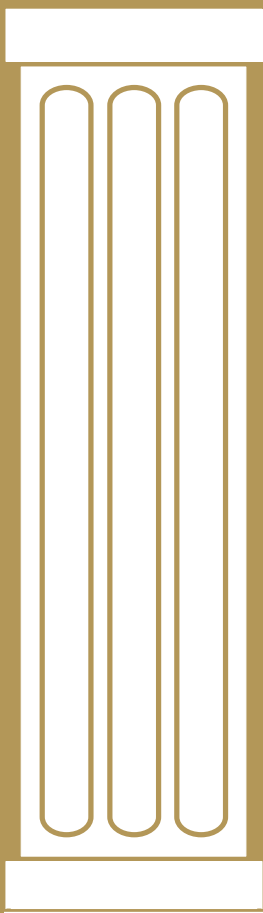


American Journal of Mediation

VOLUME 14

2021

*A Publication Dedicated to the Profession
of Alternative Dispute Resolution*



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American College of Civil Trial Mediators

MISSION STATEMENT

The *American College of Civil Trial Mediators* is a non-profit organization of dispute resolution professionals who are distinguished by their skill and professional commitment to civil trial mediation.

Membership is limited to active mediators, program administrators, and academics who have achieved substantial experience in their field as well as professional recognition for their accomplishments.

The Fellows of the College are dedicated to improving ethical and professional standards of mediation practice while fostering the growth of alternative dispute resolution systems throughout the country.

In fulfilling its mission, the College conducts advanced ADR education programs, supports ADR research, and encourages the growth of ADR systems. In addition, it is a principal objective of the College to publicly recognize those persons making major contributions to the ADR movement nationwide.

October, 1995

AMERICAN JOURNAL OF MEDIATION

Editorial Board Introduction

The year 2021 presented the Editorial Board with a new opportunity for Volume 14 of our Journal.

The College sponsored its first *American Journal of Mediation National Dispute Resolution Writing Competition* offering significant prizes to the first and second place winners. Students from twelve law schools submitted twenty-eight articles to be reviewed by our exemplary panel of judges. Our heartfelt thanks to **Lawrence Watson, Charles Crumpton, Allen Schreiber, Jay Sandak, Richard Lord, Wendy Trachte-Huber, Stephen Huber, Joe Hassinger, and Julie Walbroel** who spent many hours reading and ranking these articles. As I have written in years past, these articles reinforce my optimism for the future of our profession. Much gratitude as well to our contest committee for their exceptional effort this year: **Lawrence Watson, Lela P. Love, and Josh Stulberg**. To all, a job well done.

The winning article for 2021 is by **Tae Joon Chang** from the Benjamin N. Cardozo School of Law entitled *Risk Analysis, Reality Testing, and Mediation*. Tae examines the utilization of effective risk and cost-benefit analyses together with reality testing while remaining sensitive to cognitive biases that influence decision-making. This article is required reading for all mediators from novice to experienced.

Our second-place article is *Mediation Ethics after the Singapore Convention* by **Zachary R. Calo** from the Pepperdine University School of Law. Zachary discusses in detail the transformational impact of the Convention on international commercial mediation. He then delves into what he terms “the shape of mediation ethics” across our profession within a post-Singapore Convention context. An inciteful read for all mediation practitioners.

As in year's past, members of the Editorial Board have chosen their favorite contest papers to include in the Journal with personal introductions preceding each article.

This year offers another first for our journal. **Stephanie S. Chow** together with **Tony Piazza** has submitted a complementary article to her excellent piece in our 2020 journal. Their paper entitled *Managing Conflict by Redirecting Dialectic to Dialogue* takes us through an evaluative mediation process designed to help us as mediators manage conflicts by building better bridges between the parties.

The Editorial Board has also selected a research-based article entitled *The Mediator as the Eye of the Storm: Active Perception of Emotions through the Nonverbal* by **Alain Lempereur** and **Elise Willeau** who offer their thoughts on how mediators can perceive and manage the emotions of the participants in a mediation more effectively to resolve the conflict at hand.

I offer my personal appreciation to our Editorial Board, **Lawrence Watson, Wendy Trachte-Huber, Joaquin Fraxedas, Allen Schreiber, Don Philbin, Richard Lord, Stephen Sawicki** and to **Sarah Evans**, our Journal Administrator and Contest Coordinator for yet another year of dedication to the Journal.

In years past, I have included as part of this introduction the words below from Volume 1 of this Journal. I see no need to redraft or change them this year.

“Our editorial philosophy will reflect the goal of professional service. Each issue of the American Journal of Mediation will feature carefully selected articles researched and written by members of the nation’s ADR academic community – scholarly articles dealing with important concepts of ADR one generally expects to see in publications of this nature. In each issue, however,

we will also be publishing pragmatic and practical contributions from leading ADR practitioners – features having an immediate application to a dispute resolution professional practice. As opportunities arise, we will highlight and discuss the latest developments in ADR theory and practice; we will weigh in on where our profession is going and the challenges it meets along the way.”

We welcome your submissions the further this philosophy.

John W. Salmon
Editor In Chief

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Managing Conflict by Redirecting Dialectic to Dialogue

Stephanie S. Chow and Tony Piazza

Introduction

Even in a simple two-party dispute, in which the sole material term is dollars, hammering out a settlement can be a challenge. Toss in multiple active parties, multiple jurisdictions, complex legal and factual issues, diverse nationalities and cultures and the journey reaches heroic proportions. There are limitations built into direct negotiations that exacerbate these heroic proportions.¹ While litigators have been busy litigating or businesspersons have been growing a business over the past few years, there are mediators who have hiked this terrain many times. It is not just a question of experience, but of access to a different dynamic than is available to even the most experienced litigator.

