefully the limitations of the mediator's role and obtain a written waiver of representation from each unrepresented party. If a mediator assists in the preparation of a settlement agreement and if counsel for any party is not present, the mediator should advise each unrepresented party to have the agreement independently reviewed by counsel prior to executing it.

A mediator should make an effort to keep abreast of developments within the mediator's jurisdiction concerning what constitutes the practice of law. Different bar associations have issued conflicting opinions about whether and when a mediator engages in the practice of law, and certain states or courts have rules regarding how and in what manner a mediator may evaluate the merits of a dispute.

VII. A MEDIATOR SHOULD WITHDRAW UNDER CERTAIN CIRCUMSTANCES.

A mediator should withdraw from the process if the mediation is being used to further illegal conduct, or for any of the reasons set forth above: lack of informed consent, a conflict of interest that has not or cannot be waived, a mediator's inability to remain impartial, or a mediator's physical or mental disability. In addition, a mediator should be aware of the potential need to withdraw from the case if procedural or substantive unfairness appears to have undermined the integrity of the mediation process.

VIII. A MEDIATOR SHOULD AVOID MARKETING THAT IS MISLEADING AND SHOULD NOT GUARANTEE RESULTS.

A mediator should ensure that any advertising or other marketing conducted on the mediator's behalf is truthful. A mediator should not guarantee results, especially if such guarantee could be perceived as favoring one type of disputant or industry over another.

Short Mediation Exercises

Mentors

Bernard G. Conaway, Esquire
Conaway-Legal LLC

Yvonne Takvorian Saville, Esquire
Wiess, Saville & Houser, P.A.

David A. White, Esquire
Office of Disciplinary Counsel

Bernard G. Conaway, Esq., Conaway-Legal LLC

BERNARD G. CONAWAY is the founding member of Conaway-Legal LLC. Over the course of his 27 year career he's served as a law clerk to former Clarence Taylor, of the Superior Court of Delaware, was appointed and served for 10 years on the Superior Court of Delaware as a Special Mater in Complex Litigation, and was a partner in very large and small law firms.

His practice focuses on ADR, bankruptcy, practice before the Delaware Court of Chancery, corporate and alternate entity governance under Delaware law and complex civil litigation. In twenty-seven years of practice, Mr. Conaway has been involved in every facet of complex civil litigation serving a lead and local counsel, as Special Master, as a mediator and party selected arbitrator.

Mr. Conaway frequently appears in Delaware's Court of Chancery on matters involving director/officer indemnification and advancement pursuant to Section 145 of the Delaware General Corporate Law, for books and records demands under Section 220, served as corporate custodian under authority of Section 226, Section 275/276 regarding dissolutions, director and officer demands for indemnification and advancement, injunctive relief, specific performance, quiet title actions, guardianship, trust and estate litigation and other equitable claims. In his bankruptcy practice.

Mr. Conaway has served as lead and local counsel on every side of the bankruptcy process including representing creditors, debtors, directors against preference and insider claims, landlords, and other parties seeking to lift the automatic stay.

Since 1994, Mr. Conaway served as an arbitrator and mediator. Since then he has sucessfuly mediated thousands of cases, including hundreds of large complex, multi-party, multi-level insurance, construction, bankruptcy, environmental, and commercial cases. He has mediated law firm break-ups, intra-company disputes, governance and financial disputes between alternate entity members and personal injury claims. Mr. Conaway has served for over thirteen years as a mentor in the Delaware Superior Court's mediation training program. He formerly served as adjunct instructor at the National Judicial College in Reno, Nevada teaching civil mediation.

Mr. Conaway volunteers his time to a number of boards and committees. Over the past fifteen years he has served on numerous board and committees including the Widener University School of Law Alumni Association (board member), the York College of

Pennsylvania Collegiate Counsel (board member), St. Thomas More Society of the Archdiocese of Wilmington (past president), Caesar Rodney Rotary Club (member), Colin J. Seitz Bankruptcy Inn of Court (barrister) Wilmington, Richard S. Rodney Inn of Court (Executive Committee) Wilmington, and Superior Court Committee on Complex Litigation (member). He serves as a volunteer attorney *Guardian Ad Litem* for Delaware children and has continiously done so since 2003.

EVENTS

• Ethical Considerations in Alternative Dispute Resolution

• “Expert” Advise From Successful Arbitrators

• ADR in Practice: A Lawyer Roundtable

EXPERIENCE

• Represented a corporate client opposing a director’s 220 action involving an onerous demand for books and records. The Chancery Court dismissed the matter without production of any records and without answering the complaint.

• Appointed and/or selected to serve as a Special Discovery Master in 9 complex civil cases involving insurance coverage, products liability, construction, mass tort, and environmental cases.

• Represented a corporate client opposing a director’s 220 action involving an onerous demand for books and records. The Chancery Court dismissed the matter without production of any records and without answering the complaint.•Settled a multi-million dollar bankruptcy preference claim asserted against one of the world’s largest aluminum suppliers. The case was complicated by the interplay between US and INCO maritime conventions as well as US, UK and Bahrain law.

• Successfully secured liquidation of a client’s LLC interest in the face of vigorous opposition involving protracted discovery, trial, and appeal to the Supreme Court of Delaware.

• Following a year long effort, successfully mediated virtually all of the pending state court abuse claims brought against multiple religious order entities affiliated/working with the Diocese of Wilmington. The mediation was complicated by the number of claims, multiple insurers’ reservations of rights, unresolved and novel legal questions, funding issues, and the Diocese’s then pending bankruptcy.

• Served as local counsel for an ad hoc consortium of preferred security holders in the Chapter 11 of Washington Mutual, Inc.

• Served as local counsel to an indentured trustee and an Ad Hoc Committee of bondholders in an expedited Delaware Chancery Court trial and successfully appealed the matter to the Supreme Court of Delaware resolving a dispute over Calpine's use of $700 million subject to lien indenture restrictions.

• Served as local counsel to bondholders holding $2 billion in Countrywide Series B May 2007 bonds in an action seeking a determination whether the acquisition of Countrywide constituted a "change of control" and therefore triggered bondholder put rights. The matter was settled and the bondholders were paid nearly $2 billion (i.e., close to par) for their bonds.

• Successfully defended the former CEO of a major imaging company against preference, fraudulent transfer, and insider trading claims.

• Frequently draft LLC and Series LLC organizational documents for Delaware real estate investors including completion of client tailored limited liability agreements.

• Often represent *pro bono*, minor children in actions where the state is seeking to terminate parental rights.

AWARDS Mr. Conaway has achieved an AV Preeminent Peer Review Rating for professional ethical standards and legal ability by Martindale-Hubbell. Martindale-Hubbell Ratings provides reviews of lawyers and law firms for consumers and professionals.

Yvonne Takvorian Saville, Esq., Weiss, Saville & Houser, P.A.

Ms. Saville is a director with the law firm of Weiss, Saville & Houser, P.A., where her practice is focused on plaintiff's civil litigation in the areas of personal injury and workers' compensation. She has been appointed as a Special Master for complex civil cases in Delaware's District Court and is a frequent mediator and arbitrator, having handled over 13,500 cases. In recognition of her ADR practice, Ms. Saville was named a "Friend of the Court" by President Judge Jurden and was accepted as a Fellow with the American College of Civil Trial Mediators and as a member of the National Academy of Distinguished Neutrals. She has presented over 80 lectures on the topics of ADR, PI and WC.

Ms. Saville is a Past President of the Delaware State Bar Association (DSBA) and is a member and previous Chair of DSBA's Workers' Compensation Section. She is also a member of the Randy J. Holland Inn of Court and serves on the CLE planning commissions for the DSBA Workers' Compensation section and Delaware Trial Lawyers Association. She co-chaired the Women and Law Section annual conference for 10 years and is a past co-Chair of the DSBA Nominating Committee.

Ms. Saville has been appointed to the Judicial Nominating Commission by Governor Carney and also currently serves on the Delaware Law School Alumni Board. She is an adjunct professor at Delaware Law School where she teaches ADR. She is a previous co-chair of the Delaware Supreme Court's Access to Justice Commission and served as a member of the Judicial Strategies Committee. She has been a board member for 14 years with the Combined Campaign for Justice and served as an officer with the Delaware Financial Literacy Institute. For the last 25 years, Ms. Saville has been on the Board of Governors for the Delaware Trial Lawyers Association (DTLA) and has served as its' President twice. She is a member of the American Bar Association and the American Association for Justice.

Awards and Honors

• **"AV"** Martindale-Hubbell Peer Review Pre-Eminent Rating 5.0 out of 5 in the areas of Personal Injury, Alternative Dispute Resolution and Workers' Compensation , 2012-2021

• **Kimmel-Thynge Award**, presented by the Alternative Dispute Resolution Section of the Delaware Bar in recognition for outstanding contributions to ADR in Delaware, 2021

• **Amicus Curiae Award** or "Friend of the Court", presented by President Judge Jurden on behalf of the Delaware Superior Court in recognition of ADR practice, 2019

• **Honorable Aida Waserstein Award**, presented by the Women and Law Section of the Delaware Bar in recognition of professional excellence and significant contributions to the legal community, 2019

• **Women's Leadership Award**, presented by the Delaware State Bar Association in recognition of achievement and activities in matters affecting woman and who has served as an inspiration to and a model for women lawyers in our profession, 2018

• **Alumna of the Year Award**, presented by Delaware Law School in recognition of contribution to community and profession, 2016

• **Eagle of Justice Award**, presented by the Delaware Trial Lawyers Association for dedication to preserving the rights of Delawareans, 2016

• Named *The Best Lawyers in America*© Mediation **"Lawyer of the Year"** in Wilmington in 2015, 2018, 2020 and 2022

• Recognized in *The Best Lawyers in America*© 2015 - 2022 in the field of Mediation

• Recognized by *Delaware Today Magazine* as the **Top Alternative Dispute Resolution Lawyer**, 2013 - 2020; one of the **Top Worker's Compensation Lawyers**, 2010

• Recognized as a *Delaware Super Lawyer*® for Alternative Dispute Resolution, 2013-2021

• Named as **Delaware Top 10** *Super Lawyer*® , 2016 – 2018

• **DSBA President's Gavel and Ring** for service as the 67th President of the Delaware State Bar Association, 2014-2015

• **DTLA President's Award for Outstanding Leadership** on behalf of the Delaware Trial Lawyers Association, 2006-2007

• **Outstanding Service Award**, presented by Delaware Law School in recognition of "dedication and service to the legal community," 2006

• **Five-Year Volunteer Service Award**, presented by the Office of the Child Advocate in recognition of "pro bono work on behalf of children", 2006

• **Key Contact of the Year Award**, presented by the Delaware Trial Lawyers' Association in recognition of "outstanding service in support of Delaware's civil justice system," 2003 *Law Firm recognition*:

• Weiss, Saville & Houser, P.A. named by U.S. News and World Reports as Top Tier 1 **Best Law Firms in Workers Compensation Law and Mediation**, 2011-2022

David A. White, Esq., Office of Disciplinary Counsel

David A. White, Chief Disciplinary Counsel,
Office of Disciplinary Counsel, Delaware Supreme Court

Mr. White is a frequent speaker/moderator in the areas of legal ethics and Alternative Dispute Resolution. In March 2021, the Delaware Supreme Court appointed Mr. White Chief Disciplinary Counsel of the Office of Disciplinary Counsel ("ODC"), and Arm of the Court.

The ODC, which functions as an educational and professional resource for members of the Delaware bar, receives, evaluates, investigates, and when necessary, prosecutes complaints of lawyer misconduct and the unauthorized practice of law. The Office also recommends sanctions for attorney misconduct to the Board on Professional Responsibility and the Court.

Previously, Mr. White was in private practice, and for many years served as the office managing partner in the Wilmington, Delaware office of McCarter & English, LLP. There, he was a member of the firm's business litigation, products liability, and bankruptcy practice groups. A substantial portion of his practice was devoted to ADR and representing lenders in the areas of commercial loan workouts, commercial litigation, commercial real estate, and related bankruptcy issues.

Mr. White also taught a civil litigation course for the University of Delaware, Division of Professional and Continuing Studies, where he was awarded Excellence in Teaching awards in 2007 and 2008.

For many years Mr. White has served as an elected member of the Executive Committee of the Delaware State Bar Association, and he is a Honorary/Volunteer member of the Professional Guidance Committee.

Education:
Widener University School of Law, J.D 1986
University of Delaware, B.A. 1982

Exercise 1:

Plaintiff: Plaintiff has insurance with Nationwide, including PIP (personal injury protection) coverage of $30,000. Plaintiff's back is injured in an auto accident with Defendant. Plaintiff's injuries require $28,945.00 in medical treatment. PIP insurance covered all of the medical bills. Plaintiff now is experiencing a burning sensation in his/her lower back but medical scans have shown no disk issues/herniations. Plaintiff has told his/her doctor the pain is about a 5 or 6, not debilitating on most days but flares up a lot in rainy weather. Plaintiff said he/she felt fine before the accident, very bad right after it, and now feels this discomfort in his/her back ever since the accident.

Defendant: insurance company has taken the stand that this case is not worth much at all. There is no real basis for Defendant to contest liability, only the damages.

Dr. P says the Plaintiff's pain is "most likely related to the accident. Dr. D says Plaintiff's aches are related to age and the general degeneration over time of Plaintiff's bones.

Plaintiff is 30 years old.

Neither party wants to litigate, but Defendant says they will litigate if Plaintiff is expecting a payout greater than 3000.

Exercise 2:

Plaintiff has treated for minor back pain relating to an accident where Defendant's liability is not in issue. Plaintiff's pains are considered "soft tissue" injuries with no discernable disk herniations or injuries on any of the five scans he/she underwent on doctor's orders. Plaintiff has stopped working at his job at Amazon because he/she can no longer lift boxes. Plaintiff has purchased a TENS unit for nerve stimulation as well as a hot tub and has undergone weekly chiropractic visits for 18 months. Plaintiff's PIP insurance only covered $15,000 of the treatment he/she has undergone, all related to the ambulance ride to the hospital and frequent visits to the Primary care physician. The Chiropractic bills have accumulated to $6,080. In addition, Plaintiff's purchase of the TENS unit was $50, and the hot tub purchase and installation cost $28,500. Plaintiff also estimates that he/she has lost wages in the amount of $24,600.

Defendant has offered $1050 to pay for $1000 of chiropractic visits and $50 for the TENS unit.

Exercise 3:

Plaintiff was injured in a car accident where liability is not in issue because Defendant struck Plaintiff from the rear in what Defendant characterizes as a fender-bender. Plaintiff's doctor has indicated that the injuries which Plaintiff sustained to his/her pelvis are related to the accident. Defendant's IME doctor said it is "possible" the impact caused the injuries. Defendant took photos of the two cars showing no damage whatsoever to either vehicle and claims the accident was "literally" a slight tap of the bumpers. Plaintiff claims the impact was severe and his/her pelvis has sustained damage requiring surgery which is "risky" according to his/her doctor and could result in paralysis. He/she does not want to have the surgery which would cost his/her insurance over $100,000. Defendant said there is no way Plaintiff could have suffered this injury in the accident, but Plaintiff has no prior known injuries. Plaintiff's pain is "significant" but he/she continues to work despite the pain, needing to get up and walk around frequently. Plaintiff is seeking recovery for pain and suffering due to the apparent permanent nature of his/her injuries. Defendant thinks plaintiff is just a big baby.

Exercise 4:

Plaintiff has missed several weeks of work as a bread delivery driver due to Defendant's hit and run incident on his/her bread truck. Workers compensation insurance paid out $42,000 and now has a lien in the event Plaintiff recovers from Defendant.

Plaintiff's injuries include general aches and pains and have resulted in insurance bills in excess of PIP for the amount of $1000 (PIP covered $15,000). While Plaintiff is no longer experiencing any further pain and seems to be healed, Plaintiff believes he/she should be compensated for $16,000 in medical bills, and $60,000 for the weeks of pain he/she endured.

Day Three
Friday, April 21, 2023

Mentors

Bernard G. Conaway, Esquire
Conaway-Legal LLC

Hon. Lynne M. Parker
Commissioner, Superior Court of the State of Delaware

David A. White, Esquire
Office of Disciplinary Counsel

Role Play Mediation 1

WILL BE PROVIDED

Role Play Mediation 2

WILL BE PROVIDED

Role Play Mediation 3

WILL BE PROVIDED

Bernard G. Conaway, Esq., Conaway-Legal LLC

BERNARD G. CONAWAY is the founding member of Conaway-Legal LLC. Over the course of his 27 year career he's served as a law clerk to former Clarence Taylor, of the Superior Court of Delaware, was appointed and served for 10 years on the Superior Court of Delaware as a Special Mater in Complex Litigation, and was a partner in very large and small law firms.

His practice focuses on ADR, bankruptcy, practice before the Delaware Court of Chancery, corporate and alternate entity governance under Delaware law and complex civil litigation. In twenty-seven years of practice, Mr. Conaway has been involved in every facet of complex civil litigation serving a lead and local counsel, as Special Master, as a mediator and party selected arbitrator.

Mr. Conaway frequently appears in Delaware's Court of Chancery on matters involving director/officer indemnification and advancement pursuant to Section 145 of the Delaware General Corporate Law, for books and records demands under Section 220, served as corporate custodian under authority of Section 226, Section 275/276 regarding dissolutions, director and officer demands for indemnification and advancement, injunctive relief, specific performance, quiet title actions, guardianship, trust and estate litigation and other equitable claims. In his bankruptcy practice.

Mr. Conaway has served as lead and local counsel on every side of the bankruptcy process including representing creditors, debtors, directors against preference and insider claims, landlords, and other parties seeking to lift the automatic stay.

Since 1994, Mr. Conaway served as an arbitrator and mediator. Since then he has sucessfuly mediated thousands of cases, including hundreds of large complex, multi-party, multi-level insurance, construction, bankruptcy, environmental, and commercial cases. He has mediated law firm break-ups, intra-company disputes, governance and financial disputes between alternate entity members and personal injury claims. Mr. Conaway has served for over thirteen years as a mentor in the Delaware Superior Court's mediation training program. He formerly served as adjunct instructor at the National Judicial College in Reno, Nevada teaching civil mediation.

Mr. Conaway volunteers his time to a number of boards and committees. Over the past fifteen years he has served on numerous board and committees including the Widener University School of Law Alumni Association (board member), the York College of

Pennsylvania Collegiate Counsel (board member), St. Thomas More Society of the Archdiocese of Wilmington (past president), Caesar Rodney Rotary Club (member), Colin J. Seitz Bankruptcy Inn of Court (barrister) Wilmington, Richard S. Rodney Inn of Court (Executive Committee) Wilmington, and Superior Court Committee on Complex Litigation (member). He serves as a volunteer attorney *Guardian Ad Litem* for Delaware children and has continiously done so since 2003.

EVENTS

• Ethical Considerations in Alternative Dispute Resolution

• “Expert” Advise From Successful Arbitrators

• ADR in Practice: A Lawyer Roundtable

EXPERIENCE

• Represented a corporate client opposing a director’s 220 action involving an onerous demand for books and records. The Chancery Court dismissed the matter without production of any records and without answering the complaint.

• Appointed and/or selected to serve as a Special Discovery Master in 9 complex civil cases involving insurance coverage, products liability, construction, mass tort, and environmental cases.

• Represented a corporate client opposing a director’s 220 action involving an onerous demand for books and records. The Chancery Court dismissed the matter without production of any records and without answering the complaint.•Settled a multi-million dollar bankruptcy preference claim asserted against one of the world’s largest aluminum suppliers. The case was complicated by the interplay between US and INCO maritime conventions as well as US, UK and Bahrain law.

• Successfully secured liquidation of a client’s LLC interest in the face of vigorous opposition involving protracted discovery, trial, and appeal to the Supreme Court of Delaware.

• Following a year long effort, successfully mediated virtually all of the pending state court abuse claims brought against multiple religious order entities affiliated/working with the Diocese of Wilmington. The mediation was complicated by the number of claims, multiple insurers’ reservations of rights, unresolved and novel legal questions, funding issues, and the Diocese’s then pending bankruptcy.

• Served as local counsel for an ad hoc consortium of preferred security holders in the Chapter 11 of Washington Mutual, Inc.

• Served as local counsel to an indentured trustee and an Ad Hoc Committee of bondholders in an expedited Delaware Chancery Court trial and successfully appealed the matter to the Supreme Court of Delaware resolving a dispute over Calpine's use of $700 million subject to lien indenture restrictions.

• Served as local counsel to bondholders holding $2 billion in Countrywide Series B May 2007 bonds in an action seeking a determination whether the acquisition of Countrywide constituted a "change of control" and therefore triggered bondholder put rights. The matter was settled and the bondholders were paid nearly $2 billion (i.e., close to par) for their bonds.

• Successfully defended the former CEO of a major imaging company against preference, fraudulent transfer, and insider trading claims.

• Frequently draft LLC and Series LLC organizational documents for Delaware real estate investors including completion of client tailored limited liability agreements.

• Often represent *pro bono*, minor children in actions where the state is seeking to terminate parental rights.

AWARDS Mr. Conaway has achieved an AV Preeminent Peer Review Rating for professional ethical standards and legal ability by Martindale-Hubbell. Martindale-Hubbell Ratings provides reviews of lawyers and law firms for consumers and professionals.

The Honorable Lynne M. Parker, Superior Court of Delaware

The Honorable Lynne M. Parker became a Commissioner of the Superior Court on July 24, 2008.

Commissioner Parker received her B.S. from Drexel University, where she graduated with high honors. She received her J.D. from Villanova University School of Law.

Upon graduation from law school in 1989, she worked at the firm of Bayard Handelman & Murdoch, P.A. before joining the law firm of Clark Ladner Fortenbaugh & Young. Clark Ladner was a large firm established at the turn of the century, which disbanded in December 1996. Following the dissolution of Clark Ladner, the firm of Hollstein Keating Cattell Johnson & Goldstein, P.C., was created. She joined Hollstein Keating at its inception in 1996 and became a shareholder of the firm in 1999.

Commissioner Parker is admitted to practice law before the Supreme Court of Delaware, Supreme Court of New Jersey, Supreme Court of Pennsylvania, U.S. Court of Appeals for the Third Circuit, and District Courts of Delaware, New Jersey, and Pennsylvania.

Commissioner Parker's present term ends December 18, 2018.

Yvonne Takvorian Saville, Esq., Weiss, Saville & Houser, P.A.

Ms. Saville is a director with the law firm of Weiss, Saville & Houser, P.A., where her practice is focused on plaintiff's civil litigation in the areas of personal injury and workers' compensation. She has been appointed as a Special Master for complex civil cases in Delaware's District Court and is a frequent mediator and arbitrator, having handled over 13,500 cases. In recognition of her ADR practice, Ms. Saville was named a "Friend of the Court" by President Judge Jurden and was accepted as a Fellow with the American College of Civil Trial Mediators and as a member of the National Academy of Distinguished Neutrals. She has presented over 80 lectures on the topics of ADR, PI and WC.

Ms. Saville is a Past President of the Delaware State Bar Association (DSBA) and is a member and previous Chair of DSBA's Workers' Compensation Section. She is also a member of the Randy J. Holland Inn of Court and serves on the CLE planning commissions for the DSBA Workers' Compensation section and Delaware Trial Lawyers Association. She co-chaired the Women and Law Section annual conference for 10 years and is a past co-Chair of the DSBA Nominating Committee.

Ms. Saville has been appointed to the Judicial Nominating Commission by Governor Carney and also currently serves on the Delaware Law School Alumni Board. She is an adjunct professor at Delaware Law School where she teaches ADR. She is a previous co-chair of the Delaware Supreme Court's Access to Justice Commission and served as a member of the Judicial Strategies Committee. She has been a board member for 14 years with the Combined Campaign for Justice and served as an officer with the Delaware Financial Literacy Institute. For the last 25 years, Ms. Saville has been on the Board of Governors for the Delaware Trial Lawyers Association (DTLA) and has served as its' President twice. She is a member of the American Bar Association and the American Association for Justice.