Adversarial systems of civil adjudication are inherently and potently reactive. They are designed to thresh out factual and legal issues for resolution by a third party at trial. They are not designed to facilitate negotiated resolution of disputes. To meaningfully address the manifold issues in any action, there must be a switch from dialectic to dialogue. Yet it is equally essential that advocacy be maintained throughout the negotiation process, both to refine understanding of issues and risks in assessing settlement options, and to maintain litigation postures in the event that negotiations fail.

This paper explores the shift from dialectic to dialogue through an evaluative mediation process so that we can better manage conflicts. First step, the parties submit briefs in advance of the mediation so that the mediator has sufficient time to evaluate the

¹ *Stephanie S. Chow, Managing the Mediation Process: Reactivity, Delusion, and Standing in your Own Way of Reaching a Deal, 13 Am. J. Mediation, 37-53 (2020).*

risk profile. Second step, ensure that the participants attending the mediation have unfettered settlement authority. Third, the mediation commences with a joint session. And finally, the parties engage privately with the mediator in confidential caucus.

Evaluative Mediation

In the legal world, mediation is the bastion of dialogue and collaborative problem solving.² Building understanding. Creating win-win solutions. Searching for and identifying underlying and non-monetary interests.³ Many practitioners and attorneys believe that the evaluative processes of neutral expert evaluation or evaluative mediation should result in position bargaining.⁴ In an evaluative process, much of the research and the practice reveals that the parties fight with each other to get the neutral on their side and get a favorable decision or opinion—or helpful advocacy—from the neutral. No fostering of dialogue or building understanding between parties is targeted.⁵ Rather, the mediation quickly devolves into position bargaining lead by the mediator. But there is a better mediation process; a more efficient and effective process where that dialectic can shift to a productive dialogue.

In the early 1990s, congress passed a bill that introduced mediation into the litigation process to clear the backlogged civil court dockets.⁶ It also was utilized in hopes that it would be a better

² Eric Galton and Lela P. Love and Weiss, Jerome, *The Decline of Dialogue: The Rise of Caucus-Only Mediation and the Disappearance of the Joint Session*, 39 *Alternatives to the High Cost of Litigation 1*, Cardozo Legal Studies Research Paper No. 651, (June 2021).

³ *Id.*

⁴ *Id.*; See, Chow, *supra* note 1 at 42. *In mediation, if we trade offers and demands, I often find parties so rooted in their initial number, it becomes exponentially more difficult to move them off their initial position. As such, it is usually more effective to discuss substantive issues, present the risk profile to start providing a reasoned basis for reevaluation.*

⁵ *Id.*

⁶ Terence Dunworth, James S. Kakalik, et al., *Just, Speedy, And Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, 49 *ALA. L. REV* 17 (1997). *The Civil Justice Reform Act (CJRA) of 1990 is rooted in more than a decade of concern that cases in federal courts take too long and cost*

alternative to the inefficient and ineffective manner in which litigated cases were settled" often in a last-minute settlement conference on the steps of the courthouse or in a court conference room⁷. Court ordered mediation is quick and cost efficient. Conservative estimates indicate settlement rates of nearly 80%, with most mediations lasting only a few hours and seldom exceeding a full day⁸. Because of its efficiency, mediation has evolved from an alternative way to resolve disputes to standard practice in most civil cases.

Although, we have been practicing a version of evaluative mediation since 1980, it was not until 1996 that evaluative mediation even emerged in academia or studied by academics, scholars, and students.⁹ Riskin defines evaluative mediation as a process in which the mediator assesses the strengths and weaknesses of a legal position, or predicts likely outcomes in court, and thereby "directs some or all of the outcomes of the mediation."¹⁰ Evaluative mediation has also been described as a process in which the mediator "makes assessments about the conflict as well as its resolution and communicates those assessments to the parties," with a focus on analyzing the substantive content of the dispute and offering

litigants too much. As a consequence, proponents of reform argue, some individuals are denied access to justice. In the late 1980s, several groups, including the Federal Courts Study Committee and the Council on Competitiveness, began formulating reform proposals. One of these—the Task Force on Civil Justice Reform—initiated by Senator Joseph Biden, convened by the Brookings Institution, and assisted technically by staff from the Institute for Civil Justice (ICJ), produced a set of recommendations that ultimately took the form of legislation. The new legislation, the CJRA, required each federal district court to conduct a self-study with the aid of an advisory group, and to develop a plan for civil case management to reduce costs and delay.

⁷ Roselle Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 *Conflict Resolution Quarterly* 55 (2004).

⁸ *Id.*

⁹ Leonard L. Riskin, *Decision-making in Mediation: The New Old Grid and the New New Grid System*, 79 *Notre Dame L. Rev.* 1 (2003). Available at: <http://scholarship.law.nd.edu/ndlr/vol79/iss1/1>

¹⁰ *Id.*

whatever judgments about the content that are seen as useful to achieving a settlement.¹¹

The Physics of Fighting

Our job as mediators is to build bridges. To successfully build any bridge, whether the divide we seek to span is a river canyon, a legal dispute, or an armed conflict, the project design must respect and account for physics. This has long been intuitively obvious in three-dimensional construction projects, where the interplay between gravity and Newton's second law has informed structures from the simplest Roman arch to the Golden Gate Bridge. Yet the impact of physics has proven less apparent to us in our efforts to construct resolution of multi-dimensional interpersonal disputes.

"The Physics of Fighting" is not rocket science; it is as simple as one, two, three:

- 1) For millennia, we humans have been ruthlessly selected by evolution for "fight or flight". Our aspiring antecedents who did not swiftly react to a perceived threat rarely got to pass along their genes. As a result, you and I, Gandhi, and Mother Theresa – we are all hard wired for reactivity.
- 2) Newton's Second Law is unqualified; every action elicits an equal and opposite reaction. And therefore ...
- 3) When you plop a couple of us genetically programmed creatures into any fight – a physical altercation or the ritualized combat of litigation – what you get is a self-reinforcing cycle of reactivity.

¹¹ L. Randolph Lowry, *To Evaluate or Not: That is Not the Question!* 38 *FAM. & CONCILIATION* CTS. REV. 48 (2000).

It is fortunate for society that structural engineers take physics into account in their designs, else structures would be collapsing all around us. It is most unfortunate that although we have been suffering the consequences of protracted fighting for thousands of years, our systems for resolving conflicts have been slow to account for fundamental physics. And as a result, our social structures are verging on collapse.

The design solution for this is simple, if not easy, and has already been field tested. Our system of civil adjudication is predicated upon a Hegelian dialectic of thesis-antithesis-synthesis; each side hires lawyers to argue that they are right, and they slug it out in front of a Judge or jury, in the expectation that truth and justice will emerge from the melee. While that system may not be tremendously cost effective, it can at least serve its intended purpose of threshing out facts and issues to enable a third-party decision at a trial. What it was not designed to do is to facilitate negotiated resolutions.

Forty-two years ago, attorneys faced a dilemma: only about ten percent of all lawsuits were making their way through the ordeal of litigation to trial. The rest were ending up in a negotiated settlement but only after considerable wasted resources. In essence, one hundred percent of our lawsuits which collectively consumed billions of dollars in transactional costs each year were getting poured into a process that ultimately resolved ten percent. Today, the percentage of civil lawsuits that go to trial has dropped to about three percent. According to American Judges Association, as many as 97 percent of civil cases that are filed are resolved other than by a trial.¹² While some of these cases are dismissed or are resolved through other means, the vast majority of the cases settle.¹³

¹² J. Barkai, E. Kent, and P. Martin, *A Profile of Settlement*, 42 *Court Review*, 3-4 (2006). <http://aja.ncsc.dni.us/courtrv/cr42-3and4/CR42-3BarkaiKentMartin.pdf>

¹³ *Id.*

What happened to the other ninety percent, in which parties genetically predisposed to fight were trying to negotiate a resolution in the middle of the ritualized combat of litigation? Easy to guess. In the arena of civil litigation, the resulting economic carnage was staggering. The cumulative transactional costs of litigation – our national “civil disputation budget” was beginning to rival our annual investments in education and infrastructure. You did not have to be a socialist to conclude that was simply unsustainable.

Evaluative mediation is the process utilized to encourage a dialogue between party A and the mediator and party B and the mediator so that we can hone in on the issue or issues that leads to disparate evaluation of the case. This process allows each party to safely evaluate risks and options in a secure and non-reactive dialogue with a third party, the mediator. When each party has touched fingertips with the mediator, they have effectively touched fingertips with each other, without having to surmount the resistance of a reactive environment by reaching across the table to do so. We must engage in a vigorous dialogue of the issues because it is unrealistic to ask responsible decision makers to compromise sufficiently to bridge such divides without a reasoned basis for reevaluating their initial positions. A mediation process that includes an evaluative dialogue provides that basis.

The Shift from Dialectic to Dialogue

A brief description of how that shift from dialectic to dialogue is accomplished in the mediation of a lawsuit illustrates how potent and pernicious the force of reactivity is, and how simply it can be redirected once it is recognized. The process can be distilled into four points: (1) submit briefing in advance of the mediation; (2) ensure the participants have unfettered settlement authority; (3) commence with a joint session on the day of the mediation; and finally, (4) confidential caucus.

Step One: Advance Briefing.

No one should be expected to modify strongly held views without a rational evaluation of issues. Thus, the parties are invited to submit briefs, and the mediator must put in the time necessary to fully assimilate them. We do not have a policy encouraging or discouraging parties from exchanging briefs. The only thing we ask is that both sides communicate directly with each other as to whether to exchange briefs. What we endeavor to avoid is that one side exchanges under the assumption the other side will, and we are off on bad footing even before we commence a mediation.

Step Two: Authority.

Although mediation can be utilized at any stage in the litigation - whether on the verge of litigation or years down the litigation path, and regardless of the magnitude of the gulf between settlement positions, we routinely reach closure in one day-provided only that decision makers participate personally in the process. This last point is critical. We have seen deals fall apart because the decision makers were not personally present at the mediation and when one needs to call outside the room, the evaluative dialogue summarized back does not translate as effectively. We recently had a mediation where parties at the table did not have decision making power. They had authority but functionally, it would have not been deemed socially acceptable to go beyond what was discussed internally. Therefore, their decision-making authority was limited. And although everyone wanted to do a deal, we could not ink the deal because the right people were not present. This point about having the right people at the table - the decision makers present is critical. When parties request to mediate with us, we will always have a discussion about who will be present and whether they will have unfettered settlement discretion. In sum, without the active participation of the ultimate decision makers the process simply does not work.