Awards and Honors

• **"AV"** Martindale-Hubbell Peer Review Pre-Eminent Rating 5.0 out of 5 in the areas of Personal Injury, Alternative Dispute Resolution and Workers' Compensation , 2012-2021

• **Kimmel-Thynge Award**, presented by the Alternative Dispute Resolution Section of the Delaware Bar in recognition for outstanding contributions to ADR in Delaware, 2021

• **Amicus Curiae Award** or "Friend of the Court", presented by President Judge Jurden on behalf of the Delaware Superior Court in recognition of ADR practice, 2019

• **Honorable Aida Waserstein Award**, presented by the Women and Law Section of the Delaware Bar in recognition of professional excellence and significant contributions to the legal community, 2019

• **Women's Leadership Award**, presented by the Delaware State Bar Association in recognition of achievement and activities in matters affecting woman and who has served as an inspiration to and a model for women lawyers in our profession, 2018

• **Alumna of the Year Award**, presented by Delaware Law School in recognition of contribution to community and profession, 2016

• **Eagle of Justice Award**, presented by the Delaware Trial Lawyers Association for dedication to preserving the rights of Delawareans, 2016

• Named *The Best Lawyers in America*© Mediation **"Lawyer of the Year"** in Wilmington in 2015, 2018, 2020 and 2022

• Recognized in *The Best Lawyers in America*© 2015 - 2022 in the field of Mediation

• Recognized by *Delaware Today Magazine* as the **Top Alternative Dispute Resolution Lawyer**, 2013 - 2020; one of the **Top Worker's Compensation Lawyers**, 2010

• Recognized as a *Delaware Super Lawyer*® for Alternative Dispute Resolution, 2013-2021

• Named as **Delaware Top 10** *Super Lawyer*® , 2016 – 2018

• **DSBA President's Gavel and Ring** for service as the 67th President of the Delaware State Bar Association, 2014-2015

• **DTLA President's Award for Outstanding Leadership** on behalf of the Delaware Trial Lawyers Association, 2006-2007

• **Outstanding Service Award**, presented by Delaware Law School in recognition of "dedication and service to the legal community," 2006

• **Five-Year Volunteer Service Award**, presented by the Office of the Child Advocate in recognition of "pro bono work on behalf of children", 2006

• **Key Contact of the Year Award**, presented by the Delaware Trial Lawyers' Association in recognition of "outstanding service in support of Delaware's civil justice system," 2003 *Law Firm recognition*:

• Weiss, Saville & Houser, P.A. named by U.S. News and World Reports as Top Tier 1 **Best Law Firms in Workers Compensation Law and Mediation**, 2011-2022

David A. White, Esq., Office of Disciplinary Counsel

David A. White, Chief Disciplinary Counsel,
Office of Disciplinary Counsel, Delaware Supreme Court

Mr. White is a frequent speaker/moderator in the areas of legal ethics and Alternative Dispute Resolution. In March 2021, the Delaware Supreme Court appointed Mr. White Chief Disciplinary Counsel of the Office of Disciplinary Counsel ("ODC"), and Arm of the Court.

The ODC, which functions as an educational and professional resource for members of the Delaware bar, receives, evaluates, investigates, and when necessary, prosecutes complaints of lawyer misconduct and the unauthorized practice of law. The Office also recommends sanctions for attorney misconduct to the Board on Professional Responsibility and the Court.

Previously, Mr. White was in private practice, and for many years served as the office managing partner in the Wilmington, Delaware office of McCarter & English, LLP. There, he was a member of the firm's business litigation, products liability, and bankruptcy practice groups. A substantial portion of his practice was devoted to ADR and representing lenders in the areas of commercial loan workouts, commercial litigation, commercial real estate, and related bankruptcy issues.

Mr. White also taught a civil litigation course for the University of Delaware, Division of Professional and Continuing Studies, where he was awarded Excellence in Teaching awards in 2007 and 2008.

For many years Mr. White has served as an elected member of the Executive Committee of the Delaware State Bar Association, and he is a Honorary/Volunteer member of the Professional Guidance Committee.

Education:
Widener University School of Law, J.D 1986
University of Delaware, B.A. 1982

Setting up your own practice
Where to go next?

Speakers

Bernard G. Conaway, Esquire
Conaway-Legal LLC

Laura F. Browning
Laura Browning, Mediation & Arbitration

Superior Court Mediation Training at the DSBA
2022

DAY 2

DEVELOPING A MEDIATION PRACTICE & MARKETING

Biography of Speaker & Presentation

LAURA FORSYTHE BROWNING, ESQ.:

Ms. Browning is the principal owner of Browning ADR, LLC located in Henderson, Texas. Browning ADR, LLC, an Alternative Dispute Resolution ("ADR") Firm located in Texas that is dedicated solely to providing premier mediation and arbitration services to clients throughout Texas and Delaware. Ms. Browning serves as a full-time mediator and arbitrator.

EDUCATION/ADMISSIONS: Ms. Browning received her J.D. from South Texas College of Law in 2003, and her B.A. from Louisiana State University in 2000. She is a licensed attorney in Delaware (2004) and Texas (2008).

LEGAL WORK: Prior to her ADR practice, she practiced as an associate attorney with the law firm of Grady & Hampton, LLC (2003-2007), in Dover, Delaware. In private practice, her work focused on employment law, civil rights, personal injury, and family law matters. Later, she served as a Deputy Attorney General with the Department of Justice for the State of Delaware in the Criminal Division in Sussex County (2010-2013). As an adjunct professor, Ms. Browning taught property law and legal research at Wesley College in Dover, Delaware from (2006-2007).

ADR WORK: In 2014, her spouse, who serves in the United States Air Force, was stationed at Laughlin Air Force Base in Del Rio, Texas. Shortly after arriving in Del Rio, Ms. Browning saw a need for mediation in the area. In 2015, after she completed the University of Houston Law Center-Mediation Program, she began mediating cases along the border counties in West Texas. Since 2016, Ms. Browning has completed over 200 hours of advanced mediator & arbitration training. Today via Zoom, Ms. Browning mediates cases throughout the entire State of Texas from Houston to Abilene. She also arbitrates medical billing disputes as a panelist for the Texas Department of Insurance and arbitrates property tax cases as appointed by the State of Texas Comptroller. In 2021, she has arbitrated over 200 medical billing cases and began arbitrating medical billing cases in Virginia.

MEMBERSHIPS: Ms. Browning is a current member of the Association of Attorney Mediators, the ADR Section of State Bar of Texas, the ADR Section of the Delaware State Bar Association (Current Section Chair), the American Bar Association-ADR Section (active member with both the ABA mediation committee and ABA Women in Dispute Resolution Committee). In 2020, she reached the status of credentialed mediator with the Texas Mediator Credentialing Association.

Since the Pandemic, Ms. Browning's ADR practice is conducted *only* via the Zoom platform. Ms. Browning primarily only mediates cases in which parties are represented by counsel. In 2020, she completed the Delaware Superior Court Mediator Training and the Delaware Family Court Mediation Training.

CONTACT INFO: **BROWNING ADR, LLC**
BROWNINGMEDIATION@OUTLOOK.COM
P.O. BOX 2046
HENDERSON, TEXAS 75653
(302) 399-5427 (OFFICE)

Building & Marketing a Mediation Practice

PRESENTER

LAURA FORSYTHE BROWNING, ESQ.

BROWNING ADR, LLC.

MY STORY

- SECOND CAREER
- NEGOTIATE BETTER IN MEDIATIONS
- ADD ANOTHER SERVICE TO YOUR LAW FIRM

WHY DO YOU WANT TO MEDIATE?

WHAT KIND OF MEDIATOR ARE YOU?

- Legal Background/Setting Realistic Goals

- Facilitative v. Evaluative

FACILITATIVE V. EVALUATIVE

Facilitative:

A facilitative mediator guides the parties' conversation and discussion of issues that are important to them, without providing an opinion or judgment regarding the merit of the claims or the likely judicial outcome. The mediator can assist the parties in assessing the strengths and weaknesses of their case. The mediator will not tell the parties what to do or suggest a particular outcome

Evaluative

Evaluative mediation is generally understood to be a process which may include an assessment by the mediator of the strengths and weaknesses of the parties' cases and a prediction of the likely outcome of the case.


YOUR FIRST MEDIATION..
IS COMING...
imgflip.com

PROVIDE GOOD SERVICE

- Ready your paperwork
  - -Opening Letters Drafted
  - -Agreements to Mediate
- Change/Be Flexible
- Respond ASAP.

IN PERSON

1. Good Food/Coffee

2. Comfortable Chairs

3. Privacy/WiFi

THE TRAVELING MEDIATOR

ONLINE

1. Start On Time
2. Have Protocols for Problems
3. Rules to Ensure Confidentiality.
4. E-Signature Services (DocuSign)
5. Make Online Easy for Everyone
6. Be Patient and Reassuring
7. Think about your Background


LEWISWAGNER
QUESTION TEN
If a party tells you they will settle for $500,000, is it appropriate for you to go to the other party and ask them "What if" I could get the other party to take $500,000?

ORGANIZATIONS & NETWORKING

1. DSBA ADR Section–Meet Every Third Wednesday at 9 a.m Via Zoom. Email me at Browningmediation@outlook.com for more info
2. American Bar Association- Dispute Resolution Section Section of Dispute Resolution (americanbar.org)
3. Association of Attorney Mediators: Association of Attorney-Mediators – Welcome
4. The Academy of Professional Family Law Mediators Academy of Professional Family Mediators - APFM (apfmnet.org)
5. Find A Mentor- DSBA ADR Section

TRAINING

1. DSBA Trainings/Certifications
2. Basic Mediation Trainings

   -Law School Mediation Programs

   -Watch out for Scams
3. Advanced Mediation Training

   -Association of Attorney Mediators (Spring & Summer)

   -ABA Mediation & Arbitration Institutes (Mediation in Fall) (Arbitration in Summer)
4. Mediate.com—Good for News & Announcements

WHAT TO CHARGE...*WHEN TO CHARGE?*

COMING UP WITH AN AMOUNT:

1. Talk to Colleagues.
2. Start Small, Finish Big.
3. What are your goals in mediation?

OTHER MARKETING NOTES:

1. Closing Letters
2. Follow Up on Impasses (its ok if it does not settle)
3. Zoom Backgrounds (Canva.com)
4. Accessible Calendar (Plug In to Website)
5. Website
6. Post Cards (Vista Print/Canva.com/Moo.com)
7. Pens/Cups/Folders at Mediation (Vista Print)
8. Logo (Canva.com)

SHOULD I GET INSURANCE?

1. Self Insured.
2. If you have legal malpractice—Check to see if it specifically states mediation & arbitration.
3. Join an organization that has insurance--Association of Attorney Mediators

TROUBLE AREAS

1. Neutrality–(Protect Your Neutrality)

2. Confidentially-Practice Makes Perfect

3. Your Role: Make sure everyone knows your role is a Neutral

4. Keep a copy of ABA Model Standards of Conduct for Mediators

   Link: MODEL STANDARDS OF CONDUCT (americanbar.org)

FINAL THOUGHTS

- Mentally Prepare.
- Know why you want to do this?
- Protect your neutrality like you protect your bar card.

QUESTIONS

CONTACT ME:

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Attorney Mediator/Arbitrator
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Henderson, Texas 75653
302-399-5427 (office)

Browningmediation@outlook.com

www.BrowningADR.com

BROWNING
ADR

Superior Court Mediation Training at the DSBA
2022

DAY 2

USEFUL MATERIALS

SEMINAL CASE ON PROTECTION OF MEDIATORS FROM TESTIFYING

883 A.2d 44

PRINCETON INSURANCE COMPANY, a New Jersey corporation, an insurer for Norman R. Robinson, M.D., Norman R. Robinson, M.D., P.A., and Christiana Audiology Associates, Inc., Plaintiffs,
v.
Susan and John VERGANO, Defendants.

C.A. No. 266-N, 2004.

Court of Chancery of Delaware, New Castle County.

Submitted: September 13, 2005.

Decided: October 11, 2005.

[883 A.2d 46]

Mason E. Turner, Jr., Prickett, Jones & Elliott, P.A., Wilmington, DE, for Plaintiffs.

Stephen B. Potter, Jennifer Kate Aaronson, Potter, Carmine & Aaronson, P.A., Wilmington, DE, for Defendants Susan and John Vergano.

OPINION

STRINE, Vice Chancellor.

Defendant Susan Vergano was operated on by plaintiff Dr. Norman R. Robinson, who recommended a lymph node resection surgery. During that surgery, Dr. Robinson severed Vergano's right spinal accessory nerve. Vergano later brought suit against Dr. Robinson and others in the Superior Court, alleging that she was unable to work and was enduring pain and suffering as a result of malpractice by Dr. Robinson (the "Malpractice Case").

Just before trial, Vergano and the defendants in the Malpractice Case, who included not only Dr. Robinson and his professional corporations, but his insurer, Princeton Insurance Company, and the company that operated the hospital where the surgery was performed, Christiana Care Health Services, Inc. (collectively, the "Malpractice Defendants"), engaged in mediation. By the time of the mediation, it was clear to all the Malpractice Defendants that it was indisputable that Dr. Robinson had committed malpractice and that they had no liability defense. Thus, the key issue was the extent of Vergano's damages, with the Malpractice Defendants facing a possible verdict of over $2 million. Indeed, the Malpractice Defendants suspected that Vergano was exaggerating the extent to which the surgery had impaired her physical capabilities and caused her pain—what I will call her "claims of pain and impairment." Nonetheless, the Malpractice Defendants agreed at the end of the mediation to settle with Vergano by agreeing to pay her $945,000.

The day after the settlement was reached, Vergano attended a beef and beer fundraiser in Middletown to benefit a local group of cheerleaders. While at the event, James Drnec, who had served as one of the attorneys for Christiana Care Health Services in the Malpractice Case, saw Vergano dancing while holding a beer. Believing Vergano to be engaged in physical activity inconsistent with her claims of pain and impairment in the Malpractice Case, Drnec went home and got a video camera. He returned to the fundraiser and enlisted a female friend who also knew Vergano to ask Vergano to dance. Drnec, through this deception, got Vergano dancing again and used that opportunity to film her secretly.

Drnec then took the tape (the "Drnec Video") to the Malpractice Defendants. Princeton Insurance conducted surveillance on Vergano for several days, again without her knowledge, and observed her doing normal activities like driving and shopping (the "Surveillance Videos").

The Malpractice Defendants then reneged on their settlement, claiming that they possessed evidence that Vergano had defrauded them. They brought this action seeking a declaration to that effect and rescission of the settlement agreement.

[883 A.2d 47]

Vergano opposes that claim and demands specific performance of the settlement agreement and other damages for the Malpractice Defendants' failure to consummate the settlement agreement.

Before me now are two motions in limine by the Malpractice Defendants. The first seeks the admission of the testimony of Vergano's attorney in the Malpractice Case, Nancy H. Fullam. The Malpractice Defendants want Fullam to give opinion testimony to the effect that the conduct of Vergano observed on the Drnec Video is inconsistent with Vergano's claims of pain and impairment in the Malpractice Case.[1] They say that the crime-fraud exception to the attorney-client privilege justifies the admission of this testimony. Alternatively, the Malpractice Defendants argue that Fullam's testimony is admissible under the "at issue" exception to the attorney-client privilege because in deposition testimony in this case Vergano disclaimed having read the interrogatory answers, the complaint, or the pre-trial stipulation filed on her behalf in the Malpractice Case and indicated that Fullam filed those documents without reviewing their final form with her.

In this opinion, I deny the Malpractice Defendants' motion to admit Fullam's testimony regarding her opinion whether the conduct on the Drnec Video is inconsistent with Vergano's claims of pain and impairment in the Malpractice Case. At most, Fullam's testimony is simply that of a lay witness who would be comparing the activity shown on the Drnec Video with the claims of pain and impairment made by Vergano (and by Fullam on Vergano's behalf) in the Malpractice Case. Therefore, that testimony is of marginal, if any, relevance as the court is as well positioned as Fullam to watch the video and make the required comparison. More problematically, it is unwise policy to vitiate the attorney-client privilege simply because a former attorney now concludes that her former client was being untruthful previously.

The Malpractice Defendants have not produced evidence suggesting that the circumstances traditionally justifying application of the crime-fraud exception pertain here. They do not possess any evidence that Vergano sought advice in any manner from Fullam that would aid her in deceiving them about the extent of pain and impairment she was suffering. In fact, they allege Vergano told Fullam the same story confidentially about her claims of pain and impairment as were made to them openly in the Malpractice Case. Likewise, the Malpractice Defendants do not allege Fullam has concealed any evidence the Malpractice Defendants should have rightly possessed but do not. The Malpractice Defendants simply seek to elicit Fullam's opinion that Vergano's claims of pain and impairment—which were known to the Malpractice Defendants —are, in her view, inconsistent with Vergano's observed behavior on the Drnec Video. In considering the admissibility of Fullam's testimony, I take into account the undisputed malpractice committed by Dr. Robinson on Vergano, the undisputed fact that Vergano suffered injury as a result of that malpractice, and the medical evidence buttressing Vergano's claims of pain and impairment. Thus, the mere fact that there is a basis for reasonable minds (including Fullam's) to conclude that Vergano, who clearly had a valid claim for damages, exaggerated the extent of her pain and impairment in the Malpractice Case is

[883 A.2d 48]

the sole basis for the Malpractice Defendants' invocation of the crime-fraud exception.

Although it is important to the integrity of the judicial system that attorneys not be used as unwitting tools of fraud, it is also important clients not fear that their attorneys will testify against them in a situation when it is—as here—a hotly contested matter of opinion whether the clients' former testimony was truthful. The crime-fraud exception obviously justifies the admission of an otherwise privileged statement of fact that directly proves the falsity of prior client testimony when that is necessary to prevent the false

testimony from creating injury. But when an attorney is simply being asked to give her opinion that, based on her viewing of new evidence that emerged after the client's testimony and that was developed not by the attorney but by her client's adversaries, the previous testimony was false, there is no substantial policy purpose served by not respecting the attorney-client privilege. And, the tangential relevance of testimony of that kind is far outweighed by the prejudicial impact of having an attorney opine that her former client is a liar.

By contrast, I conclude that Fullam's testimony on one point is admissible under the at issue exception to the attorney-client privilege. Because Vergano has disclaimed responsibility for the final form of the complaint, interrogatories, and pre-trial stipulation filed on her behalf in the Malpractice Case, she has put at issue her role in the preparation of those documents. For that reason, I will permit the Malpractice Defendants to have Fullam testify about that subject—how those documents were prepared and finalized—but only that subject.

The Malpractice Defendants' other motion in limine seeks the admission of testimony by the mediator in the Malpractice Case, former Superior Court Judge Vincent A. Bifferato, Sr. As was the case with Fullam, the Malpractice Defendants seek to have Bifferato testify that the conduct he observed on the Drnec Video is inconsistent with his understanding of Vergano's claims of pain and impairment in the Malpractice Case. For her part, Vergano objects to this testimony on the grounds that the parties to the mediation agreed that any statements at the mediation would remain confidential and could not be used in any judicial proceeding, and that none of them could seek to use the mediator as a witness.

I deny the motion in limine. It is the public policy of this State to encourage the voluntary resolution of disputes through mediation. Confidentiality is vital to the mediation process, as the Malpractice Defendants acknowledged when they promised not to reveal statements made at the mediation or seek to use the mediator as a witness. Parties and mediators themselves cannot be expected to approach the process with the same candor and trust if the mutual understanding that the process is confidential cannot be relied upon. Going into the mediation, the Malpractice Defendants knew that they could not rely on any statements made in the mediation unless those statements were incorporated, in a binding way, in a formal settlement agreement. They now seek to breach their contractual promise of confidentiality so as to obtain testimony from Bifferato that he saw conduct on the Drnec Videos that was inconsistent with Vergano's claims of pain and impairment in the Malpractice Case. The purported justification for this is based on an argument that itself violates the confidentiality of the mediation; namely, that Bifferato's assessment that Vergano would make a good witness factored into the Malpractice Defendants' decision to settle.

[883 A.2d 49]

This justification is inadequate to overcome the policy purposes served by confidentiality in the mediation process. Parties in that process know that they must verify and embody in a non-confidential form any statement of fact made in mediation if they wish it to be a fundamental premise of any settlement agreement. The failure of the Malpractice Defendants to do so does not entitle them to dishonor their promise of confidentiality.

Furthermore, the testimony they seek to proffer is of marginal, if any relevance. Again, it is simply the opinion of a lay person that the behavior he observes on the Drnec Video is inconsistent with Vergano's claims of pain and impairment. The court is just as well positioned to come to that opinion itself. As important, the Malpractice Defendants have access to all the elements of the mediator's proposed testimony. Vergano's claims of pain and impairment are in the litigation record of the Malpractice Case. The allegedly inconsistent behavior after the

settlement is in their possession, in the form of the Drnec and Surveillance Videos. All that they are being denied is the opportunity to present the opinion of the mediator about whether the post-settlement evidence convinces him that Vergano was lying about her pain and impairment. Enlisting a mediator in this partisan manner is unseemly, violates the mediation agreement, and involves an attempt to obtain the admission of testimony that is clearly prejudicial, while having minimal relevance.

I. *Factual Background*

On April 25, 2000, Dr. Robinson, an ear, nose and throat doctor, performed excisional lymph node biopsy surgery on Vergano. As the precise medical terminology indicates, the purpose of the surgery was to remove lymph tissue and determine whether it was cancerous. During the surgery, Dr. Robinson severed Vergano's spinal accessory nerve, something that was not supposed to happen. The spinal accessory nerve is a cranial nerve, which controls the muscles around the shoulder blade or scapula.

Vergano and her husband, as co-plaintiff, brought a medical negligence action in Delaware Superior Court against Dr. Robinson.[2] The complaint filed on her behalf was signed by Mr. Joseph J. Longobardi III, her Delaware counsel, and listed Fullam, a Pennsylvania attorney, as trial counsel for Vergano.[3] Fullam was later admitted pro hac vice.

The complaint did not comply with the Superior Court requirement that a personal injury plaintiff file and sign Form 30 interrogatory answers with the complaint.[4] But the Malpractice Defendants apparently never made a motion to dismiss it on that basis.

In the complaint, Vergano alleged that she had suffered permanent and incapacitating injuries as a result of Dr. Robinson's malpractice. Specifically, Vergano claimed the severing of her right spinal accessory nerve resulted in chronic and severe pain and little, if any, right shoulder function. To wit, the complaint recited a litany of alleged injuries, more like a grocery than laundry list:

> transection of her spinal accessory nerve; neuroma formation; loss of mobility of the right shoulder; loss of use of the right shoulder and right arm;
>
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>
> chronic pain; altered sensation in the right neck, shoulder and upper extremity, parasthesias; tingling sensation; spinal accessory neuropathy; right shoulder drooping; ligamentus stretching; thoracic outlet syndrome secondary to sagging of the clavicle; winged scapula; muscle atrophy and weakness; inability to get comfortable; electric shock type sensation upon grasping objects with her right hand; disturbances to sleep; need for continuous and ongoing use of pain and other prescription medications, risks of toxic side effects, drug dependence and other long-term health risks from reliance upon prescription pharmaceuticals; lost opportunity for non-surgical care of her cervical lympadenopathy; disfigurement; scarring; likely reduction of plaintiff's life expectancy; mental anguish and suffering; depression; mood swings and moodiness; irritability; loss of independence; loss of energy; loss of her ability to care for her three young children; inability to safely maintain a healthy pregnancy and delivery of a healthy child secondary to the effects of medications necessary for the treatment of her injuries; daily physical and emotional incapacity; loss of her ability to care for her husband; changes to personality; embarrassment and humiliation;

> changes to mention secondary to medications; injury to nerves and nervous system; pain and suffering; all of which injuries are permanent in nature.[5]

Later in the Malpractice Case, Vergano's attorneys submitted interrogatory answers on her behalf. Like the complaint, the interrogatory answers were not in compliance with the Superior Court Rules, as they were not signed by Vergano.[6] Again, the Malpractice Defendants made no motion in response to this non-compliance. In the interrogatory answers, the same litany of claims of pain and impairment listed in the complaint are reiterated verbatim.

The complaint and interrogatories were, of course, not accepted as true by the Malpractice Defendants. Instead, the Malpractice Defendants retained their own expert, Dr. Alan J. Fink, to examine Vergano and to provide his assessment of the pain and impairment she suffered as a result of the surgery by Dr. Robinson. In connection with their defense efforts, the Malpractice Defendants also tried to develop a liability defense, but were unable to come up with a plausible basis to deny that Dr. Robinson had committed malpractice by severing Vergano's spinal accessory nerve.