Step Three: Joint Session.

On the day of the mediation the predicate for rational discourse – clear communication of how each party views their position – is established at the outset through a joint session. Although positions may have been articulated ad nauseam during litigation the impact of reactivity is profound. When every action is eliciting an equal and opposite reaction, little real communication occurs.

The agenda for this initial session should not include discussion of monetary terms — on which positions at the outset of negotiations are likely to be so far apart as to drive impasse. The focus should be on such fundamentals as the feasible scope of settlement, the confirmation protocols of the jurisdictions implicated, and which parties will need to be at the negotiating table to achieve a meaningful resolution.

If consensus cannot be reached on these foundational terms, there will never be adequate support for any settlement structure. Conversely, once such a foundation is laid, structuring a negotiation process for a global settlement can be relatively straightforward.

Over the past two decades, there has been in general a distinct shift away from initial joint sessions and a diminishing use of joint sessions¹⁴. Researchers have reported a significant decline in the use of joint sessions among a sample of attorneys and mediators.¹⁵ What was once "the foundation of the mediation process has fallen out of favor among many lawyers and mediators, particularly in commercial mediations"¹⁶. In an extensive study of 300 JAMS mediators, Jay Folberg found a dramatic drop in the use

¹⁴ Lynne S. Basis, *Face-to-Face Sessions Fade Away, Why is Mediation's Joint Session Disappearing?* *Dis. Res. Magazine* (Fall, 2014); Jay Folberg, *The Shrinking Joint Session: Survey Results*, *Dis. Res. Magazine* (Spring 2016).

¹⁵ *Id.*

¹⁶ Basis, *supra* note 14.

of joint sessions among mediators across their careers.¹⁷ The advent of court-ordered mediation in the late 1990s was effective in clearing overcrowded court dockets.¹⁸ The process was far more flexible and efficient than the civil court system. Unfortunately, the rapid expansion of mediation to virtually all civil cases superheated demand, forcing mediation firms to take shortcuts to streamline the process, reduce costs, and expand capacity.¹⁹ The result was the rise of caucused mass mediation, which has all but replaced traditional mediation (direct interaction between parties in joint session) over the past two decades.²⁰ As a result, joint sessions are all but extinct in California and are in a steep downward spiral in the Southwest and the Northwest parts of the United States.²¹

Reclaiming the Power of the Shrinking Joint Session

Unfortunately, with joint sessions falling out of favor, so did dialogue and understanding of each sides' position. The joint session's disappearance paved the way for position bargaining to characterize much of the field of mediation. Thus, mediation in many cases no longer manages discourse where listening is elevated over talking and better understanding and clarity are advanced over "winning" or making someone lose.²² With the disappearance of joint sessions, cases are settled at lightning speed, primarily in caucus, with little or no interaction between the parties.²³

¹⁷ Jay Folberg, *The Shrinking Joint Session: Survey Results*, *Dis. Res. Magazine* (Spring 2016).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Eric Galton and Lela P. Love and Weiss, Jerome, *The Decline of Dialogue: The Rise of Caucus-Only Mediation and the Disappearance of the Joint Session* (July 23, 2021), 39 *Alternatives to the High Cost of Litigation* 1 at 89 (June 2021), *Cardozo Legal Studies Research Paper No. 651*.

²³ Charles Bultena; Charles, Ramser; Kristopher Tilker, 12 *Southern Journal of Business and Ethics*, 10-31 (2020).

In evaluative mediation, the joint session affords each side with the opportunity to present an opening statement. Mercifully that is not like putting on a case in court or an arbitration, you do not need to prove anything. Rather, the opening statement serves to educate the mediator about the underlying facts of the case and at the same time, hopefully, clarifying for the other side why you see you position as you do. At the conclusion of each side's opening statement, the mediator summarizes back each party's opening statement, usually in a small fraction of the presentation time, and without spins, recharacterizations, or material omissions. On more than a few occasions, a one or even two-hour opening statement resulted in a summation back that took five to ten minutes without missing anything critical. The summation back accomplishes two things. First, the party who made the presentation is reassured that they have been heard and understood, and that the mediator took the time to read and assimilate their brief sufficiently to have tracked their presentation. Second, the opposing side – having been mentally counter-punching throughout the presentation, and thus taking little of it in, is usually listening intently to gauge what the mediator has taken away from the presentation. Ironically, even in heavily litigated cases, this is often the first time the decision makers have truly heard – rebounded off the mediator – the basis for their opponent's position.

Often, counsel tell me that they have clearly understood the other side's position since they have been entrenched in litigation for years. First, it is easy to underestimate the degree to which perceptions of an opposing party's arguments can be distorted in an adversarial process. Decades of experience have taught us that frequently the first-time key issues are clearly delineated to decision-makers is in the joint session and without that starting point, no reasoned evaluation of risks and options can proceed. When one side is making their opening statement, I have seen first-hand, opposing counsel busy mentally counter punching, and restraining themselves from responding. But when the mediator summarizes back, everyone is listening in because they have all

spent the resources and time to be there and want to hear at least what the mediator has taken away thus far. This brings me to my second point on why we have a joint session, parties deserve to know at the outset that the mediator has adequately prepared. Cogently summarizing presentations without misunderstanding or missing key points offers a level of reassurance that any critical risk evaluation that may follow in caucus has a sound basis.