In his report, Dr. Fink expressed skepticism that Vergano's claims of pain and impairment. He did not believe that any pain and impairment of her right shoulder was or could be caused by the injury to her right spinal accessory nerve. Because that nerve does not have any sensory fibers, Fink could not explain anatomically the pain and weakness Vergano described. He did, however, concede that Vergano sustained injury as a result of Dr. Robinson's severing of her nerve. For her part, Vergano was going to offer the testimony of Dr. Peter M. Witherell, who opined that Vergano's complaints of pain and impairment were of the kind that could result from the severing of the spinal accessory nerve.

As is typical in most civil litigation, Vergano's claims were tested in an adversarial manner through cross-examination in deposition. At her deposition on January 7, 2004, Vergano was asked extensive questions regarding the pain and impairment

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she was enduring as a result of the surgery gone wrong. Among other things, Vergano testified that:

> It always seems like I do one good day and then I do two days bad and pay for it ... There are some days that are fairly good ... I can, you know, maybe go to the store ... or I sit down and play with the boys, maybe get a little laundry done. Then a bad day is just on the couch taking medications to ease it... I know there's a lot more bad [days] than good ones. Maybe I'll have like one good day for every two or three bad days, because on the good day I try to, you know, in some way make up for all those bad days that I just went through, so I have a lot of energy, and I try to do some stuff, and then I tend to end up paying for that for the next two or three days.[7]

In the joint pre-trial stipulation, Vergano's Statement of Claims Including Damages describes the following injuries: "immediate, chronic and unrelenting nerve pain in her right neck, jaw, shoulder and arm ... [inability] to shrug her shoulder, raise her arm or employ her shoulder or arm for lifting even light objects. For example, she is unable to hold a can of soda, a cup of coffee, or a baby's bottle in that hand."[8]

The trial in the Malpractice Case was scheduled to begin on January 26, 2004. The record evidence developed in this litigation indicates that by that time, the Malpractice Defendants harbored a great deal of skepticism regarding Vergano's claims of pain and impairment. As might also be expected, the Malpractice Defendants drew their understanding

of Vergano's claims from the total mix of information available to them and were not blindly relying on the literal words of any information source. For example, Mary Staab, the claim adjustor for Princeton Insurance, and John Elzufon, counsel to Dr. Robinson, admitted that they understood that Vergano's assertion that she could not lift her arm was not a literal claim that she could never do so, but a figurative expression indicating that she could not do those functions without suffering pain. Indeed, the medical report of Dr. Allen Belzberg,[9] which was available to the Malpractice Defendants, indicated that Vergano had the physical capability to use her right shoulder and arm. Even though Malpractice Defendant Princeton Insurance had used surreptitious surveillance of tort plaintiffs in other situations, it did not conduct such surveillance on Vergano.

Shortly before trial, the parties agreed to mediate their dispute before Bifferato. This agreement was voluntary as the amount of damages sought by Vergano exempted the case from Superior Court's mandatory mediation process under its Rule 16.1, a process that expressly protects the "confidentiality of the conference."[10] Nonetheless, the parties made a broad contractual promise to each other not to: reveal statements made during the mediation; seek to use such statements in court; or attempt to use the mediator as a witness.[11]

After two sessions of mediation, the parties agreed to settle the claims of Vergano

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for $945,000. Although Princeton Insurance in particular was skeptical about Vergano's claims of pain and impairment, it assented to advice from Dr. Robinson's defense attorney John Elzufon, Esquire, to settle at that level. Elzufon noted that Vergano could receive an award much higher than $945,000 at trial, that the Malpractice Defendants had no liability defense, that their evidence that Vergano was not suffering material pain or impairment as a result of the Malpractice was not strong, and that Vergano would likely make a convincing trial witness.

The day after the settlement was reached, Drnec made his secret Video of Vergano dancing and drinking beer, a Video that he induced by having a friend of Vergano's invite her to dance without disclosing the motive. The Malpractice Defendants then swung into full sleuth mode, engaging private investigators to film Vergano as she went about her daily activities. Based on their conclusion that the Drnec Video and the Surveillance Videos illustrated conduct inconsistent with Vergano's claim of pain and impairment in the Malpractice Case, the Malpractice Defendants refused to honor their settlement with Vergano.

They sent the Drnec Videotape and the Surveillance Videos to Vergano's counsel, Fullam. Vergano learned about the Videos from Fullam. Fullam and Vergano then spoke, and Vergano and her husband discharged Fullam because they did not feel she had their "best interest at heart."[12] On February 12, Fullam then sent a letter to counsel for the Malpractice Defendants stating, in pertinent part that:

> As a member of the Bar of the Commonwealth of Pennsylvania and pro hac vice counsel in the State of Delaware, I am writing pursuant to Rule of Professional Conduct 3.3(a)(4) to acknowledge the inconsistency between the sworn testimony of Susan Vergano and the conduct observed on the surveillance videotape of January 25, 2004. I do so on the advice of Ethics Counsel, Samuel Stretton, Esq.[13]

Fullam also advised the Malpractice Defendants that she was being discharged by the Verganos. Because of her status as a Pennsylvania attorney, Fullam cited to Pennsylvania Rule of Professional Conduct 3.3(a)(4), which states in relevant part that: "a lawyer shall not knowingly ... offer evidence that the lawyer knows to be false.

If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." It is not clear if Fullam consulted with her Delaware co-counsel, Joseph Longobardi, III, before sending the letter.

Around this same period, the Malpractice Defendants brought the Drnec Video to the attention of mediator Bifferato, in circumstances that suggest that they indicated to him their belief that the Video demonstrated that Vergano's claims of pain and impairment in the Malpractice Case were false or at least exaggerated. They did this on an ex parte basis and did not inform Vergano or her attorneys. The Malpractice Defendants claim to have sent the Drnec Video to Bifferato at his request but they are the ones who clearly brought its existence to his attention. They also indicate that they believe Bifferato watched the Video and that they have reason to believe that he would testify that the conduct displayed on the Drnec Video is, in his opinion, inconsistent with Vergano's claims of pain and impairment in the Malpractice Case.

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On February 20, 2004, the Malpractice Defendants filed this action seeking rescission of the settlement agreement on the grounds that it was induced by fraud. Specifically, in their complaint in this action, the Malpractice Defendants aver that:

> 7. At that mediation, defendants continued to maintain that defendant Susan Vergano was suffering from an ongoing severe disability consisting, *inter alia,* of severe and constant pain in her right arm and inability to lift the right arm. Based upon, and as a result of those representations, plaintiff agreed to pay the defendants $945,000.00 in settlement of defendants' claims in the Superior Court lawsuit.
>
> 8. On January 24, 2004, defendant Susan Vergano was observed engaging in activity which was materially inconsistent with her professed disability. As a result of the report of these observations, defendant Susan Vergano was subsequently observed engaging in other activity inconsistent with her claimed injury and disability.
>
> 9. Defendants fraudulently induced plaintiff to agree to settle for the stated amount based on materially false misrepresentations as to defendants Susan Vergano's condition.

This case proceeded briskly and was set to go to trial on May 5, 2005. At the pre-trial conference, without adequate briefing or prior notice to the court or opposing counsel, the Malpractice Defendants first surfaced their desire to present opinion testimony from Fullam and Bifferato. Bifferato made clear that he, being bound to and respecting the confidentiality provisions of the mediation agreement, would only testify if ordered to do so by this court. Given the importance of the issues presented, the court postponed the trial to permit the parties to present formal briefing on the Malpractice Defendants' motion to admit this unusual and sensitive testimony.

II. *Legal Analysis*

A. *Is the Testimony of Vergano's Former Attorney Fullam Admissible?*

The Malpractice Defendants have moved for leave to present the testimony of Vergano's former attorney in the Malpractice Case, Nancy Fullam. They want Fullam to testify regarding what can be characterized fairly as two main subjects. First, they seek to have Fullam testify about how the complaint, interrogatories, and pre-trial stipulation filed on Vergano's behalf in the Malpractice Case were prepared, and Vergano's involvement in that process. In that

regard, I also infer that the Malpractice Defendants would like to have Fullam testify not only about what information Vergano provided about her claims of pain and impairment in connection with the preparation of those documents, but also what Vergano said about her claims of pain and impairment in preparing for deposition and trial. Second, and most important, the Malpractice Defendants seek to have Fullam provide opinion testimony about the consistency of the conduct engaged in by Vergano on the Drnec Video with Vergano's claims of pain and impairment in the Malpractice Case.

Vergano argues that the Malpractice Defendants seek testimony that is shielded from revelation by the attorney-client privilege. The Malpractice Defendants acknowledge that it is their burden to point to an exception to the privilege that justifies permitting Fullam to testify as to communications received by her from Vergano, or made to Vergano by her, during the course of the Malpractice Case. The Malpractice Defendants rely upon two exceptions: the crime-fraud exception and the at issue exception. I deal with these in turn.

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1. *Is the "crime/fraud" exception applicable?*

Delaware Rule of Evidence 502 recognizes a crime-fraud exception to the attorney-client privilege that applies if "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud . . ."[14] To fall within this exception, a mere allegation of fraud is not sufficient. There must be a prima facie showing that a reasonable basis exists to believe a fraud has been perpetrated or attempted.[15]

To address the applicability of this exception in sensible manner, it is important to focus on the unusual nature of Malpractice Defendants' fraud claim. Under Delaware law, a claim of common law fraud has the following elements: 1) a false representation of fact made by the defendant; 2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; 3) an intent to induce the plaintiff to act or to refrain from acting; 4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and 5) damage to the plaintiff as a result of such reliance.[16] Further, under common law fraud, the representation must not only be material, but must concern "an essential part of the transaction."[17]

Here, the Malpractice Defendants claim to have reasonably relied upon Vergano's claims of pain and impairment resulting from the malpractice committed upon her. This is an extremely odd basis upon which to premise a fraud claim. The record is clear that the major party calling the shots for the Malpractice Defendants in the Malpractice Case — Princeton Insurance — did not believe Vergano's claims of pain and impairment were entirely truthful. To the contrary, Princeton Insurance believed Vergano to be exaggerating. Given that undisputed fact and the reality that the Malpractice Defendants did not conduct surveillance on Vergano, there is an obvious question whether they can, after trial, prove reasonable reliance on anything Vergano said. Put plainly, it is difficult to keep a straight face while writing down the idea that an insurance company relied on the word of a tort plaintiff about the cause or extent of her injuries.

Vergano did not move for summary judgment in a prompt manner and has committed herself to going to trial on the Malpractice Defendants' fraud claim. This is therefore not the time to evaluate whether that claim will succeed given the requirement of reasonable reliance. In considering the viability of the fraud claim later, the court will have to consider the practical predicament of tort defendants facing claims of physical impairment and pain. Although tort defendants can obtain physical examinations of plaintiffs and conduct surveillance of plaintiffs'

conduct in public places, there are moral limits to the extent to which tort defendants can go to disprove claims of impairment. For example, assume a plaintiff complains that she can't walk without a cane. Can a tort defendant have a private detective follow

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her to a movie and scream "fire, hurry get out!" behind her to see if she's telling the truth? Obviously not. Assume a plaintiff complains he can't lift his hands above his waist. Can the defendants shout "look out!" and fire a baseball at the plaintiff's face? No way. For this reason, a critical assessment a tort defendant typically must make is the extent to which the jury, despite the defendant's own skepticism, will find the plaintiff's claims of impairment credible. In a circumstance when that assessment leads a defendant to settle, and the defendant later uncovers indisputable evidence the plaintiff perjured himself about the extent of his impairment, is the defendant without recourse to rescind the settlement? That question (in grayer variations) is not yet before me in ripe form.

Therefore, I assume for purposes of deciding this motion that the Malpractice Defendants have a viable fraud claim because there is a colorable basis to argue that the conduct Vergano engages in on the Drnec Video in particular demonstrates that some or all of her prior claims of pain and impairment were entirely false or, at the very least, purposely exaggerated. Working from that premise, one could, as the Malpractice Defendants would have me do, draw a very simple conclusion about the applicability of the crime-fraud exception.

That simple conclusion would flow from the following syllogism: Vergano sought to recover excessive damages by falsifying entirely or exaggerating the pain and impairment she suffered as a result of Robinson's malpractice. She sought the services of Fullam to accomplish that purpose. Absent Fullam's prosecution of the Malpractice Case based on Vergano's claims of pain and suffering, Vergano would not have been in a position to obtain a verdict against or a settlement with the Malpractice Defendants. Therefore, because Vergano sought to use Fullam's services to advance claims that were entirely false or exaggerated, the crime-fraud exception applies.

The problem with that simplistic reasoning is that it vitiates the attorney-client privilege when the policy justification for the crime-fraud exception does not pertain. That justification is based on the premise that when a client seeks out an attorney for the purpose of obtaining advice that will aid the client in carrying out a crime or a fraudulent scheme, the client has abused the attorney-client relationship and stripped that relationship of its confidential status. As Justice Cardozo put it, "The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law."[18] This rationale, however, I dare to venture, is itself bottomed on the assumption that the client has actively sought out legal advice from the lawyer, in order for the client to plan how he will carry out a crime or fraud.

In this case, the only thing that Vergano arguably did to abuse the privilege is to go to an attorney, tell the attorney the details of her claims of pain and impairment, and ask the attorney to present those claims. In this respect, it is important to remember that there is no doubt that Vergano was victimized by malpractice, and that the malpractice caused her pain and impairment to some material extent. Vergano, therefore, brought to Fullam a malpractice claim that was, at bottom, bona fide. Critically, the Malpractice Defendants do not argue that Vergano provided Fullam an initial, more modest story about pain and impairment, received advice from Fullam about what type of testimony would be

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most useful in obtaining a high damage award, and then modified her story in order to make a more compelling, but false, case. In fact, the

Malpractice Defendants seek to show that what Vergano told Fullam about her claims of pain and impairment is substantively the same as what was incorporated in the complaint, interrogatories, and pre-trial stipulation filed on Vergano's behalf, and in Vergano's deposition testimony, in the Malpractice Case.

In other words, if the crime-fraud exception applies here, it applies every time a client faces a well-pled charge of perjury or false statement based on an assertion made in prior litigation or administrative proceeding when an attorney helped the client present the allegedly untruthful assertion. In that instance, because the client would have sought out legal assistance to provide his allegedly phony version of the facts, the crime-fraud exception would, by definition, apply. I do not believe that to be the law.

Rather, the crime-fraud exception is best interpreted as coming into play only if circumstances not present here exist. The quintessential circumstance, of course, is when the client obtains the advice of the lawyer in order to help shape a future course of criminal or fraudulent activity. This is the classic situation when the privilege gives way, as the societal purpose of the confidential relationship has been entirely subverted, with the client seeking the expertise of someone learned in the law not so as to comply with the law or mitigate legitimately the consequences of his prior behavior, but to craft a course of future unlawful behavior in the most insidiously effective manner. A few case examples illustrate this well.

One is when there is a prima facie showing that a client gave one story early in litigation, received legal advice that indicated that the original story would not suffice to accomplish the client's end, and the client thereafter concocted a new, false version of events. In a case along exactly those lines, a federal court held that the crime-fraud exception applied but only insofar as the defendant was able to show that the client's story in fact changed as a result of the lawyer's advice.[19] Another similar situation is when a client goes initially to one lawyer and describes a legally knotty fact. The lawyer then advises the client that if he proceeds with certain legal action, he must disclose the knotty fact in the filing. Instead of proceeding with the first lawyer, taking the desired action, and disclosing the troubling fact, the client then goes to a second attorney, does not disclose the knotty fact, proceeds with the

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action discussed with the first attorney, thereby resulting in a filing devoid of the knotty fact.[20] Even more obviously, the crime-fraud exception applies when there is evidence that an attorney consciously participated with the client in shaping perjurious or materially misleading testimony.[21]

Another circumstance where the privilege gives way is when the client tries to use the attorney as a secret repository for evidence of criminal or fraudulent behavior, by giving the attorney the smoking gun, be it an actual pistol or a "hot" document. In that circumstance, the client seeks to abuse the privilege by placing evidence in the hands of an attorney with whom he has a confidential relationship.[22]

A final circumstance worth mentioning here in which the crime-fraud exception might be thought to have application is when the client confesses that he abused the lawyer's services for an improper purpose and will escape the consequences of his improper behavior absent the lawyer's disclosure. In this regard, let's posit a variation on the facts of this case. Imagine a tort victim who sympathetically tells a jury a compelling story, guided by a skillful direct examination. At the end of the trial, a large verdict is awarded. Back at the attorney's office, the client gives the attorney a bear hug and exclaims, "Can you believe the jury bought that story about how I got hurt at work? You did a great job selling that line of bull. I really hurt myself playing football with my buddies." In that circumstance, the client has admitted to testifying falsely and the lawyer is in possession of unique information that perjury has been committed.

In determining whether privileges or evidentiary immunities such as the work

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product doctrine apply, it is common for the law to consider the strength of the need that other parties have for the evidence sought. When that evidence is otherwise unavailable, courts are more willing to relax the privilege or immunity. But when the party seeking the evidence can prove its case through other means without unfair prejudice, courts tend to uphold the privilege or immunity.[23]

Here, none of the factors that implicate the policy purposes of the crime-fraud exception are present. There is no evidence that Vergano's claims of pain and impairment were influenced by legal advice that she received from Fullam. At most, Fullam acted as the unknowing conduit for false or exaggerated testimony, a possibility present in every perjury or false statement case where the allegedly wrongful contention was proffered by the client with the assistance of counsel.[24]

Likewise, there is no evidence that Fullam possesses unique evidence that Vergano made false statements in the Malpractice Case.[25] To the contrary, it is the Malpractice Defendants who developed evidence of possible perjury by Vergano and presented it to Fullam. Therefore, there is no prejudice to the Malpractice Defendants in honoring the privilege, as they do not have any basis to assert that Vergano told Fullam any story other than

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the same one that Fullam used to shape Vergano's claims of pain and impairment in the Malpractice Case, or that Fullam possesses any other evidence tending to prove that Vergano's claims of pain and impairment were false. Indeed, what the Malpractice Defendants want is for Fullam to testify that in her opinion the claims of pain and impairment (which the Malpractice Defendants can document) are false based on her comparison of those claims to the behavior on the Drnec Video (which the Malpractice Defendants recorded and provided to her).

In my view, it is unwise to create the broad precedent that the Malpractice Defendants ask me to establish. Clients should not have to fear that their lawyers will become opinion witnesses against them simply because, after the trial or proceeding, the client's adversary develops evidence that casts doubt on the client's prior truthfulness. Unless there is a showing that the client's prior factual testimony was shaped based on specific advice from the lawyer or the lawyer possesses unique evidence of the client's perjury or false statement, the mere fact that the client faces a colorable charge of perjury or false statement based on evidence submitted to a tribunal through an attorney should not in itself vitiate the privilege.[26]

If Vergano's claims of pain and impairment are false, the Malpractice Defendants can document that by proving to the trier of fact that the Drnec Video and Surveillance Videos demonstrate behavior that is inconsistent. There is no purpose served by creating the precedent that whenever a non-frivolous perjury or false statement claim is made against a lawyer's client based on later emerging evidence created entirely outside the attorney-client relationship, the crime-fraud exception should apply. To the extent it is contended that opinion testimony by former counsel as to the consistency of such later emerging evidence with the client's prior testimony is not privileged because it does not involve the revelation of any attorney-client communication, the answer is rather obvious. The opinion testimony of the lawyer about that subjective issue, if it has probative value at all, which I tend to doubt, is so unfairly prejudicial as to require its exclusion under Delaware Rule of Evidence 403.

2. Does the "at issue" exception apply?

The Malpractice Defendants claim that Fullam's testimony is also admissible under the "at issue" exception to the attorney-client

privilege. The at issue exception is based on principles of waiver and fairness intended to ensure the party holding the privilege cannot use it both offensively and defensively.[27] A party places her attorney-client communications at issue by (1) injecting the attorney-client

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communication into the litigation or (2) injecting an issue into the litigation, the truthful resolution of which requires an examination of attorney-client communications.[28] But this is one of those common areas of privilege law when the question of ultimate admissibility turns in substantial measure on whether the party seeking to discover the attorney-client communications placed at issue is disadvantaged because it is otherwise unable to obtain the information from an alternative source if the attorney-client privilege is respected.[29]

The Malpractice Defendants have proven the at issue exception applies. In her deposition, Vergano was asked by the Malpractice Defendants whether the claims of pain and impairment made in the complaint, the interrogatories, and pre-trial stipulation filed on her behalf in the Malpractice Case were accurate. Vergano disclaimed the accuracy of some of the factual statements in these documents and attributed their errors solely to Fullam. Indeed, Vergano claims never to have seen the complaint, interrogatory answers, or pre-trial stipulation in the Malpractice Case, and claims that each inaccurately describes the pain and impairment from which she suffers.[30] In her deposition, Vergano did not invoke the privilege as to the subject of how these documents came to be prepared.

Most important, it is clear that Vergano is reserving the right to argue that the Malpractice Defendants cannot premise a fraud claim on these documents because she herself did not authorize that the statements contained in them be made. At oral argument, I gave Vergano the opportunity to waive any defense based on the factual questions of whether Vergano had provided Fullam with all or part of the information contained in those documents, and whether Vergano had reviewed the finalized documents before they were filed in the Malpractice Case. Vergano, through counsel, refused. Instead of addressing the at issue exception in a focused way, Vergano simply argued that the issue of who prepared these documents is irrelevant because the record indisputably demonstrates that those documents were not relied upon by the Malpractice Defendants in deciding to settle. But that argument is just that, an argument about a dispute of fact.[31]

By seeking to distance herself from the preparation and accuracy of important documents filed on her behalf in the

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Malpractice Case, Vergano has put her communications with Fullam about those documents at issue. Furthermore, the Malpractice Defendants cannot obtain information about the preparation of these documents from any sources other than Fullam and Vergano. Therefore, the Malpractice Defendants are entitled to the testimony of Fullam and Vergano about that subject, i.e., about what role each played in the preparation of these documents and about whether Vergano reviewed the documents before they were filed with the Superior Court. That is the extent of the communications put at issue and the Malpractice Defendants may not invade the privilege to any further extent.[32]

B. *Whether to Permit the Testimony of the Mediator*

The Malpractice Defendants seek to call the mediator in the Malpractice Case, Vincent Bifferato, as a witness at trial. The stated purpose of this motion is to elicit from Bifferato, based on his viewing of the Drnec Video, his opinion whether Vergano's conduct on those tapes was consistent with the claims of pain and impairment made on her behalf in the Malpractice Case. In that respect, the Malpractice Defendants also seek to have Bifferato testify about statements made by Fullam or Vergano

about Vergano's pain and impairment during the mediation, and any statements Bifferato himself made to the Malpractice Defendants regarding his assessment of Vergano's credibility as a trial witness.

This motion raises an issue that implicates a fundamental element of the approach to mediation taken by Delaware courts — confidentiality. Our Superior Court has long required that many of its cases enter alternative dispute resolution, such as mediation or arbitration. The Superior Court Rule addressing judicially-required mediation includes a specific mandate of confidentiality, which precludes the judicial compulsion of testimony by a mediator and provides that any statement made in mediation to or from a mediator is confidential. The relevant text of the rule states:

> (3) All Memoranda, work products, and other materials contained in the case files of ADR practitioner or the Court related to the mediation are confidential. Any communication made in or in connection with the mediation which relates to the controversy being mediated, whether made to the ADR Practitioner or party, or to any person if made at a mediation conference, is confidential. The mediation agreement shall be confidential unless the parties otherwise agree in writing. Confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding except: (A) Where all parties to the mediation agree in writing to waive confidentiality; (B) In any action between the ADR Practitioner and a party to the mediation for damages arising out of the mediation; or (C) Statements, memoranda, materials, and other tangible evidence, otherwise subject to discovery, which were not prepared
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> specifically for use in and actually used in the mediation conference.[33]

In its rules for voluntary mediation, the Court of Chancery has adopted an identical requirement of confidentiality.[34] And, in the Delaware Voluntary Alternative Dispute Resolution Act or "Voluntary ADR Act,"[35] the General Assembly acknowledged its understanding of the importance of confidentiality to the mediation process, by incorporating a provision protecting confidentiality in the same manner as the relevant Superior and Chancery Court Rules.[36]

Delaware's recognition that confidentiality is vital to the effectiveness of mediation is, of course, hardly novel or path breaking. The federal courts have long utilized mediation as one of the forms of ADR required by congressional enactment,[37] and have invariably provided that communications made to or from a mediator are confidential.[38]

The importance of confidentiality to the mediation process is well understood. By its nature, mediation is a process that aims towards voluntary settlements and not compulsory outcomes. The process works best when parties speak with complete candor, acknowledge weaknesses, and seek common ground, without fear that, if a settlement is not achieved, their words will be later used against them in the more traditionally adversarial litigation process. Vice Chancellor Lamb explained this well in his decision in *Wilmington Hospitality, L.L.C. v. New Castle County:*

> Confidentiality of all communications between the parties or among them and the mediator serves the important public policy of promoting a broad discussion of potential resolutions to the matters being mediated. Without the expectation of confidentiality, parties would hesitate to propose compromise

> solutions out of concern that they would later be prejudiced by their disclosure.[39]

The Uniform Mediation Act (hereinafter, "UMA") is premised on exactly the same logic that undergirds Delaware's approach to mediation.[40] The UMA creates a broad

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privilege for statements made in mediation that shields mediators from giving testimony about statements made to or by them in the mediation process.[41] The UMA offers a helpful articulation of how confidentiality, including mediator confidentiality, functions in mediation:

> Frank exchange can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes. Such party-candor justifications for mediation confidentiality resemble those supporting other communications privileges, such as attorney-client ... privileges. This rationale has sometimes been extended to mediators to encourage mediators to be candid with the parties by allowing the mediator to block evidence of the mediator's notes and other statements by the mediator ... public confidence in and the voluntary use of mediation can be expected to expand if people have confidence that the mediation will not take sides or disclose their statements, particularly in the context of other investigations or judicial processes. The public confidence rationale has been extended to permit the mediator to object to testifying, so that the mediator will not be viewed as biased in future mediation sessions that involve comparable parties.[42]

Recognizing that their motion flies in the face of the strong public policy rationale protecting the confidentiality of statements made in mediation, the Malpractice Defendants advance a makeweight argument based on the proposition that the mediation in the Malpractice Case fell in a void where Delaware's strong interest in the success of mediation as an efficient dispute resolution mechanism does not apply. First, because Vergano sought damages in excess of one hundred thousand dollars, her claim was not subject to mandatory ADR under Superior Court Rule 16.1. And second, because the parties to the Malpractice Case did not comply with the specific provisions of the Delaware Voluntary ADR Act, the confidentiality provisions of that statute do not apply. For those reasons, the Malpractice Defendants argue that the public policies reflected in Superior Court Rule 16.1 and the Voluntary ADR Act have no bearing, and that permitting the testimony of the mediator therefore will work no substantial injury to this State's public policy.

There was no moral or logical justification for prematurely ending a tree's life in order to enable that argument to be captured on paper. The parties in the Malpractice Case executed a mediation agreement, which is a binding contract enforceable under the laws of this State. It explicitly provided:

> [883 A.2d 64]
>
> By signing this agreement, we indicate our awareness that mediation sessions and all material prepared for mediation is confidential. Each party agrees to make no attempt to compel the mediator's testimony against the other, nor to compel the mediation to produce any documents provided by the other party, nor to compel the other party to testify regarding statements made in mediation sessions. In no event will the mediator disclose confidential information provided during the course of the mediation or testify

> voluntarily on behalf of any party....[43]

This agreement, which echoes the public policy incorporated in the Voluntary ADR Act, Superior Court Rule 16.1 and Court of Chancery Rule 174, is entitled to respect and signals the parties' understanding that the same public policy governing mediations conducted directly under Superior Court Rule 16.1 would govern and shield statements made during the mediation process from use in later litigation.

To hold otherwise would result in perverse incentives. Precisely in those cases when the mediation process might be most useful to the Superior Court — complicated, high-stakes cases that are likely to be burdensome to try if not settled — parties could not, by private contract, obtain the same guarantees of confidentiality in the mediation process as are provided to parties in cases subject to mandatory ADR. The Superior Court's longstanding commitment to the sensible use of ADR to provide an efficient and fair means for the processing of cases belies attributing such a bizarre and counterproductive intent to it. Likewise, that approach would conflict with the General Assembly's strong statutory support for the use of mediation to resolve disputes, support that has been evidenced again recently by its authorization of the innovative "mediation only" filing device.[44]

The Malpractice Defendants can point to no exception in the Mediation Agreement that permits them to seek to introduce Bifferato's testimony. If one were to look to Superior Court Rule 16.1 and read its narrow exceptions to confidentiality into the Mediation Agreement that would not aid the Malpractice Defendants, as none of those exceptions are satisfied in this case. Rather, the Malpractice Defendants brazenly seek relief from their own promise of confidentiality on the grounds that an overriding consideration — the need to remedy a possible fraud — outweighs the public policy interest served by enforcing mediation agreements calling for confidentiality. Absent testimony by Bifferato, the Malpractice Defendants contend they will not be able to present all the evidence that might help them prove that their settlement was induced by fraud.

That argument is unconvincing for several reasons. Initially, the Malpractice Defendants cannot claim to have reasonably relied on any statement made in the mediation as a basis for settlement. Precisely because of the before-the-fact confidentiality condition, parties to mediation know that if they are to condition their agreement to settle on the truthfulness of a specific representation of fact, they must extract that representation in a form — such as a representation in the settlement agreement itself — that is not confidential.[45]

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Having understood and promised that any statement made by a party to the mediation during the mediation was confidential, the Malpractice Defendants are in no position to contend that they reasonably premised a binding agreement on the material accuracy of a factual statement made during that process. Many statements are made during a typical mediation, often by parties who do not trust each other, and it would render hollow the promise of confidentiality if confidentiality was vitiated whenever a party claims that its decision to settle was premised on a false statement in the mediation process.[46] Given the Malpractice Defendants' knowledge of, and contractual pledge to honor, the confidential nature of the mediation process, the undisputed evidence that they suspected Vergano's claims of pain and impairment were entirely false or at least exaggerated when entering the settlement,[47] and their failure to use the reasonable means available to them to deal with that reality, any regret they have over the settlement agreement is insufficient to justify their attempt to set aside the confidentiality provisions of the mediation agreement.

Another factor weighs against the Malpractice Defendants. Arguably, the Delaware public policy protecting the confidentiality of the mediation process is even stronger than that

reflected in the UMA. Unlike the UMA, the Delaware Voluntary ADR Act, Superior Court Rule 16.1 and Court of Chancery Rule 174 provide for only limited circumstances when statements made in the mediation process can be stripped of their confidential status, none of which pertain here. In the UMA, otherwise confidential statements made in the mediation process can be used as evidence in later proceedings when the court determines that a party's need for evidence substantially outweighs the interest in protecting confidentiality and that the evidence is otherwise unavailable.[48] Even under that more relaxed standard, the Malpractice Defendants fall far short of the mark. In their moving papers, they have not suggested that in the mediation, the nature of Vergano's claims of pain and impairment differed in any manner, much less a material way, from the way they were described in her deposition, complaint, interrogatories, and pre-trial stipulation

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in the Malpractice Case. In other words, the Malpractice Defendants can prove, through evidence that is not shielded by the confidentiality of the mediation process, the allegedly false statements upon which they supposedly relied in settling with Vergano.

Recognizing the weakness of this aspect of their argument, the Malpractice Defendants argue that they need to have the mediator testify about his assessment of Vergano's credibility and the statements he made to the Malpractice Defendants to that effect. That is, the Malpractice Defendants argue that they relied on the opinion of Bifferato, an experienced and respected former trial judge, that a jury would likely find Vergano credible in making their decision to settle. To be frank, simply by advancing this argument, the Malpractice Defendants have disrespected the confidentiality of the mediation process by implicitly revealing their version of the mediator's statements to them. In any event, the opinion of a mediator about the appeal of an adverse party as a trial witness is not the sort of representation of fact upon which a fraud claim can be premised. Mediators give parties their frank judgment about how cases will come out all the time — that is one of the primary tools in the mediator's kitbag. To set aside the confidentiality of the mediation process simply because a party claims that a mediator made an erroneous judgment about a party's credibility and the party relied upon that judgment would, as with the Malpractice Defendants' prior argument, gut the promise of confidentiality that is at the heart of the mediation process.

Of course, the Malpractice Defendants claim that this case is different because of the Drnec Video. They contend these tapes illustrate behavior, which they predict, Bifferato will opine is inconsistent with his understanding of Vergano's claims of pain and impairment. But that argument merely further demonstrates the absence of necessity for dishonoring the confidentiality of the mediation process. As with their similar argument involving Fullam, the Malpractice Defendants simply want Bifferato to give testimony about the consistency of the claims of pain and impairment Vergano made in the Malpractice Case — which are admissible through that record with the behavior of Vergano on the Drnec Video — which is also admissible. That lay opinion testimony is, if relevant at all, far more prejudicial than probative,[49] and would turn a neutral mediator into a partisan witness whose very status is likely to render his testimony more than justifiably influential.

It is a challenge to posit a more poisonous means to weaken the promise of confidentiality our public policy regards as critical to the effectiveness of mediation than authorizing the use of a mediator as an opinion witness against a mediating party. If such a drastic order would ever be justifiable, one would imagine that there would have to be a plainly compelling need to place the mediator in a partisan role so as to avoid a manifestly unjust result — circumstances that are entirely absent here. The court itself can make the same comparison the Malpractice Defendants wish Bifferato to make and, if convinced, draw the Malpractice Defendants' desired conclusion that

Vergano intentionally misled them about the extent of her pain and impairment.

Similarly, Bifferato's testimony is not necessary to help the Malpractice Defendants prove that they settled with Vergano in large measure because they calculated a jury would, contrary to their own skepticism about her honesty and credibility,

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find her a convincing witness. I understand it is for this purpose that the Malpractice Defendants seek to have Bifferato's testify that he told them that he felt Vergano would be viewed sympathetically by a jury. But the Malpractice Defendants can accomplish that purpose through the presentation of evidence not shielded as confidential by the Mediation Agreement. In the evidentiary record, the Malpractice Defendants have already produced contemporaneous, pre-settlement memoranda from their counsel in the Malpractice Case, John Elzufon, opining that Vergano made a convincing witness and would likely be found believable by a jury. Therefore, even under the more relaxed UMA standard, the Malpractice Defendants' need to set aside the confidentiality of the mediation process in the most intrusive manner possible — by having the mediator himself testify — is insubstantial and far outweighed by the need to preserve the utility of mediation as an effective dispute resolution mechanism.[50]

For all these reasons, I deny the Malpractice Defendants' motion to admit the testimony of Bifferato. Before leaving this subject, I feel compelled to add an uncomfortable coda. In the mediation process, it is common for parties to have ex parte contact with the mediator. Through this approach, the mediator hears each side separately and is able to best formulate a strategy for evaluating if common ground can be achieved, especially in situations when relations between the parties are so strained that compromise is unlikely if both are present simultaneously. The utility of these ex parte sessions is in no small measure reflected in the strong confidentiality protection given mediation, as without that protection these ex parte sessions could be a treasure trove for the later discovery of admissions of party opponents. But although that point has relevance given the subject of this motion, I raise this issue for another, more delicate reason.

Once the Malpractice Defendants possessed the Drnec Video, they sought to enlist Bifferato in their cause as a witness. The fact that by doing so they were violating the literal terms of the Mediation Agreement has been discussed. More to the point now, however, is the manner in which they went about accomplishing their aims. Instead of writing to Bifferato in a communication copied to Vergano, and expressing their interest in having the mediator view the Drnec Video, they provided the tape to Bifferato in an ex parte contact that the record only casts dim light upon. That overture was troubling. Unlike an ex parte session during the mediation process that was designed to further the purpose of forging a mutually agreeable settlement, the Malpractice Defendants were seeking to obtain Bifferato's assistance in helping them dishonor the settlement and obtain other relief against Vergano in litigation.

The very means by which they went about this purpose was unfair not only to Vergano, who should have been a party to any communications by the Malpractice Defendants to Bifferato for this very unusual purpose, but to Bifferato himself, a man with a hard-earned reputation for fairness and integrity. Although one cannot be certain because the Malpractice Defendants have been sketchy about the contact, the court can only draw the inference that they approached Bifferato in a manner that communicated their belief that the Drnec Video depicted behavior that proved that they and Bifferato had been lied to by

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Vergano. If such a strong charge was to be levied to a neutral mediator, it should have been done with prior notice to Vergano, so that each side had an opportunity to put events in context. Instead,

the conduct of the Malpractice Defendants creates the appearance of having desired to bias the mediator. I do not dilate on this topic in order to cast doubt on the good faith of the attorneys involved; these things happen sometimes without adequate forethought and I believe that to be what happened here. Rather, I focus on this aspect of this dispute in order to prevent future instances of this kind.

III. *Conclusion*

The Malpractice Defendants' motion to admit the testimony of Nancy Fullam is denied in major part, and granted only to the limited extent identified in this opinion. The Malpractice Defendants' motion to admit the testimony of Vincent Bifferato is denied.

IT IS SO ORDERED.

Notes:

1. The Malpractice Defendants also wish to use the Surveillance Videos for that purpose. For brevity's sake, I focus on the Drnec Video, which is the Malpractice Defendants' favorite evidence.

2. *See* Del.Super. Ct. C.A. No. 02C-04-194-MMJ.

3. In the interest of simplicity, I refer to Vergano singularly throughout because Mrs. Vergano was the lead plaintiff and her conduct is that at issue in this lawsuit.

4. *See* Del.Super. Ct. R. Civ. P. 3(h); Del.Super. Ct. Civ. Form 30.

5. Malpractice Defs.' Br. Ex. A.

6. Del.Super. Ct. R. Civ. P. 33(a).

7. Vergano Dep. 140, 146-48, Jan. 7, 2004 (excerpted).

8. Joint Pre-Trial Stipulation ¶ G(1).

9. Dr. Belzberg is a surgeon at Johns Hopkins who attempted a nerve graft repair on Vergano in November 2000.

10. Del.Super. Ct. R. Civ. P. 16.1(*l*)(2)(B)-(3).

11. Vergano Br. Ex. E.

12. Vergano Dep. 34-35, Mar. 25, 2005.

13. Jt. Ex. Submission Ex. 2j.

14. Del. R. Evid. 502(d).

15. *See Sealy Mattress Co. of N.J. Inc. et. al. v. Sealy Inc.,* 1987 WL 12500 (Del.Ch. June 19, 1987).

16. *Stephenson v. Capano Dev. Inc.,* 462 A.2d 1069, 1074 (Del.1983).

17. *E.I. DuPont DeNemours Co. v. Florida Evergreen Foliage,* 744 A.2d 457, 462 (Del.1999) *quoting Nye Odorless Incinerator Corp. v. Felton,* 162 A. 504, 512 (Del.Super.1931).

18. *Clark v. United States,* 289 U.S. 1, 15, 53 S.Ct. 465, 77 L.Ed. 993 (1933).

19. *See Frieman v. USAir Group, Inc.,* 1994 WL 675221 (E.D.Pa.1994). In *Frieman,* the plaintiff brought a personal injury action alleging he was permanently and totally disabled as a result of an injury he sustained aboard a shuttle bus at an airport when he hit his head on the bus's overhead air conditioning unit. *Id.* at *1. The defendants alleged, among other things, that the plaintiff changed his story during the litigation, first stating that the lack of warning labels on the air conditioning unit caused the injury, and then later, not long after the plaintiff's new counsel entered his appearance, testifying it was the bus's forward motion that caused his injury. *Id.* at *7. Defendants sought to depose the plaintiff's former attorney about the plaintiff's purported change in story, arguing the former attorney's communications with the plaintiff about the "true manner" in which the accident allegedly took place would be relevant to demonstrate the

second explanation was perjury, a criminal act. *Id.* The court concluded the former attorney's communications with the plaintiff were subject to disclosure only if the two discussed how the plaintiff might supplement his testimony with untrue statements in order to improve his case, but that absent a showing plaintiff consulted the former attorney with this purpose in mind, confidential attorney-client communications about the accident remained privileged. *Id.* at *8.

20. In *United States v. Ballard,* 779 F.2d 287 (5th Cir.), *cert. denied,* 475 U.S. 1109, 106 S.Ct. 1518, 89 L.Ed.2d 916 (1986), the defendant, Ballard, entered a transaction with his attorney, Smith, transferring assets. One month later, Ballard paid Smith to file a bankruptcy petition for him. Smith advised Ballard to wait one year explaining that if a petition were filed immediately Ballard would have to disclose the transaction, which would become part of the assets of the estate. Ballard told Smith he would wait but then subsequently retained another lawyer to file a petition for him. Ballard did not disclose the assets described by Smith as problematic. Eventually, Ballard received his bankruptcy discharge. *Id.* at 290. He was later indicted and convicted for making false statements in his bankruptcy petition with the help of Smith's testimony. Ballard appealed his conviction in part claiming his former attorney's testimony concerning allegedly privileged communications was inadmissible. *Id.* at 291. The Court concluded Smith's advice and refusal to proceed without disclosing the transaction were the reasons Ballard sought other counsel so any privilege for communications between attorney and client ceased when the purpose of the privilege was abused. *Id.* at 293.

21. *E.g., United States v. Gordon-Nikkar,* 518 F.2d 972, 974-75 (5th Cir.1975) (holding the crime-fraud exception applied when there was evidence that an attorney counseled his clients to perjure themselves about possession of cocaine); *State Farm Fire and Cas. Co. v. Superior Court,* 54 Cal.App.4th 625, 648-49, 62 Cal.Rptr.2d 834 (1997) (explaining when, among other things, in-house counsel prepared witnesses on how to be evasive and avoid providing relevant evidence at depositions, the crime-fraud exception applied).

22. *See, e.g., In re Ryder,* 263 F.Supp. 360, 365 (E.D.Va.1967) *aff'd,* 381 F.2d 713 (4th Cir. 1967) (holding attorney's possession of stolen gun and money for client is not encompassed within attorney-client privilege); *Morrell v. State,* 575 P.2d 1200 (Alaska 1978) (reaffirming rule that criminal defense attorney must turn over to the prosecution real evidence that the attorney obtains from his client); *People v. Lee,* 3 Cal.App.3d 514, 83 Cal.Rptr. 715 (1970) (holding attorney-client privilege does not give lawyer the right to withhold evidence).

23. *See In re Fuqua Industries, Inc., Shareholder Litigation,* 2002 WL 991666, at *3 (Del.Ch. May 2, 2002) *citing Garner v. Wolfinbarger,* 430 F.2d 1093, 1104 (5th Cir.1970) (identifying a non-exclusive list of factors that a court may consider in determining whether good cause has been shown to permit discovery of documents to which the attorney-client privilege would otherwise attach in a derivative action including the availability of information from other sources); *In the Matter of Richard L. Sutton,* 1996 WL 659002, at *14-15 (Del.Super.Aug. 30, 1996) (explaining that where a party has substantial need of materials and is unable without due hardship to obtain the substantial equivalent, the court may order production of materials otherwise protected by the work product privilege) *citing Tackett v. State Farm Fire & Cas.,* 558 A.2d 1098, 1102 (Del.Super.1988) ("Where the benefit to the resolution of the case outweighs the potential injury to the party from whom discovery is sought, disclosure may be required."). *See also Sealy Mattress Co. of N.J.,* 1987 WL 12500, at *6-7 (implying if persons other than the attorney are knowledgeable or competent to testify on an issue then waiver of the attorney-client privilege might not result as it might when the attorney is the only person having certain knowledge).

24. A Superior Court decision took an approach similar to that reached here. In that matter, a defendant was facing criminal charges

of perjury and evidence tampering based on his alleged submission of a falsified document through attorneys representing him in an action in this court. *In the Matter of Sutton,* 1996 WL 659002, at *12. The Attorney General sought the defendant's communications with his Chancery lawyers, arguing that because they had proffered the allegedly falsified evidence at the defendant's instance, the crime-fraud exception applied. Because the Attorney General was unable to make a prima facie case that the defendant had made any communication to his attorneys that were intended by him to facilitate his "allegedly fraudulent activity," the court denied the motion. *Id.* at *12. In so ruling, Judge Cooch held that it was insufficient for the Attorney General simply to make a prima facie case that the defendant had submitted, through counsel, an exhibit he knew to be false; rather, the Attorney General had to make a prima facie showing that "communications were made for the purpose of further [the defendant's] alleged crime or fraud." *Id.* at *13.

25. *Compare Owens-Corning Fiberglas Corporation v. Watson,* 243 Va. 128, 413 S.E.2d 630, 637-38 (1992) (attorney-client privilege did not protect a memorandum from the medical director of a corporation to in-house counsel when that memorandum clearly indicated that there was abundant evidence that asbestos could cause the medical problem known as asbestosis and when the company filed a false interrogatory a mere five days later denying knowledge of any such evidence).

26. The approach I take here is similar to that taken by Judge Winter, writing for the U.S. Court of Appeals, in *In re Richard Roe, Inc.,* 68 F.3d 38, 40 (2d Cir.1995). In that decision, Judge Winters noted the "crime-fraud exception does not apply simply because privileged communications would provide an adversary with evidence of a crime or fraud. If it did, the privilege would be virtually worthless because a client could not freely give, or an attorney request, evidence that might support a finding of culpability." *Id. See also United States v. Stewart,* 2003 WL 23024461, at *2 (S.D.N.Y.2003) ("[C]onfidential communications must be in furtherance of the criminal or fraudulent conduct for the crime-fraud exception to apply. If the law were otherwise, every defendant accused of a crime involving the making of false statements to a government agency would lose the protection of the attorney-client privilege with respect to prior statements to his lawyer concerning the same subject matter.") (citations omitted).

27. *Hoechst Celanese Corp. v. Natl. Union Fire Ins. Co. of Pittsburgh,* 623 A.2d 1118, 1125 (Del.Super. 1992).

28. *Fitzgerald v. Cantor,* 1999 WL 64480, at *2 (Del.Ch. Jan. 28, 1999).

29. *Id.*; *Tenneco Auto. Inc. v. El Paso Corp.,* 2001 WL 1456487, at *4 (Del.Ch. Nov. 7, 2001) (noting the at issue exception is premised upon the rationale of fairness and that confidential information may be tapped only when the needed information cannot be reliably obtained from another source). *See also Tackett v. State Farm Fire & Cas. Ins. Co.,* 653 A.2d 254 (Del.1995) (explaining that in the usual situation of implicit waiver of attorney-client privilege, the opposing party will have no alternative source for obtaining the concealed information if the privilege is upheld).

30. Vergano Dep. 23-31, Mar. 25, 2005.

31. So, too, is another of Vergano's arguments. Vergano correctly point out that she never signed her interrogatory answers in the Malpractice Litigation as required by Superior Court Civil Rule 33. Nor did the complaint Fullam filed on her behalf comply with the Superior Court requirement that a personal injury party file and sign Form 30 interrogatory answers with the complaint. Vergano is right to argue that these facts are among those relevant to the question of whether the Malpractice Defendants could or did reasonably rely on the factual statements about pain and impairment contained in those documents. But she has presented no legal argument that persuades me that an evidentiary hearing about the reliance question can be short-circuited.

32. *See Tenneco Auto. Inc.,* 2001 WL 1456487, at *4 ("Because the `at issue' exception exists to protect a party from the unfair application of the attorney-client privilege, the limitations on the exercise of the privilege must be no greater than that which is essential to achieve the exception's purposes"); *see also E.I. Dupont DeNemours & Co. v. Admiral Insurance Co.,* 1993 WL 19587, at *1 (Del.Super.Jan.25, 1993) (noting considerable efforts to narrow blanket production may be required given the importance of the social policy underpinning attorney-client privilege).

33. Del.Super. Ct. R. Civ. P. 16.1(*l*)(3).

34. Del. Ch. Ct. R. 174(c).

35. 6 *Del. C.* ch. 77.

36. 6 *Del. C.* § 7716.

37. *See* The Alternative Dispute Resolution Act of 1998, 28 U.S.C.A §§ 651-658 (2001) (requiring all federal district courts to implement ADR programs).