Step Four: Caucusing.

There is no dearth of literature on why parties benefit from a mediator's evaluation and why parties in dispute want and need evaluations.²⁴ Evaluative mediation is defined as a process in which the mediator assesses the strengths and weaknesses of a legal position, or predicts likely outcomes in court, and thereby "directs some or all of the outcomes of mediation."²⁵ Riskin and Lowry share the view that evaluative mediators take an interest in both the content and the process of the dispute, and they use case assessment to exert a considerable degree of influence over both in pursuit of settlement. Much of the research and literature claims that there are significant benefits of early caucusing. Some of the benefits include exploring delicate relational issues and laying further groundwork for recognition which can sometimes be easier in caucus, especially in the early stages of the process. Parties often find it difficult to give recognition to another person when feeling vulnerable oneself.²⁶ In practice, some mediators meet prior to the mediation session to help parties clarify their needs and positions.²⁷ Clear proponents of the

²⁴ L. Randolph Lowry, *Evaluative Mediation*, In J. Folberg, A. L. Milne, and P. Salem (eds.), *Divorce and Family Mediation: Models, Techniques, and Applications*. (2004).

²⁵ Leonard Riskin, *Decision-Making in Mediation: The New Old Grid and the New Grid System*, 79 *Notre Dame L. Rev.* 1 at 12, (2003).

²⁶ Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*, 154 (1994); Gregorio Billikopf-Encina, *Contributions of Caucusing and Pre-Caucusing to Mediation*, *Group Facilitation: A Research and Applications Journal*, Number 4 (Spring 2002).

²⁷ *Id.*

pre-caucus, especially in case involving entrenched disputes express that it is these separate meetings that a lot of the major work of the mediator is done. The separate meetings are a venue for significant developments in the mediation as a whole, not an optional adjunct to the process, to be used only when things are getting sticky.²⁸

In contrast to the research and literature conducted, in our work, we rarely engage in pre-mediation caucuses. When the clients of the lawyers walk in the door on the day of the mediation, we would like it to be the case that they do not have to wonder to what degree that our opinion has already been pre-colored by any discussions that we have had preceding the mediation. We would rather that their first experience of us and the process be that they are hearing a summation back of the presentation from their counsel that without interjecting any spins or any missing anything important, which demonstrates that we have invested the time before the mediation; that we have wrapped our brain around the issues that are in dispute. That we have heard and sufficiently well understood position that we can cogently summarize back in a fraction of the time that it took to make the presentation. That in turn provides a basis for dialogue once you go into caucus.

Some researchers note that mediators should not evaluate. Even Lowry who is a proponent of evaluative mediation calls it “the most controversial technique in mediation.”²⁹ However, in our

²⁸ J. Winslade, and G. Monk, *Narrative Mediation: A New Approach to Conflict Resolution*, 137 (2000).

²⁹ L. Randolph Lowry, *To Evaluate or Not: That is Not the Question!* 38 *FAM. & CONCILIATION CTS. REV.* 48 (2000); See, Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 *FLA. ST. U. L. REV.* 937 (1997); *Ten reasons why mediators should NOT engage in an evaluative dialogue: (1) the roles and related tasks of evaluators and facilitators are at odds; (2) evaluation promotes positioning and polarization, which are antithetical to the goals of mediation; (3) Ethical codes caution mediators-and other neutrals-against assuming additional roles; (4) If mediators evaluate legal claims and defenses, they must be lawyers; eliminating non-lawyers will weaken the field; (5) There are insufficient protections against incorrect mediator evaluations; (6) Evaluation abounds: The disputing world needs alternative paradigms; (7) Mediator evaluation detracts from the focus on party responsibility for critical*

experience of a combined 50 plus years, practice has clearly demonstrated that critical evaluation of issues and options is essential. It is asking the impossible of parties to take in critical feedback with an open mind if it is being delivered in front of their opponents. Conversely, there may be information which should be made known to the mediator that could alter risk analysis, or inform or constrain settlement options, that parties would prefer not to disclose to opponents. And finally, caucusing permits frank discussion of options without fear of compromising negotiating positions.

In caucus, an important strategy is for the mediator to play devil's advocate and present a risk profile to the parties should the case not settle. The mediator can challenge the substantive legal merits of the most critical issues that present the greatest risks to the parties if they pursue or continue down the litigation path. Mediators can draw on particular legal language, including legal precedent, experience mediating thousands of cases, experience with practice and/or procedure, in order to formulate the assessment predicting that the party present in the caucus room would fail on certain causes of action. It can be equally powerful for the mediator to point out collateral risks of continuing the action such as loss of business or reputational damage. This negative assessment or risk profile dialogue is a process shared by many mediators.³⁰ Because of the limited precious time a mediator has to spend with the parties and because parties can get lost in the forest for the tree (and lose focus), mediators must avoid the temptation to dazzle parties with their footwork by hitting on every conceivable point they might have to litigate. Instead, mediators should focus in on the practical risks that

evaluation, re-evaluation, and creative problem-solving; (8) Evaluation can stop negotiation; (9) A uniform understanding of mediation is critical to the development of the field; and (10) Mixed processes can be useful, but call them what they are!; Lela P. Love & Kimberlee K. Kovach, ADR.' An Eclectic Array of Processes, Rather than One Eclectic Process, 2000 J. Disp. RESOL. 295. (2000).