38. A sampling of the rules of some distinguished federal courts illustrates this point. 3d Cir. L.A.R. 33.5(c) (describing the local federal appellate rules governing confidentiality of mediation proceedings including prohibiting mediators from disclosing to anyone statements or information developed during the mediation process); U.S. Dist. Ct. Rules D. Del., Overview of Mediation/ADR ("information disclosed to the Magistrate Judge by a party or counsel during the mediation session, including in any written submissions, is not disclosed to the other party without consent. All mediation proceedings are confidential, are not admissible as evidence in any other proceeding . . ."), *available at* http:// www.ded. uscourts.gov/MPTmain.htm; U.S. Dist. Ct. Rules S. E.D.N.Y., Civ. R. 83.12(k) ("The entire mediation process shall be confidential. The parties and the mediator shall not disclose information regarding the process, including settlement terms, to the Court or to third persons unless all parties agree ... The mediator is disqualified as a witness, consultant, attorney, or expert in any pending or future action relating to the dispute . . .").

39. *Wilmington Hospitality, L.L.C. v. New Castle County,* 788 A.2d 536, 541 (Del.Ch.2001).

40. Uniform Mediation Act, National Conference of Commissioners on Uniform State Laws (Final Draft 2001), available at http:// www. mediate.com (last visited 9/21/05) (hereinafter, "UMA").

41. *Id.* at Prefatory Note ("[t]he law has the unique capacity to assure that the reasonable expectations of participants regarding the confidentiality of the mediation process are met, rather than frustrated. For this reason, a central thrust of the Act is to provide a privilege that assures confidentiality in legal proceedings."). Some of the relevant sections of the UMA are worth mentioning. Section 8 on confidentiality provides "Unless subject to [insert statutory references to open meeting act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this state." Sections 4 through 6 describe the privilege against disclosure in mediation, waiver and preclusion of privilege, and exceptions to that privilege. More specifically, section 4(b) outlines the privileges that apply to mediation proceedings: "In a proceeding, the following privileges apply ... (2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator."

42. *Id.* at Prefatory Note (citations omitted).

43. Vergano's Br. Ex. E.

44. In 2003, the mediation-only device was enacted into law as 10 *Del. C.* §§ 346-347.

45. UMA Prefatory Note ("Once the parties and mediators know the protections and limits, they can adjust their conduct accordingly... Although it is important to note that mediation is not essentially a truth-seeking process in our justice system such as discovery, if the parties realize that they will be unable to show that

another party lied during mediation, they can ask for corroboration of the statement made in mediation prior to relying on the accuracy of it.").

46. *See* Maureen A. Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation,* 8 HARV. NEGOT. L. REV. 29, 50-51 (2003).

47. The record shows that Malpractice Defendant Princeton Insurance frequently employed surveillance techniques to assess the truthfulness of claims prior to paying out benefits and other awards. But the Malpractice Defendants failed to use that approach in the Vergano case despite not believing her claims of pain and impairment. In this respect, I note in my own, not inconsiderable experience as a mediator, reliance on unverified factual statements has never provided the basis for a settlement, although probabilistic assessments by the parties about which side's version of events is likely to be believed often do. When there are factual disagreements that must be resolved before settlement, parties know that there are tools that exist that they must use to ensure the truthfulness of other parties' representations, such as settling contingent upon the accuracy of certain contractual representations. During mediations this court has facilitated, for example, it has not been uncommon for a party to represent they do not have the funds to pay an award of a particular amount. When this occurs, the other party has sometimes agreed to a lower sum contingent upon submission of written proof that the poor-mouthing party's financial condition is as represented.

48. UMA § 6(b).

49. Del. R. Evid. 403.

50. As the UMA explains, one of the key goals of a mediation privilege is to promote candor, which is encouraged by "maintaining the parties' and mediators' expectations regarding confidentiality of mediation communications." UMA Prefatory Note.

Building Trust with Parties: Are Mediators Overdoing It?

ARNAUD STIMEC
JEAN POITRAS

Trust is a key factor in the dynamics of any attempt to settle a conflict. A mediator may be the needed link between the parties, as long as they trust their mediator. But how far should mediators go to win parties' trust? On the basis of questionnaires filled out by participants in employer-employee mediation, we arrive at a conclusion that differs from the prevailing wisdom. There is a threshold point rather than a linear relationship between the level of trust in the mediator and the degree of conflict resolution. Once the threshold has been reached, additional trust does not necessarily result in a higher level of conflict resolution. Possible explanations are set out and practical implications are discussed.

Recourse to mediation is usually justified when the dialogue and decision-making process have reached an impasse. Impasses frequently stem from difficulty in understanding one another or finding mutually acceptable solutions. In such cases, mediation aims to facilitate dialogue between the parties to a conflict through a neutral third party who serves as a sort of "bridge" between them. However, for the parties to agree

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to mediation, it is legitimate to think that they must first place their trust in the mediator. This trust is the point of departure from which the mediator can bring to bear his or her expertise to help resolve the conflict.

Consequently, it can be hypthesized that the stronger the trust between the mediator and the parties, the higher the probability of finding a satisfactory outcome. A linear relationship would therefore exist between the two variables. However, it can also be hypothesized that increasing the level of trust beyond a certain point will not have a greater effect; a sort of threshold trigger would exist.

Establishing which hypothesis (linearity or threshold) is in step with the empirical reality is an important factor in allocating the time and means at mediators' disposal for implementing their strategy. Mediators' investment in trust may result from a choice, but also from a preference. In both cases, the level of investment in trust should be linked with the outcome. Our study aims to further define the relationship between the level of trust in the mediator and the extent to which the conflict is settled.

The Role of Trust in Mediation

As the mediator focuses primarily on the relationship between the participants during mediation, he or she must first gain the trust of each party. There are therefore two types of trust in mediation: the trust that exists between the parties and the trust that exists between each party and the mediator. In this section, we explore this second type of trust.

Issues and Trust

Not all social interactions are based on trust. Mediators also have experience in situations where trust is not an issue; for example, stakeholders in a dispute may experience disagreement or a communication problem yet maintain faith in the good intentions and promises of the other party. The issues may not even elicit any possible trust-based concerns. Morton Deutsch identifies three conditions where the issue of trust is significant (Lewicki and Bunker, 1995):

1. The presence of any uncertainty or ambiguity over the course of future actions
2. The final result depends on other people's behavior
3. An action's negative consequences may outweigh its positive effects

Trust can be defined as an expectation of positive intentions and behaviors (Lewicki and Bunker, 1995) to mitigate uncertainty and potential negative consequences. It is a matter of "the willingness of one party to be vulnerable to the actions of another party based on the expectations that the other will perform a particular action important to the trustor, irrespective of the ability to monitor or control that other party" (Mayer, Davis, and Schoorman, 1995, p. 712).

Sources of Trust

Trust is a multidimensional concept (Lewicki and Bunker, 1995). First, trust may be calculus-based, as with an expectation of the other party's behavior that is based on sanctions (penalties, rewards) or routine. For example, a musician might leave an instrument at the repair shop without asking for a receipt, knowing that the craftsman's business depends on his reputation in the small world of music and conscious of how easily this reputation could be damaged. As a relationship progresses, a second, knowledge-based level of trust comes into play. The feeling of knowing a person is based on the predictability (or unpredictability) of his or her behavior. Thus we can trust someone because we know from our past experience with the person that he or she is fair. Last, an intimate knowledge of the other party—or at least the perception of shared values, standards, and interests—can instill a third type of trust, called identification-based trust. We find it easer to trust people who are "like us." Conversely, we might distrust people because they are "different" from us (Ting-Toomey, 1999).

Trust Deficit Between the Parties

Trust is a key factor in an escalating conflict as well as in any attempt at conflict resolution (Rubin, Pruitt, and Kim, 1994). Deterioration in trust is clearly associated with degrading relationships and retreat from a settlement. Dialogue can be interrupted or made extremely difficult, justifying the intervention of a mediator. When individuals call on a mediator, their trust has often deteriorated, sometimes at all three levels identified here (calculation, relationship, and identification). When the parties are therefore in a trust deficit, their trust in the mediator fills the gap in their trust in one another.

The Mediator's Role in Fostering Trust

One of the mediator's roles is often to restore a sufficient level of trust to create a climate conducive to conflict resolution (Rubin, Pruitt, and Kim,

1994). Otherwise, competitive and defensive strategies prevail. Unfortunately, it is possible that the trust between the parties will never be restored. In such cases, mediation can even be a way of circumventing the reciprocal trust problem without actually addressing it.

One party invests in the mediator the trust it cannot place in the other party. The presence of a trusted mediator can reassure parties that they will not concede too much (or make a hasty decision or forfeit compensation) or make them feel safe in revealing a particular element (during a meeting, for example) without fear that it will be used against them by the other party. The more the parties trust the mediator, the more they will speak out, move forward, converge, and commit.

The mediator's role in this respect is adequately described in the literature. Trust in the mediator may ease concerns about physical or moral integrity, confidentiality of information exchanged (particularly sensitive information), honoring commitments, and the efficiency and effectiveness of the process (Moore, 1996; Stimec, 2004). Trust has a twofold purpose in mediation: fostering acceptance of the mediation and facilitating the process itself, particularly from the perspective of improving communications between parties and with the mediator.

Building the Parties' Trust in the Mediator

Most mediation manuals and trainings in Northern and Western cultures propose building trust by supporting a contractual-type relationship. This is mainly achieved by explaining the mediation process and the mediator's role as well as committing to confidentiality and a code of conduct. Moreover, trust may depend on other factors: reputation, social group, or status (Wehr, 1991). Poitras (2008) has demonstrated that the trust of participants in a mediation depends especially on impartiality and the level of mastery displayed during the process, as well as on warmth and consideration.

A party's trust evolves progressively, depending on such things as whether the mediator is perceived as impartial or not, whether he or she encourages open dialogue, and whether he or she understands the stakes without losing sight of the objective of settling the dispute (Landau and Laudau, 1997; Poitras, 2008). The mediator's position may be particularly fragile with respect to the imbalance between the time needed for building and losing trust; it takes less time to lose trust than to earn it.

Required Level of Trust in the Mediator

Studies on the dynamics of conflict (Rubin, Pruitt, and Kim, 1994; Lewicki and Wiethoff, 2000) clearly indicate that conflict resolution is strongly linked to trust. Although the question is not addressed precisely in these terms, a linear relationship can be hypothesized: the greater the trust, the greater the probability that an agreement will result from the dialogue. Yiu, Cheung, and Mok (2006) obtained a similar result, but it remains to be confirmed because it is based on the mediators' rather than the parties' perception. However, another hypothesis is possible. This is a threshold relationship between trust in the mediator and the likelihood of resolving a conflict. Below the threshold, conflict resolution is unlikely; the benefits to increasing trust are marginal above the threshold.

Understanding the required level of trust is important for mediators. If the first hypothesis is validated, mediators may invest in building trust virtually without end, constantly cultivating opportunities to build trust with parties. According to this hypothesis, losing trust impairs the process of reaching an agreement. Thus mediators should avoid any move that might result in a loss of trust. However, if the second hypothesis is validated, once the required trust threshold has been crossed mediators should concentrate their efforts on other issues instead. In other words, after the threshold is passed, gaining or losing trust will not have an impact on the likelihood of reaching an agreement, as long as the level of trust remains above the threshold.

Our study is based on a quantitative method for identifying which of the two hypotheses predominates. Therefore, it consists in evaluating, from a perspective other than that of the mediators, the level of trust necessary to contribute to a high degree of conflict resolution.

Methodology

The present study uses an empirical methodology to better understand the relationship between the parties' trust and the mediator's trust. Although it would be useful to better pinpoint the behaviors that generate trust (see Poitras, 2008), our subject and its corresponding measures involve the relationship between the degree of trust and the degree of conflict resolution.

The study was conducted in partnership with the Commission des normes du travail du Québec (CNT). This organization's mission is to

inform the public about matters surrounding labor standards, supervise application of labor standards, receive complaints from employees, and compensate them under the terms of the Labour Standards Act and its regulations. One of the organization's roles is to achieve agreement between employers and employees with respect to disputes relating to the application of this act and its regulations. The organization examines grievances dealing with dismissals without cause and forbidden work practices, as well as psychological harassment complaints. The CNT offers mediation services in these contexts.

Data Collection

Participants are employees and employers involved in workplace disputes mediated by a professional mediator from the CNT. Participants were recruited by thirty-six CNT mediators in eight regions of Quebec. Mediators were invited to play a part in the experiment on the basis of two criteria: (1) they had at least two years of experience as a mediator and (2) they had been full-time mediators for at least a year. The mediators' main role was to serve as intermediaries between the researchers and parties by making sure the questionnaires were distributed at the end of each mediation according to a predetermined protocol to ensure the scientific validity of the data collection process. Respondents returned their questionnaires to researchers by way of prepaid return envelopes, thereby preserving the anonymity of their answers. The data collection period was spread out over three two-month periods: May and June 2006, September and October 2006, and April and May 2007.

Sample Description

Once the data had been collected, 350 valid questionnaires were retained for statistical analysis. The response rate is 52 percent, which is satisfactory for this kind of study. As far as the mediation results are concerned, we note that mediation led to an agreement in 64.9 percent of cases. In sociodemographic terms, 57.1 percent of respondents are employers, 42.9 percent are employees, 48.6 percent of respondents are men, and 51.4 percent are women. The average age of respondents is approximately 42.5 years. About 34.5 percent of respondents are university graduates, 32.8 percent of respondents are college graduates,[1] and 32.7 percent of respondents have a high school diploma. Lastly, respondents' average length of seniority is 7.6 years, and their median salary is CDN$31,250.

Degree of Resolution

Mediation at the CNT is part of an arbitration process for employees' complaints done by a CNT commissioner. In this context, mediation is offered on a voluntary basis to the parties before arbitration. If the parties sign an agreement resolving their dispute at the end of mediation, the file is closed and there is no arbitration. However, the agreement may be complete or partial (in the latter case, the agreement does not settle all points but the parties decide to close the file anyway).

On the other hand, if an agreement has not been reached at the end of mediation, the file is sent to arbitration. Parties often decide to end the mediation, break off communication, and have no further interaction until the hearing. Sometimes parties decide to end mediation but nevertheless agree to meet one last time before arbitration, thereby keeping the door open for one last round of negotiations before the hearing. As a result, files that are not settled in mediation are nevertheless sometimes resolved before arbitration.

In such cases, although there was no agreement during the mediation, we can postulate that the mediation process potentially advanced the discussion enough so that a postmediation settlement could take place even though the mediation was officially terminated. This situation perfectly illustrates the importance of evaluating not only the rate of settlement (agreement versus no agreement) but the degree of progress made toward a solution as well.

To evaluate the degree of resolution, parties chose one of four statements to describe the final result of the mediation: (0) end of mediation and await arbitration; (1) end of mediation, but the parties agree to meet one last time before arbitration; (2) partial agreement and closing of the file; and (3) global agreement and closing of the file. Thus the degree of resolution was characterized as 0 percent (26 cases), 33.3 percent (97 cases), 66.6 percent (23 cases), or 100 percent (204 cases).[2]

Trust Level

To evaluate the parties' level of trust toward their mediator, a trust scale was used in a general questionnaire distributed to parties at the end of the mediation process. The trust scale focused on parties' general feeling rather than on specific dimensions of trust, because we were not interested in how trust toward the mediator is built, but rather in how trust level affects the degree of resolution.

In accordance with Bollen's rule (1989), three statements measured the general level of parties' trust toward the mediator:

1. I felt that I could trust the mediator.
2. I consider the mediator was trustworthy.
3. I trusted the mediator.

It is important to note that each statement was integrated into a different part of a general questionnaire. Thus trust was measured three times, using three slightly different wordings with identical meanings, in order to have a more reliable measure. The parties indicated the extent to which they agreed with each statement by using a six-point Likert scale ranging from "strongly disagree" (= 1) to "strongly agree" (= 6). With a Cronbach alpha of 0.88, the coefficient of internal consistency for the scale is satisfying.

The scale was standardized and quartiles were used to divide the parties into four groups: those having a level of trust much lower than average (mean = −1.81; 43 cases), those having a level of trust lower than average (mean = −0.44; 96 cases), those having a level of trust higher than average (mean = 0.24; 83 cases), and those having a level of trust much higher than average (mean = 0.78; 128 cases). The groups thus formed were then used to assess the degree of resolution according to the level of trust.

Analysis of Variance

An analysis of variance (ANOVA) test was used to compare the degree of conflict resolution between the four levels of confidence. The degree of resolution is the dependent variable and the level of trust in the mediator is the predictor or independent variable. Furthermore, we observed that the degree of resolution varies slightly according to the data-collection periods. The sampling period is correlated to the degree of resolution ($r = .281$, $p < 0.05$), which was entered as the covariate in our model.

Moreover, some studies have shown that the participant's role in the mediation has an impact on a number of perceptual variables, even, for example, the perception that a workplace dispute has been wholly or partially resolved (Bingham, Chesmore, Moon, and Napoli, 2000; Bingham and Pitts, 2002). As a result, the role played by the participants in the mediation, either as complainant or moving party or as respondent or defending party, is used as a moderating variable. More specifically, the statistical analyses are separated as a function of each party's status (employee

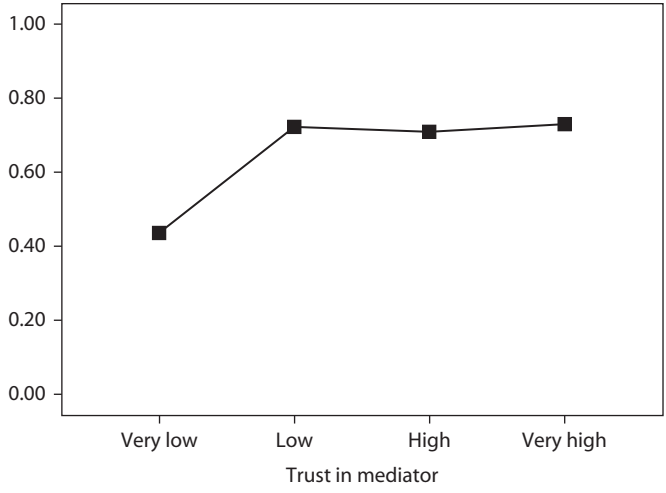
or employer), in order to verify if the relationship between degree of resolution and trust level varies as a function of the parties' status.

Results

The analyses of variance yield significant results for both employers and employees. Each case confirms the hypothesis of a threshold relationship, therefore indicating that the relationship between the level of trust in the mediator and the degree of conflict resolution is not linear.

With regard to employees, the ANOVA test demonstrates a significant difference ($F = 2.91$; $p = 0.037$) between the four levels of trust with respect to the degree of resolution (see Figure 1). In addition, post-hoc tests show that the group with a very low level of trust is associated with a lower degree of resolution than the other groups ($p = 0.013$, $p = 0.013$, and $p < 0.01$, respectively), whereas the other groups' degree of resolution is similar. The shape of the curve again illustrates the threshold effect initiated at a low level of trust. Once the threshold is reached, the degree of resolution goes up by 65 percent and remains at 72 percent on average. It is also interesting to note that before the threshold is reached (very low level of trust), the degree of resolution is around 44 percent. These results indicate that before the employees reach their threshold level of trust in the mediator, the probability of resolving the conflict is low (less than one chance in

Figure 1. Degree of Resolution by Employee Level of Trust in the Mediator

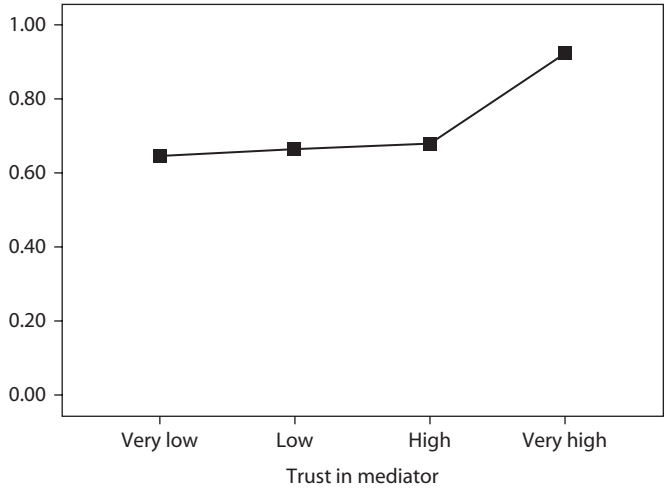


two). Finally, according to this model the level of employees' trust in the mediator accounts for 15 percent of the degree of conflict resolution variance (adjusted R squared). This indicates that employees' trust toward the mediator has a significant but moderate impact on the degree of resolution.

With regard to employers, the ANOVA test indicates a significant difference ($F = 8.05$; $p < 0.01$) between the four levels of trust with respect to the degree of resolution (see Figure 2). In addition, post-hoc tests show that the group with a very high level of trust is associated with a higher degree of resolution than the other groups ($p < 0.01$ in every case), whereas the other groups' degree of resolution is similar. The shape of the curve clearly illustrates the threshold effect at a high level of trust. After the threshold is reached, the degree of resolution goes up by 39 percent to remain at 92 percent. These results indicate that once the employer's threshold level of trust in the mediator is reached, the probability of resolving the conflict is very high, almost at its highest. Finally, according to this model the employer's level of trust in the mediator accounts for 15 percent of the variance in the degree of conflict resolution (adjusted R squared). This indicates that the employer's trust toward the mediator has a significant but moderate impact on the degree of resolution.

In short, the two ANOVA tests show significant differences between the groups' trust levels, and the curves illustrate the threshold effect in both cases. However, it is interesting to note that employees have a lower threshold than

Figure 2. Degree of Resolution by Employer Level of Trust in the Mediator



employers. This means that employers need to have a higher level of trust in mediators for the degree of conflict resolution to increase.

Discussion

The results of our study show that a threshold relationship exists between trust in the mediator and the degree of conflict resolution. Before discussing the practical implications of these results, let us examine some hypotheses that may explain why this is a threshold relationship. Three particular hypotheses merit study.

Instrumental Trust Hypothesis

From the work of Lewicki and Wiethoff (2000), we might ask whether a calculus-based form of trust is sufficient in most situations. Parties open up once they trust that the mediator has no incentive to harm them, and the probability of reconciliation through mediation then increases. In this hypothesis, the mediator's goal is not to build trust but rather to refute mistrust. The mediator can establish a favorable calculus-based form of trust in many ways, particularly by demonstrating that he or she is financially independent from the institution, that his or her profession is strictly regulated, or that the mediator exposes himself or herself to sanctions for not acting fairly. The barrier to opening up is removed once parties no longer mistrust the process. Once mediation is perceived as a low risk, parties are ready to move on, and further development of trust will not change much.

In the CNT mediation context, employers may feel they have the most to lose by showing their hand. As a result, it can be expected that they must develop a higher level of trust in the mediator than employees before opening up. Our observations concur with this hypothesis.

Reactive Devaluation Hypothesis

A known mechanism in conflict resolution theory, reactive devaluation (Ross, 1995), may offer another explanation. Reactive devaluation refers to a party's tendency to reject an offer from the other party—even if it makes sense—from the belief that anything the other party proposes is necessarily unfavorable. By positioning themselves as trustworthy intermediaries, mediators "objectivize" the parties' proposals, thereby neutralizing the reactive devaluation mechanism. The degree of conflict resolution gained with increased trust in the mediator would be attributable to the neutralization

of this reactive devaluation mechanism. Once this mechanism has been deactivated, further increasing the level of trust does not lead to further gains relative to the degree of resolution.

In the context of the mediations covered by this study, most proposals are made by employers. Consequently, employees are more prone to the reactive devaluation mechanism than employers. According to this hypothesis, gains in the degree of resolution should be greater among employees than employers. This concurs with our observations (employees +65 percent and employers +39 percent).

Third-Party Dissolution Hypothesis

According to Julian Freund (1983), conflict tends to polarize relationships and include third parties in this dynamic. As a result, too much trust in the mediator can activate the third-party dissolution mechanism. In such cases, mediators are perceived as allies, and this once again polarizes the relationship. A party may therefore adopt a passive attitude and believe that the mediator will move the other party (Rubin, Pruitt, and Kim, 1994) to make concessions. From this angle, trust can have one of two effects: one that encourages participation and a spirit of openness (positive) or one that has a hardening effect (negative). According to this hypothesis, beyond a given threshold the positive and negative effects of trust can balance out, at which point gains stagnate.