³⁰ *D. Della Noce, Evaluative Mediation: In Search of Practice Competencies, 27 Conflict Resolution Quarterly 2 at 193 (Dec. 2009).*

can in turn be factored into the party's evaluation of their issues and ultimately, their settlement position.

Where mediators diverge is the next path. Many mediators at this point in the process, after having dialogued with verve about the risks of litigating the case, the mediator would ask the parties, "what is your best offer?" or "what is your best demand?" so that they can begin the time hallowed dance of position bargaining. In stark contrast, we do not engage in position bargaining, and we never ask parties for their best offer or demand. Position bargaining creates incentives to stall a settlement.³¹ When negotiators bargain over positions, they tend to lock themselves into those positions.³² The more you defend, argue, or clarify your position, the more entrenched in that position you will become. By becoming more committed to your position, you have created the need to "save face" which makes it less likely that any agreement will be reached that could reconcile the parties' interests.

There are certainly issues and situations that warrant position bargaining. When there are not a lot of moving parts or complex nuances, position bargaining can absolutely help bring a resolution between two parties. These situations include buying a car, fender benders, or landlord/tenant disputes. However, when there are multiple parties, cultures, and complex issues, position bargaining will often break down talks. This is because the parties will not be focused on the underlying concerns of the parties. Without uncovering interests, they will not be met.

Resolution of any high-stake dispute requires material compromises that responsible businesspersons should not be asked to make without first being presented with a rational basis for modifying risk assessments. A mediation that devolved into position bargaining through the mediator cannot support a rational dialogue; it simply plays into and amplifies the reactive cycle. A lot of energy can be expended with only the illusion of progress, while in reality,

³¹ *Chow, supra note 1 at 47-48.*

³² *William Ury, Getting to Yes, 2d (1992).*

resistance is steadily increasing. Position bargaining between opposing parties or from a mediator will inexorably elicit reaction, regardless of who conveys them.

In an evaluative dialogue, by the conclusion of a few rounds of caucusing, the mediator should be able to advance a proposal for settlement, confident that it at least tracks the course of dialogue that has occurred between the mediator and each party. And this is the critical and simple difference: rather than striving to force or cajole touching fingers across the table between the parties, this process allows each party to safely evaluate risks and options in a secure and non-reactive dialogue with a third party, the mediator. When each party has touched fingertips with the mediator, they have effectively touched fingertips with each other, without having to surmount the resistance of a reactive environment by reaching across the table to do so.

The culmination of a successful mediation is a summary term sheet intended to be enforceable in the event that more formal documentation cannot subsequently be agreed upon. In that regard, if the nature of the dispute is such that complex material settlement terms should be anticipated, counsel may wish to consider exchanging drafts in advance of the mediation with blanks for terms open to negotiation.

Gaps of eight figures in stated negotiation positions on the morning of mediation have devolved to seven figures after a confidential conversation with each decision maker. This underscores the point that a mediator has access that is denied to even the most skillful advocate. The scope of that access is broad and extends to data. Regardless of how good your relationship may be with opposing counsel, there are things they cannot disclose that could yield invaluable insight into finding detours around roadblocks to settlement. Access can lead to a more balanced evaluation of risks. On many occasions, I have heard settlement positions predicated on confidence in what a given witness would testify at trial. When I have requested and was granted permission

to speak with the witness on the phone, within the confines of a confidential caucus, that conversation has often yielded a vastly different story than had been assumed and led to a material reevaluation of settlement positions. We humans tend to hear echoes of our own thoughts and desires. Simply having someone who is in a position to ask different questions, or even the same questions in a slightly different way can elicit very different answers, and a more balanced set of data. Delving into a substantive dialogue is the only way to unearth new data and offer new insight to unroot parties from their settlement positions. Position bargaining would do the opposite and cement parties into their positions.

The remaining gap in positions can usually be bridged by a mediator's proposal to which each party can respond initially in confidence without compromising negotiating positions.

Can redirecting dialectic to dialogue be that simple?

Can it possibly be that simple? Thousands of successful mediations over the course of decades answers that question. And the answer should be no surprise to anyone who has ever tried forcing opposing poles of powerful magnets together. Lots of energy can be expended with only the illusion of progress, while in reality resistance is steadily increasing. Redirect those poles toward a neutral point and it becomes a challenge to keep them apart. Position bargaining or "shuttle diplomacy" cannot have this effect. It is the conveying of positions between opposing parties that itself inexorably elicits reaction, regardless of who conveys them.

But aren't conflicts outside the confines of the legal system a lot less structured and a lot messier? Absolutely, but physics is agnostic. The same reactive forces are at play, just a whole lot stronger, which means that building those bridges will be harder. Bigger divide, bigger project. But the structural engineering parameters still obtain.

Conclusion

Effective conflict management must reconfigure the lines of communication from dialectic of trading arguments and positions between parties to a dialogue between each party and the mediator. Disburdened of reactivity, evaluations of issues and options by experienced business leaders tends to converge. The remaining gaps in positions can usually be bridged by a mediator's proposal to which each party can respond initially in confidence without compromising negotiating positions. Humans are at the core of conflicts and disputes and, therefore, an effective way preventing and resolving conflict can only be through understanding. As the Dalai Lama puts it: "Don't let a little dispute injure a great relationship. When you think everything is someone else's fault, you will suffer a lot. When you realize you have made a mistake, take immediate steps to correct it. When you realize that everything springs only from yourself, you will learn both peace and joy."