In the CNT mediation context, most employers are suspicious of mediators. The common belief is that mediators have a positive bias toward employees because they are members of the CNT (an agency that defends employees' rights). According to the third-party dissolution hypothesis, the positive and negative impacts of trust should balance out at a higher level of trust for employers; they are less likely to believe that mediators will take their side. This concurs with our results.

Implications for Mediators

A number of practical consequences stem from the fact that trust between mediators and parties is based on a threshold, rather than a linear, relationship. First, on the basis of our findings, we recommend that mediators devote their expertise to other aspects of the process rather than try to further increase the level of trust once the threshold has been reached. More observation and research are needed to build indicators to help the mediators determine when the threshold is reached. In addition, we must not lose sight

of the fact that trust in the mediator accounts for only 15 percent of resolution-level variance. This suggests that although trust in the mediator is important, it is not crucial to conflict resolution.

Second, the difference observed between employers and employees may suggest that the threshold influences each party differently. When employees do not trust the mediator, the level of resolution is very low (44 percent). However, when employers do not trust the mediator, the level of resolution remains acceptable (65 percent). This would indicate that gaining an employee's trust is a minimum prerequisite for initiating mediation with a reasonable probability of resolution. Nevertheless, when employers have a high level of trust in the mediator, it is interesting to note that the probability of resolution increases to 92 percent. This would suggest that, whereas gaining employees' trust is necessary for initiating mediation, the success of the process depends on gaining the trust of employers. This brings up an interesting ethical challenge: how to spend more time on building trust with employers without losing neutrality or sending impartial signals.

Third, the impression that trust in the mediator is in a linear relationship with the likelihood of reaching an agreement may make some mediators hesitant to confront the parties, out of fear of losing their trust. The fact that this is a threshold relationship changes things. Once the threshold has been reached, the mediator can become more intrusive, confrontational, or directive in guidance, without being afraid of overly offending the parties. Although the mediator might lose a degree of trust, as long as the level of trust remains over the activation threshold this type of intervention will not theoretically hurt the likelihood of resolving a conflict. After a minimum trust threshold is reached, the mediator can in fact opt to be more proactive, even confrontational, to move the situation along. However, in the framework of mediation at the CNT, note that the higher threshold of employers leaves the mediator less leeway than with employees.

Limits and Future Research

As in all research, a statistical relationship does not necessarily indicate causality. Nonetheless, as we used a hypothetico-deductive model, capitalizing on a fairly broad literature, we are inclined to think that the threshold effect is significant. Moreover, subsequent research into the various tactics, behaviors, and statements mediators can use to reach the trust activation threshold would be worthwhile. This would, among other things, involve pinpointing which approaches become useful, and which approaches to

privilege. Furthermore, measuring trust between mediators and parties in various contexts (such as family mediation) would verify the extent to which the measured threshold effect is generalized. It may also be useful to include items in the questionnaire to verify the validity of one of the proposed explanatory hypotheses. Last, cultural variation would merit exploration to the extent that the personal investment expected from third parties varies internationally according to geographic location and context.

Conclusion

We have demonstrated that, contrary to popular belief, the relationship between trust in a mediator and the degree of resolution is not perfectly linear. In fact, we have observed a threshold relationship. Consequently, past the threshold a higher level of trust will not improve resolution. However, below the threshold mediation is unlikely to succeed. In the context of employer-employee disputes, it is likely that employers' trust threshold is higher than that of employees. Furthermore, our data show that, although gaining employees' trust is necessary to conduct mediation, gaining the employers' trust as well dramatically increases the likelihood of resolving a conflict.

The main practical implication of these results is that the mediator must initially build parties' trust; however, once the trust threshold level has been reached, it is strategically better to focus efforts on other aspects of the mediation rather than to try to further develop the parties' trust. In addition, the fact that the parties' trust in a mediator is not a linear relationship with conflict resolution has an important implication for confrontation. Mediators should not hesitate to be more interventionist or confrontational for fear of losing trust. As long as the level of trust remains above threshold level, confrontation does not reduce the likelihood of reaching an agreement (even though it might mean losing some degree of trust). In fact, it is more likely that the mediation process might be hindered if the mediator, overly focused on trust building, avoids being assertive. Therefore, when mediators focus too much on trust, they might be simply overdoing it.

Notes

1. In the Province of Québec (Canada), a college is an institution offering the equivalent of an associate's degree in the United States.

2. One advantage of the degree of resolution as a measurement scale is that it respects the parameters of a normal distribution and thus allows use of multivariate data analysis.

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10 REASONS TO MEDIATE YOUR CASE – OTHER THAN SETTLEMENT

Wed, Feb 12th, 2020 | by Miles Mediation | ADR Resources, News | Social Share

There is a common belief that the only reason to schedule a case for mediation is to get it settled. This belief makes sense as a high percentage of cases do settle at mediation, and guiding parties toward resolution at mediation is the goal of any neutral. However, there are a number of very positive things that can be achieved at mediation that don't involve settlement. In this article, I will discuss the top ten 'non-settlement' benefits that can occur at mediation.

1). The mediation session affords the opportunity for an experienced neutral to listen to your view and then provide a fresh perspective. An experienced neutral has mediated and arbitrating thousands of cases, and they make it their business to know how juries are reacting to cases. Also, most mediation firms keep data on cases their neutrals mediate. At Miles, we share this information with our neutrals at our quarterly meetings. As a consequence, our clients not only receive the benefit of the individual neutral's thoughts and observations, but what our data reveals about current trends. A client

armed with this information may choose to change their evaluation or modify the way they decide to present their case should it have to be tried.

2). The mediation session allows you to learn what your opponent believes about their case, what they will argue at trial, and the evidence they will present. Most attorneys are good at guessing what their opponents are thinking and how they will present their case. However, it's not unusual for me to hear attorneys say that they learned something new about their opponent's position at mediation or that they gained a new perspective. Often the mediation is the first opportunity for the insurance adjuster/corporate representative has to meet and hear from the plaintiff. Conversely, it is typically the first chance the plaintiff has to hear directly from the defense. Of course, these revelations won't always change the way you value a case, but it's still beneficial to learn what your opponent is thinking.

3). Most clients trust their attorneys and wisely listen to their opinions about the case. However, there are occasions where attorneys find themselves at odds with their clients, and these attorneys find themselves in the unenviable position of having to advance a position that is likely to fail at trial. No attorney wants to argue or disagree with their clients. The mediation session allows the neutral to be the 'bad guy' and tell the client things they don't want to hear. I've witnessed many instances where clients' minds are changed, and cases resolve. In those instances where clients remain defiant, the attorney gains 'political cover' so that if the case does go south, the client can't say they weren't put on notice.

4). Many lawsuits arise from tragic circumstances. An individuals life was turned upside-down in an instant by something that wasn't their fault. It's understandable that these people are angry and demand to be heard. Indeed, these individuals won't move on to problem-solving until they have had the opportunity to confront the one who harmed them. The mediation session is the only opportunity the emotional plaintiff will have to sit across the table from their opponent and be heard. This moment is one of the main reasons that mediation is often successful. After the aggrieved individual has had their say and been acknowledged they are ready to move on to discussing resolution. Even in instances where a case doesn't resolve at mediation, the fact that the plaintiff has been heard sets the stage for resolution in the future.

5). One lament I hear consistently from attorneys is how contentious the practice of law has become in recent years. There are many reasons for this change in climate, but I believe that one of the main reasons is the increased use of email. When I began practicing law, attorneys often met in person to discuss issues, and one of the highlights of my week was attending calendar calls. Today most communication is conducted electronically, and there are fewer and fewer opportunities for in-person meetings. It's more difficult to be combative when you are face to face with your opponent.

The mediation session is one of the few times, if not the only time during litigation, that litigants are required to sit across the table from each other with the common objective of reaching a compromise. When I was actively mediating, I would tell parties that one of my goals was to ensure that they would leave the mediation better off than they came. Of course, the object of the exercise was to settle. Still, in the instances when that didn't occur, I was often successful in lowering the level of animosity and putting the parties on a path toward an eventual resolution.

6). Just because the parties can't agree on a final solution doesn't mean they can't find areas of agreement and construct a plan for going forward. Sometimes parties come to mediation with opposite views of the case. An experienced neutral can help parties to understand why they see things differently and suggest ways to bring the parties together. For example, the plaintiff's attorney may believe that surgery was related to an injury sustained in an automobile accident. In contrast, the defense attorney may see no causal link between the accident and the claimed injury. The neutral could suggest the parties meet together with the treating physician to discuss the matter. I recall one mediation I conducted where we were able to get the physician on the phone at the mediation. After the call, the parties, armed with a clearer understanding of the doctor's opinion, were able to resolve the case

7). When it becomes apparent that the parties won't be able to reach a settlement and that there is little prospect of a resolution short of trial, the parties can use the mediation session to agree on a high low agreement to reduce uncertainty at trial.

8). **If the parties aren't able to reach an agreement to resolve the case**, they may agree to utilize another form of ADR like arbitration. Arbitration allows the parties to end their dispute with a significant savings of time and money. It also ensures that an arbitrator will decide with substantive knowledge of the matter in dispute. This process is often preferable to leaving the outcome to 12 jurors with little knowledge or interest in the case.

9). **At trial, all a jury can do is return a monetary verdict**. They can't craft a creative solution. At mediation, the parties have the freedom to find a solution that doesn't necessarily involve money. I've facilitated many mediations where an apology from the defendant was an essential part of the settlement. Other mediated agreements have involved commitments on the part of the defendant to take corrective actions to prevent future incidents. Of course, if a monetary settlement is reached at mediation, the parties can structure the payout to minimize tax consequences.

10). Most cases settle at mediation; however, if a case doesn't end at mediation, that doesn't mean it won't settle. One of the main benefits of mediating is to obtain the services of a neutral who will continue to work with the parties after the mediation to ensure a successful resolution

ICODR Video Mediation Guidelines

1. Accessible

Confirm individually with each party their willingness to use technology for the session. Ensure both you and each participant have an effective connection (e.g. audio clear, adequate lighting, good bandwidth). Use a videoconferencing platform that is free to parties, reliable, and easy to log into. Send reminders to parties with log in information a minimum of two days before and two hours before the scheduled start time.

2. Competent

Practice the software you are using before you utilize it with your parties and offer to try it out with the parties individually in advance of the session. Inform parties what technology will be employed prior to the session. Learn the additional ethical obligations that come along with mediating over video (see links below) as well as addressing the parties' ethical obligations for video mediation in your ground rules.

3. Confidential

Let the parties know you will not record video or audio in your online mediations. Get a written commitment from the parties in advance that they will not record audio or video as well, nor take screen shots. If parties want to show a document or photo in the session have them share their screen and show it instead of emailing it to other participants. Once all parties have joined, lock the room so others cannot join in.

4. Fair/Impartial/Neutral

Begin the session with everyone's video and microphone on, as if they were in the room. If one party disconnects, suspend the session until they can re-join. If a party's audio cuts out or becomes distorted, notify them once the audio resumes and ask them to repeat what was said during the outage. Always have a back--up option for sound, for instance dialing in by phone. Join 10 minutes early to troubleshoot any problems.

5. Secure

Use a secure videoconferencing platform with end-to-end encryption. Do not use apps or software that require location information to be shared, or inform the parties that they have the ability to turn that off (and explain how to do so). Ensure the videoconference will not "time out" or close down after a certain duration. Have all videos on screen at the same time as opposed to only highlighting the speaker.

ICODR
THE INTERNATIONAL COUNCIL FOR ONLINE DISPUTE RESOLUTION

The International Council for Online Dispute Resolution
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April 2020

ICODR's Ethical Standards: https://icodr.org/standards/
NCTDR's Ethical Principles: http://odr.info/ethics-and-odr/

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2023

OTHER RESOURCES

ARTICLES AND FORMS

MICHAEL WEISS

YVONNE TAKVORIAN SAVILLE

MEGHAN E. BUTTERS

LAW OFFICES
WEISS, SAVILLE & HOUSER P.A.
1105 N MARKET STREET, SUITE 200
P. O. BOX 370
WILMINGTON, DELAWARE 19899

TELEPHONE
(3 02) 656-0400
—
F AX
(3 02) 656-5011

Date

Re: Plaintiff v. Defendant
C.A. No.: xxC-xx-xxx VLM

Plaintiff atty's name
Address

Defendant atty's name
Address

Dear Counsel:

I am pleased to have been selected as a mediator in this case.

This letter will confirm that the Mediation has been scheduled in the above-referenced matter for Tuesday, October 4, 2016 at 10:00 a.m. in the offices of law firm name and address.

My fee will be $ per hour. The invoice will be sent to the parties after the Hearing takes place. If the Hearing is cancelled within _____ days of the scheduled date, there may be a cancellation fee.

If the parties wish to submit Mediation Statements, please do so by October 2, 2016.

Very Truly Yours,

/s/ YVONNE TAKVORIAN SAVILLE
YVONNE TAKVORIAN SAVILLE

YTS/jc

cc: Ms. Kay Tamone, CM to Hon. Vivian L. Medinilla

Mediation Intake Form

Confidential: Not to be Shared with the Other Party. Please Print.

(Note: We need to assess the level and potential of any abuse (if any) in the martial relationship and establish boundaries about safety before issues can be mediated)

Name _____ Date _____

Address _____

City _____ State _____ ZIP _____

Home Phone _____ Cell Phone _____

Work Phone _____ Email _____

Name of Employer _____ Position _____

❑Full Time ❑Part Time Number of Years Employed _____ Date of Birth _____

Name of Spouse _____

Date and City of Marriage _____ Date of Separation _____

Names and Ages of Children _____

With whom are the children living? _____

Was abuse present in the marriage relationship? ❑Yes ❑No

If so, ❑ Physical ❑ Emotional ❑ Chemical ❑ Other _____

Is there an Order for Protection or Restraining Order? _____

Have you had, or are you now in counseling, therapy and/or treatment program? Yes ❑ No ❑ If Yes, what kind, with whom and for how long? _____

_____

Do you have an attorney? ❑Yes ❑No If Yes, who? _____

❑Retained ❑Consulting

How did you find out about us? _____

If referred by an individual, may we send them a thank you note? ❑Yes ❑No

Area of greatest concern about the divorce _____

_____

Please return to:
Steve McBride, Steve McBride LLC, 5600 Greenwood Plaza Blvd, Ste 255, Greenwood Village, CO 80111
Phone: 303 867 1400 FAX 303 800 8230 Email: steve@divorcefinancecolorado.com

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PLAINTIFFS	)	
Plaintiffs,	)	
	)	
v.	)	C. A. No.:
	)	
DEFENDANTS	)	
Defendants.	)	

AGREEMENT TO MEDIATE

This is an agreement by the parties and their attorneys (if applicable), whose signatures appear below, to submit to mediation in the above-captioned matter. We understand that mediation is a voluntary process, which we may terminate at any time.

By signing this agreement, we indicate our awareness that mediation sessions and all material prepared for mediation are confidential. Each party agrees to make no attempt to compel the mediator's testimony against the other, nor to compel the mediator to produce any documents provided by the other party, nor to compel the other party to testify regarding statements made in mediation sessions. In no event will the mediator disclose confidential information provided during the course of the mediation or testify voluntarily on behalf of any party. The mediator may find it helpful to meet with each party separately; in this event, the mediator will not reveal what is said by one of us to the other(s) without permission.

We further agree that:

(1) All parties, including a representative of the insurance carrier, if applicable, and the attorneys of all represented parties will attend the mediation sessions. No one else may attend without permission of all parties and the consent of the mediator;

(2) The mediator will not function as the representative of or legal counsel to any party. Each unrepresented party acknowledges having been encouraged to consult with an attorney prior to signing any agreement;

(3) The mediator has the discretion to terminate mediation at any time if the mediator believes that the case is inappropriate for mediation or that an impasse has been reached;

(4) The only information relative to the mediation session(s) that will be reported to the Court will be:

(a) The fact that mediation session(s) was actually held; and

(b) Whether the parties have reached an agreement or, in the alternative, whether the case should continue routinely through the judicial process.

No other type of report will be prepared by the mediator and submitted to any Court in connection with this case.

(5) If a settlement is reached, the agreement shall be reduced to writing and, when signed, shall be binding upon all parties to the agreement. If the terms of the agreement are to remain confidential, the agreement will reflect that settlement was achieved and that a stipulation of dismissal will be filed with the Court.

(6) The parties and their attorneys and/or representatives agree to keep all matters discussed confidential.

_____ _____

Plaintiff _____ Defendant _____

_____ _____

_____ _____

Attorney for Plaintiff Attorney for Defendant

_____

Defendant _____

_____

_____

Attorney for Defendant

_____

Yvonne Takvorian Saville

Mediator

_____

Date

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

COUNTY: NEW CASTLE ☐ KENT ☐ SUSSEX ☐

Plaintiff (s),

v.

Defendant (s).

C.A. No.: _____

MEDIATOR'S REPORT

A mediation conference was held in the above-captioned case on _____ 200__.

This mediator reports that:

1. ☐ All parties (*were / were not*) present.
   ☐ The following party(ies) (*was not/were not*) present:_____

   _____

2. Meaningful mediation sessions (*did / did not*) take place.

3. As a result of mediation, this case is:

   ☐ SETTLED**
   ☐ SCHEDULED WITH ME FOR ADDITIONAL MEDIATION
   ☐ AT IMPASSE AND READY FOR SCHEDULING ORDER
   ☐ READY FOR TRIAL *($150.00 TRIAL FEE IS NOW DUE)*
   ☐ READY FOR ARBITRATION
   ☐ OTHER (PLEASE SPECIFY) _____

**** NOTICE TO ALL PARTIES: If a Stipulation of Dismissal is not filed within sixty (60) days of the date, the case will be referred to the assigned Judge for dismissal.**

_____
Mediator's Signature

Dated :_____

_____
Mediator's Name (Please Print)

cc: Counsel & All Parties

Revised 8.21.03

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

COUNTY: NEW CASTLE ☐ KENT ☐ SUSSEX ☐

Plaintiff (s)

v.

C.A. No.: _____

Defendant(s)

SETTLEMENT AGREEMENT

The parties agree as follows:

_____ Signature

_____ Signature

_____ Signature

_____ Signature

_____ Signature

_____ Signature

_____ Mediator's Signature

_____ Mediator's Name (Please Print)

Dated: _____

Revised 8.21.03

SUPERIOR COURT
CIVIL CASE INFORMATION STATEMENT (CIS)

COUNTY: N K S CIVIL ACTION NUMBER:_____

Caption:

_____

_____

_____

_____

_____

_____

Civil Case Code: _____

Civil Case Type: _____
(SEE REVERSE SIDE FOR CODE AND TYPE)

MANDATORY NON-BINDING ARBITRATION (MNA) _____

Name and Status of Party filing document:

_____

Document Type:(E.G.; COMPLAINT; ANSWER WITH COUNTERCLAIM)

_____

JURY DEMAND: YES ____ NO ____

ATTORNEY NAME(S):

_____

ATTORNEY ID(S):

_____

FIRM NAME:

_____

ADDRESS:

_____

_____

TELEPHONE NUMBER:

_____

FAX NUMBER:

_____

E-MAIL ADDRESS:

_____

IDENTIFY ANY RELATED CASES NOW PENDING IN THE SUPERIOR COURT OR ANY RELATED CASES THAT HAVE BEEN CLOSED IN THIS COURT WITHIN THE LAST TWO YEARS BY CAPTION AND CIVIL ACTION NUMBER INCLUDING JUDGE'S INITIALS:

_____

_____

EXPLAIN THE RELATIONSHIP(S):

_____

_____

_____

_____

OTHER UNUSUAL ISSUES THAT AFFECT CASE MANAGEMENT:

_____

_____

_____

(IF ADDITIONAL SPACE IS NEEDED, PLEASE ATTACH PAGE)

THE PROTHONOTARY WILL NOT PROCESS THE COMPLAINT, ANSWER, OR FIRST RESPONSIVE PLEADING IN THIS MATTER FOR SERVICE UNTIL THE CASE INFORMATION STATEMENT (CIS) IS FILED. THE FAILURE TO FILE THE CIS AND HAVE THE PLEADING PROCESSED FOR SERVICE MAY RESULT IN THE DISMISSAL OF THE COMPLAINT OR MAY RESULT IN THE ANSWER OR FIRST RESPONSIVE PLEADING BEING STRICKEN.

SUPERIOR COURT CIVIL CASE INFORMATION STATEMENT (CIS) INSTRUCTIONS

CIVIL CASE TYPE

Please select the appropriate civil case code and case type (e.g., **CODE** - **AADM** and **TYPE** - **Administrative Agency**) from the list below. Enter this information in the designated spaces on the Case Information Statement.

APPEALS
AADM - Administrative Agency
ACER - Certiorari
ACCP - Court of Common Pleas
AIAB - Industrial Accident Board
APSC - Public Service Commission
AUIB - Unemployment Insurance Appeal Board

COMPLAINTS
CABT – Abatement
CASB – Asbestos
CAAA - Auto Arb Appeal
CMIS - Civil Miscellaneous
CACT - Class Action
CCON – Condemnation
CCLD – Complex Commercial Litigation Division **(NCC ONLY)**
CDBT - Debt/Breach of Contract
CDEJ - Declaratory Judgment
CDEF - Defamation
CEJM - Ejectment
CATT - Foreign & Domestic Attachment
CFJG - Foreign Judgment
CFRD - Fraud Enforcement
CINT - Interpleader
CLEM - Lemon Law
CLIB - Libel
CMAL - Malpractice
CMED - Medical Malpractice
CPIN - Personal Injury
CPIA - Personal Injury Auto
CPRL - Products Liability
CPRD - Property Damage
CRPV - Replevin
CSPD - Summary Proceedings Dispute
CCCP - Transfer from CCP
CCHA - Transfer from Chancery

MASS TORT
CABI - Abilify Cases
CBEN - Benzene Cases
CFAR - Farxiga Cases
CHON - Honeywell Cases
CMON - Monsanto Cases
CPEL - Pelvic Mesh Cases
CPLX - Plavix Cases
CPPI - PPI Cases
CTAL - Talc Cases
CTAX - Taxotere Cases
CXAR - Xarelto Cases

INVOLUNTARY COMMITMENTS
INVC- Involuntary Commitment

MISCELLANEOUS
MAGM - AG Motion - Civil/Criminal Investigations *
MADB - Appeal from Disability Board *
MAFF - Application for Forfeiture
MAAT - Appointment of Attorney
MGAR - Appointment of Guardianship
MCED - Cease and Desist Order
MCON - Civil Contempt/Capias
MCVP - Civil Penalty
MSOJ - Compel Satisfaction of Judgment
MSAM - Compel Satisfaction of Mortgage
MCTO - Consent Order
MIND - Destruction of Indicia of Arrest *
MESP - Excess Sheriff Proceeds
MHAC - Habeas Corpus
MTOX - Hazardous Substance Cleanup
MFOR - Intercept of Forfeited Money
MISS - Issuance of Subpoena
MLEX - Lien Extension
MMAN - Mandamus
MWIT - Material Witness *
MWOT - Material Witness - Out of State
MRAT - Motion for Risk Assessment
MROP - Petition for Return of Property
MCRO - Petition Requesting Order
MROD - Road Resolution
MSEL - Sell Real Estate for Property Tax
MSEM - Set Aside Satisfaction of Mortgage
MSSS - Set Aside Sheriff's Sale
MSET - Structured Settlement
MTAX - Tax Ditches
MREF - Tax Intercept
MLAG - Tax Lagoons
MVAC - Vacate Public Road
MPOS - Writ of Possession
MPRO - Writ of Prohibition

MORTGAGES
MCOM - Mortgage Commercial
MMED - Mortgage Mediation
MORT - Mortgage Non-Mediation (Res.)

MECHANICS LIENS
LIEN - Mechanics Lien

* Not eFiled

DUTY OF THE PLAINTIFF

Each plaintiff/counsel shall complete the attached Civil Case Information Statement (CIS) and file with the complaint.

DUTY OF THE DEFENDANT

Each defendant/counsel shall complete the attached Civil Case Information Statement (CIS) and file with the answer and/or first responsive pleading.

Revised 10/2019

SAMPLE MEDIATION INTRODUCTION

Good morning, I am _____ , from (the mediation program). I am your mediator today, which means that I am here to help you and to aid your efforts to resolve your conflict. To help you, I will stress three things:

One, your voluntary participation. The mediation process exists for you benefit, which is why it can be voluntary. I will be helping you make your own choices in your own self-interest by examining your essential needs and positions.

Two, I will emphasize fairness. This means that I will treat each side equally and act only inside the limits you authorize.

Three, confidentiality. The settlement conference is off-limits, just as stated in the mediation agreement you signed. That is a contract. Even more, chat we talk about in private remains private unless you say otherwise.

To start the process, I will ask each side to put their issues on the table and to tell us about their case. You can take the time you need, but most people take about 15 to 20 minutes to describe things. When both sides have finished, we will then break into separate groups or caucuses and work from there to resolve the matters.

_____, I would like for you to start by sharing some information about how you see the situation. What would you like to tell us?

SAMPLE INTRODUCTION ii

It's good to see the two of you here. I'm (Mediator's Name) and I will be serving as your Mediator. You may call me by my first name; how would you like me to address you?

The purpose of our meeting is to help you work out an understanding acceptable to both of you to resolve the situation that has been developing for you.

First, I would like to explain how we will proceed, so you know what is happening next. I will begin by asking each of you to explain to me exactly how you view things. I will do my best to understand exactly how it looks from your shoes. After that, we will identify and agree on what the basic issues of disagreement are. Then we will work together in examining exactly what you want of each other and what some possible solutions might be. Our goal is to help you find a solution that both of you feel comfortable with.

I would like you to understand what my role is here. My goal is to help You figure out Your own solution to Your problems. You are the ones who will be living with your solution from here on, so we want you to be the ones who decide what the solution will be. I won't be telling you what to do or trying to judge who is right or wrong. I am much more interested in helping you to think about solutions for the future than in trying to judge what happened in the past. Mainly I am interested in helping to talk about a solution that both of you can live with. I want to assure you that anything that you may say during our session is confidential. I will be taking notes from time to time so that I can remember things, but when I finish, I will destroy my notes.

Either of you may ask to take a break at anytime during our discussion. For example, if you feel yourself getting really upset at any time and feel that you really need to take a break to simmer down a little, let me know, and we will take a little time out. You can step outside for a few minutes if you wish, but I will ask you to let me know what is happening and then to return when you are ready to continue. Sometimes it is helpful for me, the mediator, to meet separately with each of you during our discussion, so we may be doing that occasionally as well.

It is necessary for this process for each of you to sign this written agreement to mediate. If you would just look it over, please. It basically says that you have come of your own accord, that what you say here will be kept confidential, and that the Mediators will not be asked to release information discussed here, nor will they be summoned into court to testify on matters disclosed here.

Last of all, I would like to discuss ground rules a bit.

I ask each of you to agree not to interrupt when the other person is speaking. I have placed paper and pencil here on the table so that you can keep notes about any responses

to make. I also would like for you to agree to avoid the use of any abusive language, name calling, etc. These rules are especially important in the next part of our discussion here. (Address each Party by name and ask) (Name), can you agree. . .

I'd like to begin now with hearing each of you explain your perspective on this situation. is it all right with you if we begin with (Name of Complainant), since he/she initiated the mediation? We will hear from you (Name of Responding Party) when he/she is finished. In case there are things you disagree with as (Name of Complainant) speaks, make note of them and explain your perspective on them when it is your turn. (Name of Complainant), you can go ahead and begin.

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Article 5

2017

Implicit Bias and Prejudice in Mediation

Carol Izumi
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IMPLICIT BIAS AND PREJUDICE IN MEDIATION

*Carol Izumi**

ABSTRACT

Mediators aspire and endeavor to meet their ethical duty of "neutrality" in mediation. Yet their ability to actually conduct mediations without bias, prejudice, or favoritism toward any party is extraordinarily difficult, if not impossible. Research shows that unconscious mental processes involving stereotypes and attitudes affect our judgments, perceptions, and behavior toward others. Implicit bias, the automatic association of stereotypes and attitudes with social groups, may produce discriminatory responses toward parties despite a mediator's best efforts at creating an outwardly even-handed process. Even the most well-intentioned and egalitarian mediators must actively engage in bias reduction strategies to mitigate prejudice in mediation.

I. INTRODUCTION[1]

FIRST, I want to thank Michael Green, Richard Delgado, the symposium organizers, the SMU Dedman School of Law community, and other panelists. I am very honored and pleased to be participating in this symposium and particularly in this Prejudice in Mediation session. The issues raised in Professor Delgado's article[2] are as important today as they were thirty years ago.

I would like to spend my limited time on recent social science research, the third theory of prejudice referred to in the article,[3] and apply those

* Clinical Professor of Law, University of California Hastings College of the Law. The author thanks the UC Hastings administration for professional development support as well as Maryam Rangwala and Jacob Bothamley for invaluable research assistance.

1. This presentation distills and updates an earlier article on the effect of implicit bias in mediation. For a much deeper analysis of this topic, see Carol Izumi, *Implicit Bias and the Illusion of the Mediator Neutrality*, 34 WASH. UNIV. J.L. & POL'Y 71 (2010).

2. Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

3. *Id.* at 1380–91 (Section 3: Social Psychological Theories of Prejudice).

discoveries to mediation. My commentary today centers on the research findings related to implicit bias, or unconscious bias. While we cannot address all facets of prejudice in alternative dispute resolution[4] on an individual mediator level, reducing mediator bias should be one strategy in the larger reformation. Structural and institutional challenges require commitment from many motivated stakeholders. Without robust mediator self-monitoring, external process maneuvers and programmatic changes will not be as effective. Given what we know in 2017, I would argue that we should be even *more* concerned about prejudice in mediation. I say that for three reasons: the past 20-plus years have yielded new scientific revelations about prejudice,[5] the use of mediation has proliferated,[6] and little has changed in terms of mediator training, the practice of

4. Alternative dispute resolution as used in this article includes negotiation, mediation, arbitration, and other consensual dispute resolution processes. The acronym "ADR" will be used hereafter.

5. *See* Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Stereotyping and Prejudice*, in 7 THE PSYCHOLOGY OF PREJUDICE: THE ONTARIO SYMPOSIUM 55, 56 (Mark P. Zanna & James M. Olson eds., 1994); Jennifer S. Hunt, *Implicit Bias and Hate Crimes: A Psychological Framework and Critical Race Theory Analysis*, in SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES 247, 255 (Richard L. Wiener et al. eds., 2007) (implicit stereotypes may trigger hate crimes); *Moving Beyond Prejudice Reduction: Pathways to Positive Intergroup Relations*, *in* CHARTING NEW PATHWAYS TO POSITIVE INTERGROUP, 6–8 (Linda R. Tropp & Robin K. Mallett, eds., 2011); Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 771 (1995); Hon. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1030 (2008); Mahzarin R. Banaji, Curtis Hardin & Alexander J. Rothman, *Implicit Stereotyping in Person Judgment*, 65 J. PERSONALITY & SOC. PSYCHOL. 272 n.2 (1993); Sara R. Benson, *Reviving the Disparate Impact Doctrine to Combat Unconscious Discrimination: A Study of* Chin v. Runnels, 31 T. MARSHALL L. REV. 43, 58–59 (2005) (disparate impact doctrine should be reinstated in Equal Protection cases to combat implicit discrimination); David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1434 (2008); Elayne E. Greenberg, *Fitting the Forum to the Pernicious Fuss: A Dispute System Design to Address Implicit Bias and 'Isms in the Workplace*, 17 CARDOZO J. CONFLICT RESOL. 75, 112 (2015) (workplace discrimination caused by implicit prejudice); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 947 (2006); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 473 (2010); Jerry Kang, Nilanjana Dasgupta, Kumar Yogeeswaran & Gary Blasi, *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUDIES 886, 887 (2010); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128–32 (2012); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1061–62 (2006); Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 428, 431 (2007); Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 191–92 (2005) (recent psychological research identifies the impact of implicit bias on peremptory challenges); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 296 (2012); *see generally* CHERYL STAATS, KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2014 (2014).

6. *See* DONNA STIENSTRA, ADR IN THE FED. DIST. COURTS: AN INITIAL REPORT 3 (2011) and OFFICE OF DISPUTE RES., FY 2011 BUDGET REQUEST AT A GLANCE 1 (2011); Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 2 (2012) (asserting that ADR programs have expanded over the past several years). *See also* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 166–67 (2003) (citing internet references to mediation, arbitra-

mediation, and the lack of diversity within mediator ranks.[7]

Let me preface my remarks with a disclaimer. I am not a social scientist, just a curious lawyer with a little bit of knowledge. My convictions about mediation stem from thirty years in the trenches directing law school mediation clinics and mediating cases in a variety of contexts on a pro bono basis.[8] This presentation will unfold as follows. First, I discredit the notion of mediator neutrality in practice. Second, I describe implicit bias and conditions that allow discrimination to occur in mediation. Lastly, I offer thoughts on how mediation can be practiced with more attention to bias reduction.

II. MEDIATOR NEUTRALITY

A core value of mediation is the notion of mediator neutrality.[9] I identify four elements of what is commonly thought of as mediator neutrality:

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tion and conflict resolution); Heather Scheiwe Kulp, *Increasing Referrals to Small Claims Mediation Programs: Models to Improve Access to Justice*, 14 CARDOZO J. CONFLICT RESOL. 361, 364 (2013) (identifying an increase in the need for ADR programs after the 2008 economic crisis led to an increase in self-represented litigants); Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUDIES 843, 844 (2004) (citing growth and impact of ADR and decreasing number of trials); Floyd D. Weatherspoon, *The Impact of the Growth and Use of ADR Processes on Minority Communities, Individual Rights, and Neutrals*, 39 CAP. U. L. REV. 789, 791–93 (2011) (impact of ADR processes on minority communities and individual rights); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 642 (2002) (empirical study of civil case mediations in Ohio).

7. Bush & Folger, *supra* note 6, at 26–27 (asserting that there is a lack of diversity among mediators and barriers to encouraging more diversity in mediation); Leah Wing, *Whither Neutrality? Mediation in the 21st Century*, *in* RE-CENTERING CULTURE AND KNOWLEDGE IN CONFLICT RESOLUTION PRACTICE 93–107 (2008) (study of 100 individuals from various minority groups who felt shut out of the "gated mediator community"); Weatherspoon, *supra* note 6, at 800–01 (noting "lack of diversity in the pool of potential neutrals" that "stems from a system of exclusion and invisibility.").

8. From 1986–2010, I directed the Consumer Mediation Clinic at George Washington University Law School and the Community Dispute Resolution Center Project at GW Law from 1999–2010. In 2010, I joined the UC Hastings law faculty to direct the Mediation Clinic and ADR Externship Program. Since 1986, I have mediated hundreds of civil, criminal, and juvenile cases, community disputes, consumer-business disputes, human rights complaints, educational and school-based matters, and employment-related grievances in Washington D.C., Virginia, Michigan, and California.

9. *See Model Standards of Conduct for Mediators* 2005 A.B.A. SEC. DISP. RESOL., Preamble, http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf [https://perma.cc/CN99-SL83]; Hilary Astor, *Rethinking Neutrality: A Theory to Inform Practice—Part I & Part II*, 11 AUSTRALASIAN DISP. RESOL. J. 73, 73, 145–46 (2000); Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35, 35 (1991); Wing, *supra* note 7, at 93–94; *see also* JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 418 (3d ed. 2013); SUSAN NAUSS EXON, ADVANCED GUIDE FOR MEDIATORS 153 (2014); DEBORAH M. KOLB, THE MEDIATORS (1983); and Linda Mulcahy, *The Possibilities and Desirability of Mediator Neutrality—Towards an Ethic of Partiality?*, 10 SOC. & LEGAL STUD. 505, 510–11 (2001).

no conflict of interest;[10] procedural equality;[11] outcome-neutrality;[12] and lack of bias, prejudice, or favoritism toward any party.[13] The fourth element is often stated as the mediator's duty to avoid actual bias or the appearance of bias.[14] Another common definition is "freedom from favoritism and bias in word, action and appearance."[15]

The neutrality requirement, however, is neither practicable nor attainable in real life.[16] Studies reveal a disconnect between the aspiration of neutrality and actual techniques and strategies of mediators.[17] It is undeniable that mediators influence parties, using various degrees of persuasion and even outright manipulation to obtain results.[18] They push and "sell" proposals and selectively facilitate or manage the process toward favored outcomes.[19]

Moreover, conducting a mediation without bias or favoritism requires that mediators be conscious of their assumptions, biases, and judgments about the participants. Necessarily, mediators would have to have a high degree of self-awareness about their impact on the parties and the pro-

10. Susan Douglas, *Questions of Mediator Neutrality and Researcher Objectivity: Examining Reflexivity as a Response*, 20 AUSTRALASIAN DISP. RESOL. J. 56, 57 (2009) (finding four themes regarding neutrality). *See* Alfini, *supra* note 9, at 418; *Model Standards of Conduct for Mediators*, *supra* note 9, at III(A).

11. Hilary Astor, *Mediator Neutrality: Making Sense of Theory and Practice*, 16 SOC. & LEGAL STUD. 221, 223 (2007); William Lucy, *The Possibility of Impartiality*, 25 OXFORD J. LEGAL STUD. 3, 8, 11 (2005); *Model Standards of Conduct for Mediators*, *supra* note 9, at VI(A). *See also* Alfini, *supra* note 9, at 418.

12. *See* JOHN W. COOLEY, THE MEDIATOR'S HANDBOOK: ADVANCED PRACTICE GUIDE FOR CIVIL LITIGATION 2, 23 (2d ed. 2006); CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 449 (3rd ed. 2003); Exon, *supra* note 9, at 154. *See also* Lucy, *supra* note 11, at 8; *Model Standards of Conduct for Mediators*, *supra* note 9, at II; Alison Taylor, *Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process*, 14 MEDIATION Q. 215, 218 (1997).

13. DOUGLAS N. FRENKEL & JAMES H. STARK, THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT 86 (4th ed. 2012); Astor, *supra* note 9, at 77; *Model Standards of Conduct for Mediators*, *supra* note 9, at I; Susan Oberman, *Mediation Theory vs. Practice: What Are We Really Doing? Re-Solving a Professional Conundrum*, 20 OHIO ST. J. ON DISP. RESOL. 775, 819–20 (2000).

14. Astor, *supra* note 9, at 77.

15. Susan Nauss Exon, *The Effects That Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation*, 42 U.S.F. L. REV. 577, 581 (2008) (quoting DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 68 (Phyllis Bernard & Bryant Garth eds., 2002).

16. BERNARD S. MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION 83 (2004); Astor, *supra* note 9, at 79–80; Cobb & Rifkin, *supra* note 9, at 36–37; Scott R. Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 TEX. L. REV. 227, 253–54 (2003).

17. David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC'Y REV. 613 (1989); Mulcahy, *supra* note 9, at 513.

18. Astor, *supra* note 9, at 73, 74; James R. Coben, *Mediation's Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception*, 2 J. ALT. DISP. RESOL. 4 (2004); James H. Stark & Douglas N. Frenkel, *Changing Minds: The Work of Mediators and Empirical Studies of Persuasion*, 28 OHIO ST. J. ON DISP. RESOL. 263 (2013).

19. *See* Greatbatch & Dingwall, *supra* note 17. *See also* Coben, *supra* note 18; Mulcahy, *supra* note 9, at 512.

cess. Neutrality in practice is illusory because of the operation of implicit, or unconscious, bias.[20] Let us move now to a discussion of implicit bias and how it might operate in the mediation context.

III. IMPLICIT BIAS IN MEDIATION

No doubt many of you know about implicit bias, but I will briefly summarize some basic findings so we share a common understanding. Just as our brains help us categorize objects based on characteristics, our brains use schemas to sort people into groups, such as male or female, young or old.[21] Mental processes that operate outside our conscious awareness are implicit, or unconscious.[22] The big reveal of this research is that we do not always have conscious, intentional control over our mental associations, perceptions, and impressions.[23]

Simply stated, implicit bias refers to automatic associations of stereotypes and attitudes with social groups.[24] Implicit stereotypes and attitudes that result from repeated exposure to cultural stereotypes in our society form the basis for implicit racial, gender, ethnic, and other biases.[25] Research shows that stereotypes are automatically activated merely by encountering a member of a social group.[26] This "automaticity" of

20. Greenwald & Banaji, *supra* note 5, at 4; Greenwald & Krieger, *supra* note 5, at 946; Lane, Kang & Banaji, *supra* note 5, at 427, 428, 431.

21. Becca R. Levy & Mahzarin R. Banaji, *Implicit Ageism*, *in* AGEISM STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 49, 51–52 (Todd D. Nelson ed., 2002); Rachel Godsil & john powell, *Implicit Bias Insights as Preconditions to Structural Change*, POVERTY & RACE, (Sept./Oct. 2011); Kang et al., *supra* note 5, at 1160–61; Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CALIF. L. REV. 1063, 1064–65 (2006); Kang, Dasgupta, Yogeeswaran & Blasi, *supra* note 5, at 888; Kang & Lane, *supra* note 5, at 468–69; Richardson & Goff, *supra* note 5, at 297; Tropp & Mallett, *supra* note 5, at 6. *See generally* Kirwan Institute, *supra* note 5, at 51.

22. Godsil & powell, *supra* note 21; Kang, Dasgupta, Yogeeswaran & Blasi, *supra* note 5, at 887; Kang & Banaji, *supra* note 21, at 1064; Kang & Lane, *supra* note 5, at 467–468, 469–70; Kang et al., *supra* note 5, at 1126; Richardson & Goff, *supra* note 5, at 295, 297; Tropp & Mallett, *supra* note 5, at 6–7; *see* Banaji & Greenwald, *supra* note 5, at 56–58; Banaji, Hardin & Rothman, *supra* note 5, at 272; Greenwald & Krieger, *supra* note 5, at 945–46; Lane, Kang & Banaji, *supra* note 5, at 428; Krieger & Fiske, *supra* note 5, at 1032–33; *see generally* Kirwan Institute, *supra* note 5, at 16.

23. Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Stereotyping and Prejudice*, in 7 PSYCHOLOGY OF PREJUDICE: THE ONTARIO SYMPOSIUM 55, 56 (Mark P. Zanna & James M. Olson eds., 1994); Banaji, Hardin & Rothman, *supra* note 5, at 272 n. 2; Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 4 (1995); Greenwald & Krieger, *supra* note 5, at 946; Kang, Dasgupta, Yogeeswaran & Blasi, *supra* note 5, at 887; Kang & Lane *supra* note 5, at 469; Lane, Kang & Banaji, *supra* note 5, at 428, 431; Richardson & Goff, *supra* note 5, at 297.

24. Rachel D. Godsil, *Why Race Matters in Physics Class*, 64 UCLA L. REV. 40, 51–52 (2016); Kang, Dasgupta, Yogeeswaran & Blasi, *supra* note 5, at 1; Kang & Lane, *supra* note 5, at 469–70; Kirwan Institute, *supra* note 5, at 16; Richardson & Goff, *supra* note 5, at 301–02.

25. Jerry Kang, *Bits of Bias*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 1, 3–7 (Justin Levinson & Robert Smith eds. 2012); Godsil, *supra* note 24, at 52–53; Greenwald & Krieger, *supra* note 5.

26. Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY AND SOC. PSYCHOL. REV. 242, 242–43 (2002); Greenwald & Banaji, *supra* note 23, at 15; Krieger & Fiske, *supra* note 5, at 1033; Tropp & Mallett, *supra* note 5, at 7.

stereotype activation influences our judgments, actions, and decisions.[27] Despite our best intentions and explicit beliefs, implicit biases can produce behavior that diverges from our endorsed principles.[28] So, a mediator may espouse egalitarian beliefs, but her implicit biases produce discriminatory responses toward the parties.

You probably know about the Implicit Association Test (IAT). By measuring the strength of associations based on response speeds in categorization tasks, the IAT produces an implicit measure.[29] Millions of people have taken the IAT;[30] you can go to the Harvard Implicit website and select from a menu of IATs.[31] The Race IAT is the most widely used.[32] Most Americans, around 75%, exhibit a strong and automatic positive evaluation of white Americans and a relatively negative evaluation of African Americans.[33] Similarly, 68% of heterosexuals manifest implicit bias in favor of straights over gays and lesbians.[34] Implicit ageism measures are quite strong; both older and younger subjects tend to have negative implicit attitudes toward the elderly and positive implicit attitudes toward the young.[35] These results contrast sharply with self-reported attitudes.[36]

Four main conclusions are drawn from implicit social cognition research: (1) there is variance, sometimes wide, between implicit and explicit cognition; (2) we show a pervasive and strong favoritism for our own social group, as well as for socially valued groups; (3) implicit cogni-

27. Blair, *supra* note 26, at 242–43; Kang, Dasgupta, Yogeeswaran & Blasi, *supra* note 5, at 1; Kang & Lane, *supra* note 5, at 467; Richardson & Goff, *supra* note 5, at 301–02; L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2629 (2013).

28. Godsil, *supra* note 24, at 52; Greenwald & Krieger, *supra* note 5, at 951; Kang & Lane, *supra* note 5, at 469; Richardson & Goff, *supra* note 5, at 295.

29. Jack Glaser & Curtis D. Hardin, *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RESEARCH IN ORGANIZATIONAL BEHAVIOR 39, 41 (2009); Anthony G. Greenwald, Mahzarin R. Banaji & Brian A. Nosek, *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003); Greenwald & Krieger, *supra* note 5, at 952–53; John T. Jost, Laurie A. Rudman, Irene V. Blair, Dana R. Carney, Nilanjana Dasgupta, Kang & Lane, *supra* note 5, at 472–73.

30. "The test's architects reported that, by October 2015, more than 17 million individual test sessions had been completed on the [IAT] website." *See* Jesse Singal, *Psychology's Favorite Tool for Measuring Racism Isn't up to the Job*, NYMAG.COM (Jan. 11, 2017, 12:18 PM), http://nymag.com/scienceofus/2017/01/psychologys-racism-measuring-tool-isnt-up-to-the-job.html [Perma link unavailable]; *see also* Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 UC IRVINE L. REV. 843, 860 (2015).

31. *Project Implicit*, HARVARD U., https://implicit.harvard.edu/implicit/ [https://perma.cc/DUE5-Q336] (last visited April 12, 2017).

32. Kang & Lane, *supra* note 5, at 474 n. 33 (citing Brian A. Nosek et al, *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 3–4 (2007)).

33. Lee, *supra* note 30, at 861.

34. Lee, *supra* note 30, at 860–61 n. 140 (citing Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 19 (2007)).

35. Becca R. Levy & Mahzarin R. Banaji, *supra* note 21, at 50–52, 54–55, 64; *see* Greenwald & Krieger, *supra* note 5, at 949.

36. Kang & Lane, *supra* note 5, at 488.

tions predict behavior; and (4) implicit cognitions can be changed.[37]

Significantly, implicit bias often predicts individually discriminatory behaviors more than explicit attitudes.[38] Here are a couple of research examples. Doctors with stronger anti-black attitudes and stereotypes were less likely to prescribe a medical procedure for African Americans compared with white Americans with the same medical profiles.[39] In another study, white subjects with stronger levels of implicit racial bias found a facial expression happy or neutral if the face was white, but angry or neutral if the face was black.[40] Nonverbal behaviors are also shaped by unconscious attitudes and stereotypes.[41]

In mediation, well-meaning practitioners who hold explicit egalitarian attitudes and views experience automatic stereotype activation upon encountering parties.[42] Mediators are highly likely to favor their own ingroup and be biased against out-group members, especially less socially valued ones.[43] This bias can play out in spontaneous behaviors such as eye contact, seating distance, blinking, and smiling.[44] White male mediators, the predominant racial and gender group in the field, may unconsciously ascribe negative traits to parties of color relating to work ethic, honesty, criminal propensity, and competence.[45] A study about lawyers is instructive here. Partners at a law firm were given an identical memorandum written by "Thomas Meyer," identified as an associate who

37. Lane, Kang & Banaji, *supra* note 5, at 431–38.

38. Greenwald & Krieger, *supra* note 5, at 954–55; Lane, Kang & Banaji, *supra* note 5, at 430, 436. *See, e.g.*, Mahzarin R. Banaji & R. Bhaskar, *Implicit Stereotypes and Memory: The Bounded Rationality of Social Beliefs*, in MEMORY, BRAIN, AND BELIEF 139, 167 (Daniel L. Schacter & Elaine Scarry eds., 2000); Mahzarin R. Banaji & Nilanjana Dasgupta, *The Consciousness of Social Beliefs: A Program of Research on Stereotyping and Prejudice*, *in* METACOGNITION: COGNITIVE AND SOCIAL DIMENSIONS 157, 167 (Vincent Y. Yzerbyt et al. eds., 1998); Krieger & Fiske, *supra* note 5, at 997.