The Mediator as the Eye of the Storm: Active Perception of Emotions through the Nonverbal¹

Alain Lempereur² & Elise J. Willeau³

I. Introduction

In Eastern Congo, tensions were high in the spring of 2006. The previous decade of bloody atrocities filled everyone's memories. The current calm looked precarious and the upcoming elections forecasted further storms. As a facilitator of a meeting in Goma, I watched the first attendees enter the room and observed. No one said a word, but some shoulders seemed to carry the weight of the entire world. Everyone seemed uptight and stared at each other. I noticed that no one sat next to one participant. I could sense the heaviness and discomfort. The atmosphere was ice-cold and ominous. The meeting had not started yet, but already tensions were rising. There's nothing easy or casual about sharing a room with your "enemy." There was no need for words; it was enough to look around. One could easily make sense of the silence. A colleague whispered to me that the person no one would sit next to was the former head of security in town, responsible for mass arrests, including the son of one of the female participants.

I decided to break the ice and commenced the meeting. Opening my arms, and smiling, I thanked everyone for coming. I acknowledged

¹ This article is based on a research that was delivered at the 29th Annual Conference of the International Association for Conflict Management (New York, June 2016).

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that it wasn't easy for many to sit here, but that it was indispensable for a peaceful future in North Kivu, and that I was convinced we would all do a good job together. Already I saw some participants smiling in return, warming up, relaxing slightly. (AL)⁴

The scene above illustrates the importance of mediators' "being-there" (Heidegger, 1962), with eyes wide open from the start. Straightaway, they are thrown in the epicenter of a conflict. If they are mindful, they can strive to be fully aware of the parties. Doing so, they awaken all their senses, and put them to work at once in order to grasp parties' emotions through non-verbal clues. They seek the deepest possible understanding of the parties (Lempereur, Salzer & al., 2021) and become the calm eye in the storm. Mediators "feel" the room temperature, subtly sense the tensions, and immediately act accordingly to try to defuse them. By starting on the right foot and continuing their conscious efforts to actively perceive parties all the way through the session, mediators cultivate an atmosphere for authentic exchanges and improve the likelihood of a responsible, satisfactory outcome.

Stone, Patton, and Heen (2010) point out that feelings are often at the heart of difficult conversations. Mediators must see them on the spot and then address them properly, as they often go hand-in-hand with tensions. If not handled well, toxic emotions have the power to derail mediations, with significant risks to delay, or to prevent, any potential agreement, and they may even escalate the conflict. Thus, how mediators grasp, acknowledge and manage emotions, even when no one is saying anything, plays a key role in order to succeed. This explains why mediators are often trained to be on alert, and tune themselves to emotions, theirs and the parties'.

Although emotions arise in both parties and mediators, and often interrelate, this text focuses on the mediators' capacity to activate all their senses to better perceive the emotions that parties display,

⁴ For more information about this workshop: see Wolpe and al., 2006.

including in their latent form. The mediation process calls for an enhanced capacity of mediators to decode emotions by paying special attention to nonverbal communication. When mediators access the nonverbal, they can better detect the presence of emotions in a timely manner and identify them accurately.

II. Watch for Latent Emotions – Do Not Wait for Patent Emotions

Paul Ekman, world expert on emotions, writes that “emotions are a process, a particular kind of automatic appraisal influenced by our evolutionary and personal past, in which we sense that something important to our welfare is occurring” (2003, p.13). Emotions have the potential to reveal a great deal about human beings’ underlying motivations and priorities. Mediators play a key role in this discovery process, if and when they catch emotions being expressed.

Naturally, at the point when a party is pounding their fists and yelling, most mediators notice the presence of emotion and can label it as anger. In this type of clear and loud form, it is easy to identify *patent* expressions of emotions, such as anger, which are only the tip of the emotional iceberg. They are easy to spot, because the emotional storm is fully active. A mediator’s mission is broader and deeper: it is to explore emotions underneath the surface, in their *latent* form, well before they reach their climax. In order to access the submerged part of the emotional iceberg, mediators have to excel at perceiving early signals, revealing emotions before their outburst.

In fact, it is possible to identify emotions early on in the process, long before the point of “no return,” i.e. before the “emotional redline,” where parties lose control. According to Paul Ekman however, “we are often so focused on what the person is saying that we miss the subtle signs [indicating emotions] completely” (2003, p.76). His research further shows “that most of us are not very good

at recognizing how other people are feeling unless their expressions are pretty strong.”

Revealing the onset of emotions in a timely manner matters in leading meaningful conversations in the right direction towards appeasement and resolution. Therefore, understanding emotions and reading them *early and accurately*, becomes a critical skill for mediators. Consider two different scenarios that mediators face:

Scenario 1: Identifying patent emotions too late: *Imagine a first hypothesis where, at the mediation table, Party 1 discusses a possible solution, and Party 2 suddenly interrupts. Party 1 ignores the interruption and pursues her line of thoughts, but the tension slowly grows, especially when Party 2 interrupts her again, claiming that her ideas “make no sense at all!” Soon, the mediation really isn’t going anywhere and comes to an abrupt halt.*

At this point, a mediator may decide to mitigate the situation by acknowledging how hard it might be for parties to listen to each other’s ideas, or by gently reminding everyone of established ground rules on interruption. But the task has become arduous, as frustration and anger were allowed to intensify without checks. Perhaps the mediator is even obliged to suspend the joint session and ask for a caucus, giving parties time to cool down before returning together in the room. In the worst-case scenario, when a mismanaged emotion like anger reaches its extreme form, it can potentially destroy the mediation altogether.