39. Lane, Kang & Banaji, *supra* note 5, at 430.

40. Rachel Godsil, Linda Tropp, Phillip Goff & john powell, *The Science of Equality, Volume 1: Addressing Implicit Bias, Racial Anxiety, and Stereotype Threat in Education and Health Care*, PERCEPTION INSTITUTE 1, 25 (citing Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640 (2003)).

41. *Id.* at 26 (citing Carl O. Word et al., *The Non-Verbal Mediation of Self-Fulfilling Prophecies in Interracial Interactions*, 10 J. EXPERIMENTAL SOC. PSYCHOL. 109, 113–119 (1974)).

42. Blair, *supra* note 26, at 242–43.

43. Lane, Kang & Banaji, *supra* note 5, at 431–438.

44. Greenwald & Krieger, *supra* note 5, at 955, 961–62 (citing Word et al., *supra* note 41, at 113–119); Lane, Kang & Banaji, *supra* note 5, at 436; Evan M. Rock, *Mindfulness Mediation, the Cultivation of Awareness Mediator Neutrality, and the Possibility of Justice*, 6 CARDOZO J. CONFLICT RESOL. 347, 358 (2005).

45. Cynthia Lee, *Race, Policing, and Lethal Force: Remedying Shooter Bias with Martial Arts Training*, 79 LAW AND CONTEMPORARY PROBLEMS 145, 151 (2016) (citing Jennifer Eberhard et al., *Seeing Black: Race Crime, and Visual Processing*, 87 J. PERSONALITY AND SOC. PSYCHOL. 876, 876 (2004)); Rachel Godsil, *supra* note 24, at 53; L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2052 (2011); *see also* Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 595 (1976); H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 596 (1980).

graduated from NYU Law School.[46] Half of the partners were told Meyer was white; on average, they found 2.9 of the 7 spelling/grammar errors in the memo.[47] The partners who were told that Meyer was black found 5.8 of the 7 errors.[48] Qualitative evaluations of the memos were equally striking.[49]

In-group bias or preference may not seem as pernicious as out-group discrimination, but the effect can be the same.[50] Treating a favored group more positively still results in a discriminatory outcome.[51] We might think of hiring practices that result in predominantly male work forces. In Silicon Valley, for example, Google is overwhelmingly male.[52] A few years ago the company began requiring implicit bias training, and by 2015, more than half of its 49,000 employees had attended.[53]

In addition, bias can cause racial anxiety.[54] Social scientists have observed that we may feel more anxious when we interact with out-group members than with our in-group members.[55] Research on racial anxiety shows that for some people interracial interactions may trigger physical and cognitive indicators of anxiety.[56] People of color often fear discrimination and hostile treatment; white individuals may fear being perceived as racist and being treated with distrust.[57] This can result in unsatisfactory

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46. Godsil et al., *supra* note 40, at 36–37 (citing Dr. Arin N. Reeves, *Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEXTIONS 1, 3–8 (2014)).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 23 (citing M.B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. SOC. ISSUES 405, 429–444 (1999)).

51. *Id.* at 23.

52. Farhad Manjoo, *Exposing Hidden Bias at Google*, N.Y. TIMES (Sept. 24, 2014) ("Seven out of 10 people who work at Google are male. Men make up 83 percent of Google's engineering employees and 79 percent of its managers. In a report to the Equal Employment Opportunity Commission last year, Google said that of its 36 executives and top-ranking managers, just three are women."), https://www.nytimes.com/2014/09/25/technology/exposing-hidden-biases-at-google-to-improve-diversity.html [https://perma.cc/2CLJ-353F].

53. *Id.*

54. Godsil et al., *supra* note 40, at 28 (citing Elizabeth Page-Gould et al., *With a Little Help from My Cross-Group Friend: Reducing Anxiety in Intergroup Contexts Through Cross-Group Friendship*, 95 J. PERSONALITY AND SOC. PSYCHOL. 1080, 1080–1094 (2008); W.G. Stephan & C.W. Stephan, *Intergroup Anxiety*, 41 J. SOC. ISSUES 157, 157–175 (1985)).

55. Godsil et al., *supra* note 40, at 27 (citing Stephan & Stephan, *supra* note 54; Linda R. Tropp & Elizabeth Page-Gould, *Intergroup Contact*, *in* APA HANDBOOK OF PERSONALITY AND SOC. PSYCHOL. 535, 535–560 (J. Dovidio, J. Simpson, eds. 2014)).

56. Godsil et al., *supra* note 40, at 27 (citing David M. Amodio, *Intergroup Anxiety Effects on the Control of Racial Stereotypes: A Psychoneuroendocrine Analysis*, 45 J. EXPERIMENTAL AND SOC. PSYCHOL. 45, 60–67 (2009); Wendy B. Mendes et al., *Why Egalitarianism Might Be Good for Your Health: Physiological Thriving During Stressful Intergroup Encounters*, 18 J. PSYCHOL. SCI. 991, 991–998 (2007); Page-Gould et al., *supra* note 54).

57. Godsil et al., *supra* note 40, at 28 (citing David M. Amodio, *supra* note 56; L. Tropp & E. Page-Gould, *supra* note 55, at 1081; Elizabeth Page-Gould et al., *supra* note 54; Sophie Trawalter, Jennifer A. Richeson, J. Nicole Shelton, *Predicting Behavior During Interracial Interactions: A Stress and Coping Approach*, 13 PERS. AND SOC. PSYCHOL. REV. 243, 243–268 (2009); Jacquie D. Vorauer, *An Information Search Model of Evaluative Concerns in Intergroup Interaction*, 113 PSYCHOL. REV. 862, 862–886 (2006); Jacquie D. Vo-

interaction and a negative feedback loop—their respective fears seem to be confirmed by each other's behavior.[58] People experiencing racial anxiety have shorter interactions, maintain less eye contact, use a less friendly tone, and feel more awkward.[59] A 2014 report by The Perception Institute, a consortium of leading social scientists, documents the adverse effects of implicit bias and racial anxiety in education and health care.[60] For example, patients of color may perceive discrimination on the part of white health care professionals, which leads to distrust and avoidance of health services.[61]

Combined with implicit bias and racial anxiety, other phenomena may foster discrimination in mediation. Confirmation bias reinforces mediator judgments formed by implicit attitudes and stereotypes.[62] By seeking and over-relying on evidence that merely confirms our beliefs, contradictory information is ignored.[63] In other words, mediators may see more stereotype-congruent than counter-stereotypical evidence.[64]

Also, the lack of normative certainty in mediation may play a role.[65] Studies show that "situations that include clear indications of right and wrong behavior . . . tend to lessen the likelihood of discrimination."[66] Normative ambiguity arises when appropriate behavior is not clearly defined in a particular context and where negative behavior can be justified on a basis other than race.[67] With scant normative consensus in the ADR field regarding appropriate mediator behavior, mediators can rationalize

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rauer & Sandra M. Kumhyr, *Is This About You or Me? Self-Versus Other-Directed Judgments and Feelings in Response to Intergroup Interactions*, 27 PERS. AND SOC. PSYCHOL. 706, 706–719 (2001)).

58. Godsil et al., *supra* note 40, at 29 (citing Paolini et al., *Intergroup Contact and the Promotion of Intergroup Harmony: The Influence of Intergroup Emotions*, in SOCIAL IDENTITIES: MOTIVATIONAL, EMOTIONAL, AND CULTURAL INFLUENCES 209–238 (R. Brown & D. Capozza eds. 2006); L. Tropp & E. Page-Gould, *supra* note 55).

59. Godsil et al., *supra* note 40, at 29 (citing Jim Blascovich et al., *Perceiver Threat in Interactions with Stigmatized Others*, 80 J. PERSONALITY & SOC. PSYCHOL. 253, 253–267 (2001)).

60. Godsil et al., *supra* note 40, at 34 (Education), 40 (Healthcare).

61. Godsil et al., *supra* note 40, at 43 (citing L.A. Siminoff et al., *Cancer Communication Patterns and the Influence of Patient Characteristics: Disparities in Information-Giving and Affective Behaviors*, 62 PATIENT EDUC. COUNS. 355, 360 (2006)).

62. Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 OHIO STS J. DISP. RESOL. 683, 715 (2005); *see* Godsil et al., *supra* note 40, at 36–37 ("The 'Meyer' study seems to be a case of 'confirmation bias' in which reviewers saw what they expected to see based upon stereotypes and then drew conclusions that confirmed those stereotypes."); Arin N. Reeves, *Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEXTIONS 1 (2014).

63. Reeves, *supra* note 62.

64. Lee, *supra* note 45, at 165 (stereotype-congruent and stereotype-incongruent errors in shooter bias).

65. *See* Izumi, *supra* note 1, at 107–108 (citing Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013 (2004) (applying normative ambiguity to mediation setting)).

66. Wang, *supra* note 65, at 1038.

67. Wang, *supra* note 65, at 1038–39 (citing Samuel L. Gaertner & John F. Dovidio, *Aversive Racism, Advances*, in 36 EXPERIMENTAL SOC. PSYCHOL. 67–68 (2004) (defining normative ambiguity; describing helpful behavior in ambiguous situations as "prosocial")).

discriminatory actions on neutrality or other grounds.[68]

IV. BIAS REDUCTION STRATEGIES

The good news is that implicit biases are amenable to change.[69] Suppression of stereotyped associations and engagement of non-prejudiced responses requires "intention, attention, and effort."[70] What might this look like for mediators?

Intention requires *Awareness and Motivation*.[71] Acknowledging one's own biases is a necessary first step.[72] Court programs and service providers should require mediators to take the IAT and engage in other bias reduction efforts to receive case referrals. Once mediators become aware of their biases, they are more likely to muster the two kinds of motivation necessary to reduce their biases: external (appearing non-prejudiced to others) and internal (appearing non-prejudiced to oneself). Studies show that both types of motivation are important for bias reduction success.[73]

Attention entails *Salience and Cognitive Resources*.[74] While stereotypes are automatically activated, the *application* of those stereotypes in our

68. Izumi, *supra* note 1, at 108 (applying normative ambiguity theory to mediation).

69. Jerry Kang, *Implicit Bias: A Primer for the Courts*: *Prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts*, NATIONAL CENTER FOR STATE COURTS (2009); Laurie A. Rudman et al., *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERS. & SOC. PSYCHOL. 856, 866 (2001) (citing Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, PSYCHOL. BULL. 117, 117–42 (1994)); Blair, *supra* note 26; N. Dasgupta & A.G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERS. & SOC. PSYCHOL. 800, 802, 807 (2001); P.G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERS. & SOC. PSYCHOL. 8 (1989); Kang & Banaji, *supra* note 21, at 1106–07 (citing Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERS. & SOC. PSYCHOL. 828, 828–29 (2001)); Kang & Lane, *supra* note 5, at 501.

70. Armour, *supra* note 5, at 741 (quoting Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERS. AND SOC. PSYCHOL. 5, 16 (1989)).

71. Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERS. & SOC. PSYCHOL. 1142, 1159 (1996); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493 (2005); E. Ashby Plant & Patricia B. Devine, *Internal and External Motivation to Respond Without Prejudice*, 75 J. PERS. AND SOC. PSYCHOL. 811, 826 (1998).

72. Kang, *supra* note 71, at 1529.

73. Plant & Devine, *supra* note 71, at 825–27 (citing David P. Ausubel, *Relationships Between Shame and Guilt in the Socializing Process*, 62 PSYCHOL. REV. 378, 378–90 (1955)). Later studies determined the importance of internal motivation, finding that the measure of implicit bias was lowest among individuals with high levels of internal motivation and low levels of external motivation. *See* Patricia G. Devine et al., *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond Without Prejudice*, 82 J. PERS. & SOC. PSYCHOL. 835 (2002).

74. Bruce D. Bartholow et al., *Stereotype Activation and Control of Race Bias: Cognitive Control of Inhibition and Its Impairment by Alcohol*, 90 J. PERS. & SOC. PSYCHOL. 272 (2006); Blair, *supra* note 26, at 243; Blair & Banaji, *supra* note 71, at 1159; Lee, *supra* note 30, at 861–63; Wang, *supra* note 65, at 1038, 1043.

judgments, decisions, and interactions may be moderated.[75] By confronting their implicit biases, rather than ignoring them, mediators can actively monitor and inhibit stereotype-consistent responses. On this point, in August 2016, 250 immigration judges attended mandatory anti-bias training, and the United States Department of Justice announced that 28,000 more employees would take the training.[76] Mediators should be required to undergo rigorous anti-bias training, much more than a one-hour Elimination of Bias class.

For example, mediators could be taught two effective debiasing strategies: (1) using discrepancy experiences to enhance motivation and inhibit prejudiced responses;[77] and (2) goal-directed behavior.[78] A discrepancy experience is when you become aware of a response or reaction that runs counter to your explicit beliefs and attitudes.[79] Developing an "implementation-intention" plan for bias reduction is expressed as follows: "If I encounter X, I will do Y."[80] Also, mediators can suppress stereotype application more effectively with sufficient cognitive resources. This means eliminating distractions, stress, fatigue, time-pressures, and other circumstances that lead to decision-making shortcuts and less thoughtful, deliberate responses.[81]

Effort involves *Exposure and Enhanced Practices*. Implicit social cognition research shows that bias and racial anxiety can be attenuated through interpersonal interactions with people of different social groups.[82] A meta-analysis of studies found that intergroup contact correlates negatively with prejudice.[83] Also, exposure to counter-stereotypical exemplars decreases implicit bias.[84] People who increased their exposure to positive examples of social groups showed decreased implicit bias to-

75. Blair & Banaji, *supra* note 71, at 1142–43, 1159 (1996). *See also* Blair et al., *supra* note 69, at 837; Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642 (2004).

76. Caitlin Dickerson, *How U.S. Immigration Judges Battle Their Own Prejudice*, N.Y. TIMES (Oct. 4, 2016), https://www.nytimes.com/2016/10/05/us/us-immigration-judges-bias.html?_r=0 [https://perma.cc/TS3E-BK3P].

77. Patricia G. Devine, Patrick S. Forscher, Anthony J. Austin & William T.L. Cox, *Long-term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking* Intervention 48 J. EXP. SOC. PSYCHOL. (2012); Margo J. Monteith, *Self-Regulation of Prejudiced Responses: Implications for Progress in Prejudice-Reduction Efforts*, 65 J. PERS. & SOC. PSYCHOL. 469, 469 (1993).

78. Peter M. Gollwitzer et al., *The Control of the Unwanted*, *in* THE NEW UNCONSCIOUS 485, 486 (Ran R. Hassin, et al. eds., 2005).

79. Monteith, *supra* note 77, at 469.

80. Gollwitzer et al., *supra* note 78, at 486–87.

81. Richardson & Goff, *supra* note 5, 304–05; *see also* Pamela M. Casey, et al., *Addressing Implicit Bias in the Courts*, 49 J. AM. JUDGES ASS'N 64, 67 (2013) (Published by the National Center for State Courts).

82. Tropp & Mallett, *supra* note 5, at 3, 5; Kang & Banaji, *supra* note 21, at 1101; Page-Gould, *supra* note 40, at 1081.

83. Kang & Banaji, *supra* note 21, at 1102–03.

84. Godsil et al., *supra* note 40, at 12, 45–46; Dasgupta & Greenwald, *supra* note 69, at 802, 807; Kang & Banaji, *supra* note 21, at 1103 (citing Christopher L. Aberson et al., *Implicit Bias and Contact: The Role of Interethnic Friendships*, 144 J. SOC. PSYCHOL. 335, 340, 343 (2004)); Kang & Lane, *supra* note 5, at 501.

ward blacks, women, gays, and Asian Americans in various studies.[85]

To this end, I urge use of a co-mediation model. Given the dismal level of mediator diversity, I would go so far as to require mixed race and gender mediator teams. I am rethinking my initial aversion to race matching in mediation because we need a way to mentor and employ more mediators of color. Studies show that minority mediators are underrepresented in the field and encounter significant barriers to gaining access.[86] In an implicit bias presentation to the International Academy of Mediators last year, the co-presenter and I showed statistics obtained from seven mediation service providers.[87] The percentage of mediators of color within these organizations ranged from a low of 3% to a high of 14%.[88] Even when they are on lists, mediators of color report difficulty receiving appointments.[89] While the use of mediation has increased, the use of minority mediators has not.[90] At a minimum, if every court-connected mediation[91] included at least one mediator of color on a two-person team, the diversity picture would change.

Having diverse mediators matters to participants. A recent study by the State Justice Institute of Maryland surveyed ADR participants in district court day-of-trial mediation.[92] Of note, having at least one ADR practitioner's race match the race of the reporting participant was positively associated with: (1) parties feeling that they listened and understood each other and jointly controlled the outcome; (2) an increase in a sense of self-efficacy (i.e., ability to speak and make a difference) and an increase in the sense that the court cares.[93]

I would also require regular observations and evaluations of mediators. Having periodic oversight would offer some review of interactions with the parties. Official oversight of spontaneous actions and decisions has been shown to reduce implicit bias.[94]

And finally, effective bias reduction practices include using protocols

85. Godsil et al., *supra* note 40, at 45 (referencing Margaret J. Shih, Rebecca Stotzer & Angelica S. Gutierrez, *Perspective-Taking and Empathy: Generalizing the Reduction of Group Bias Towards Asian Americans to General Outgroups*, 4 ASIAN AM. J. OF PSYCHOL. 79 (2013) (watching *The Joy Luck Club* reduced implicit bias toward Asian Americans)).

86. Bush & Folger, *supra* note 6, at 1, 26–28; Weatherspoon, *supra* note 6, at 800–01.

87. Carol L. Izumi, Presentation at the International Academy of Mediators Conference in San Francisco, CA (May 7, 2016) (data on file with author).

88. *Id.*

89. Bush & Folger, *supra* note 6, at 1, 26–28; Weatherspoon, *supra* note 6, at 800–01.

90. *See* note 89 and accompanying text.

91. I suggest court-connected mediation programs due to public funding and required anti-discrimination policies.

92. STATE JUSTICE INSTITUTE AND MARYLAND JUDICIARY, *What Works in District Court Day of Trial Mediation: Effectiveness of Various Mediation Strategies on Short- and Long-Term Outcomes* (2016).

93. *Id.* at 34.

94. Alan Schwarz, *A Finding of Umpire Bias Is Small but Still Striking*, N.Y. TIMES (Aug. 19, 2007), http://www.nytimes.com/2007/08/19/sports/baseball/19score.html [https://perma.cc/J7VY-FAQG].

and tools to track evaluations, decisions, and outcomes.[95] Data collection, checklists, rubrics, and the like are ways to detect and reduce discrimination.[96] More consistent and granular data collection and analysis by courts, service providers, and mediators could reveal troublesome patterns or practices in mediation. As seen in the Maryland Court report and the New Mexico MetroCourt studies from the late 1990s, information on the race of the mediator and the participants can yield important information and help us see if racial disparities are evident.[97]

95. Casey, *supra* note 81, at 70; Richardson & Goff, *supra* note 27, at 2645 (citing Carol Isaac, Barbara Lee & Molly Carnes, *Interventions That Affect Gender Bias in Hiring: A Systematic Review*, 84 ACAD. MED. 1440, 1444 (2009); Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474 (2005)) .

96. Casey, *supra* note 81, at 70; Richardson & Goff, *supra* note 27, at 2645.

97. *See* STATE JUSTICE INSTITUTE AND MARYLAND JUDICIARY, *supra* note 92; *see also* Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV. 767 (1996) (revealing outcome disparities for minority parties in mediated and adjudicated cases); Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the MetroCourt Study*, 20 HAMLINE J. PUB. L. & POL'Y 211, 212 (1999) (concluding that mediators showed "Anglo-protective bias" in this study).

Advocacy Skills: Tips for Selecting a Good Mediator

by Jerry P. Roscoe

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While members of the Bar benefit from local court programs that may assign mediators, often serving as volunteers, advocates and their clients often have cases that merit more control over the mediation process. In such cases, the parties may elect to choose their mediator.

With several sources for professional mediators, the advocate often struggles with criteria for mediator selection. Selection criteria are all too often limited to mediation experience and settlement rate. If you are in the market for a mediator, your mediator selection process may benefit if you consider the following additional criteria:

Subject Matter: Do you want an expert, or an expert mediator?
While many parties initially seek a mediator with expertise in the subject matter of the mediation, they often learn that there may be more value in a mediator who possesses highly developed mediation skills. This is a balance which each advocate and client should consider carefully. Mediation skills require experience and time to develop. A skilled mediator is usually a "quick study" of subject matter who is able to learn enough from pre-mediation statements to be able to understand the nomenclature and converse in the subject matter. Many advocates agree that, while subject matter expertise may not be essential for a mediator, some familiarity with the issues tends to lend efficiency to the process.

References: Are you getting the real picture?
Most advocates ask potential mediators for a list of references. The mediator typically provides names of counsel for whom the mediation process worked well and who will be most likely to provide positive references.

An alternative is to ask the mediator for the names of the counsel who participated in the mediator's last five mediations. You will learn not only whether some counsel had negative experiences with the mediator, but also, by looking at the length of time the cases span, be able to determine how active the mediator's practice really is.

Training: Is your mediator a trainee or a trainer?
Since there are few official standards for mediators, a mediator may have been trained for as few as two days. A course of even five days may not be sufficient

to develop effective mediation skills. When interviewing a professional mediator, it is often useful to ask not only about the training they received, but also how much training they conduct. The challenge of teaching is often a greater learning experience than training received.

Philosophy: Facilitative, Evaluative or Transformative?
Does your prospective mediator believe that the "playing field" needs to be leveled by asking parties to share information that one party might otherwise prefer be kept confidential, such as alternative case theories or case law which may help one party? Does your mediator believe that it is constructive to share their opinion? Do they understand what happens after their opinion has been shared? Has your mediator been trained in transformative mediation, a process that attempts to strengthen parties' relationships, or in facilitative mediation, where the mediator serves as a catalyst to the negotiation process?

Credibility: Mediators don't settle cases, parties do.
A mediator's ability to quickly establish credibility with a wide variety of parties is critical. Experience and early research seem to indicate that the only reliable preliminary indicator of the success of mediation is the parties' judgment early in the mediation process as to the mediator's capability. Do prior counsel report that the mediator was able to establish credibility with the parties early in the process? Was the mediator able to handle difficult clients - even where attorney-client relationships had eroded? Remember: while many mediators take credit for resolving cases - i.e. their "settlement rate" - mediators don't settle cases, parties do. If your prospective mediator is promoting their settlement rate, might they not have established a personal interest in the outcome of your case?

Confidentiality: Do they quash subpoenas?
To what extend does the mediator protect confidentiality? What will your mediator do if subpoenaed by your client, your client's next attorney, or the other side? Have they had experience with these issues? Will the mediator breach confidentiality where they feel they have a moral or ethical obligation to do so? Will they reveal to you in advance what those thresholds are? Will they furnish you with all ethical codes to which they subscribe? What will they do when their ethical code conflicts with their ethical obligations as an attorney?

Cost: What if there is no mediation?
What are the mediator's policies for cancellation? What if only one party cancels? What if the mediator terminates mediation - will the parties still pay? Does the mediator offer daily as well as hourly rates? Does the mediator charge for preparation or travel time?

Lawyers and firms who have received training in mediation advocacy are able to offer clients additional expertise as settlement counsel in ADR (Alternative Dispute Resolution) processes. They develop not only litigation strategies, but also case resolution strategies, which include a rigorous process for interviewing mediators.

Biography

Jerry P. Roscoe is Chair of the Washington, DC Bar Litigation Section's ADR Committee and is a member of the Litigation Section Steering Committee. He is a professional mediator, arbitrator and trainer with ADR Associates, LLC with offices in Washington DC, New York and Boston. He teaches mediation and negotiation at Georgetown University Law Center and as a Teaching Assistant at the Harvard Law School Program of Instruction for Lawyers.

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