Scenario 2: Identifying latent emotions early enough: *Imagine now a second hypothesis. Party 1 presents her ideas. As she does this, the mediator is actively watching the non-verbal behavior of Party 2 and sees contempt in formation, with one side of the lip tightened and raised. The mediator also recognizes some signs of impatience when Party 2 begins fidgeting in his chair. When Party 1 is interrupted for the first time, the mediator notices Party 1’s eyebrows pull down, and her lips narrow, indicating anger.*

In Scenario 2, the mediator who is highly perceptive recognized that one or both parties started being “contemptuous,” “impatient,” or “angry,” when the emotion was beginning or still hidden. In this case, maybe she could pause and check-in with the party in question. By identifying emotion in its early stage, the mediator has the capacity to act preventively: she can acknowledge early on what is happening, and let both parties express themselves before negative emotions build and get to unmanageable levels.

The two scenarios outline that mediators have a responsibility to watch closely what is happening, to open their eyes, and not simply keep their ears attentive. They must also consider two separate issues: *early warning* or not, and then *early action* or not. Of course, early awareness of emotions is the necessary condition for early intervention, but it is not sufficient. Some mediators will be more or less *perceptive* and others will be more or less *active*, as they face cues of mounting emotions. This text mostly addresses the first question, though it recognizes that mediators must learn “to deal with emotions,” and come up with strategies of *timely and appropriate intervention* in order to avoid failures of the mediation process.

How can we support mediators who wish to increase their awareness of parties’ emotions? How can we awaken their senses so they can recognize emotions promptly? Our hypothesis is that by concentrating some of their efforts on how the parties express themselves beyond words and on what “every *body* is saying” (Navarro, 2008), mediators can increase their chance of spotting parties’ emotions before they become so strong that they disrupt the process. To better perceive emotions in their early stages, mediators should go beyond relying mostly on a single sense – hearing – and activate all their senses, as much as possible. The next section of this text will discuss how “active sensing” or “active perceiving” can support mediators in their ongoing quest to understand and serve their parties better.

III. Practice Active Sensing – Open your Eyes

Roger Fisher and William Ury (1991) prescribe that negotiators should separate people from problems. Mediators often apply this advice in the management of the process, shifting attention between people and problems. As meeting facilitators, they learn how to invite parties to focus on underlying motivations and interests, rather than positions, in order to further a spirit of problem-solving. Should they note emotions intensifying, they refocus on people, acknowledge feelings, and wait until parties feel validated and cool down to turn back to the problems. Because “negotiators are people first” (Fisher and Ury, 1991 p.18), in addition to developing the capacity to *shift from one focus to another*, the initial negotiation sequence might require to focus on people first before moving on to problem-solving prematurely (Lempereur, Colson & Pekar, 2010).

One way of putting people first in conflict resolution is paying greater attention to what parties are communicating and, in particular, what emotions they are expressing in the first place. In that respect, Rogers and Farson (1987) stress the importance of the active listening technique to deepen understanding. Their tool has become *common* practice for mediators who strive to increase empathy towards the parties. Facilitators should not simply listen *passively* to parties; they are urged to *actively* demonstrate understanding, i.e. paraphrasing what they heard in their own words and checking with the party that they correctly understood what was said. Active listening is about the mediator restating facts, opinions and emotions that each party expressed, but also providing parties an opportunity to hear the other side’s story through a third party’s voice. Many times, mediators end up identifying and then acknowledging what Fisher and Shapiro (2005) summarize as five core concerns of the parties in conflict: appreciation, affiliation, roles, status, and autonomy. Active listening, because it does not simply assume understanding but checks it, is already a meaningful first step in mediation to increase understanding, including

emotions, but it can be pushed further by summoning more senses to that purpose.

A person is more than words, and the mediator is more than ears. By only using “active listening,” mediators rely too heavily on hearing and deprive themselves of signals communicated through other senses. They risk missing the person as a whole. On the contrary, if they mobilize other senses, they get closer to grasp the entire human being. Indeed, as people, we communicate through words, gestures, voice intonation, eye contact, facial expressions, etc. And as recipients of that communication, we can perceive with more than our ears. The question is how can mediators access such a wealth of extra information that often provides subtle access to underlying emotions?

In addition to “active listening,” mediators can be encouraged to be more holistic recipients of communication through “active sensing” or “active perceiving.” This broader tool implies using as many senses as relevant to read and understand a person and, each time when it is appropriate, checking in with that person to verify that what has been sensed is accurate. In active perceiving, the mediator pays attention to verbal *and* nonverbal communication. Active listening becomes thus part of a more encompassing approach. Active perceiving complements the data already procured by the “one-sense” active listening. As a next step, a simple increase from one sense to two, if not five, can, in fact, already ensure important complementary information: “E²” supposes the combined use of *eyes and ears*; it implements active perception to the next level. As noted by CIA investigators, those who want to perform better in lie-detection can “look and listen,” what is called “L²” (Cheshire, 2014). The following illustration explains how active perceiving works, when it involves the mediator’s eyes.

During a session, a mediator noted that one of the parties went from sitting up straight to slouching back in their chair with their arms crossed. By recognizing this behavioral change, the mediator,

without putting that party on the spot, can gently check in with the party, when appropriate, what this change entails. There could be several hypotheses explaining the gesture. First, it is possible the party is cold and tired from having spent one hour in a chair. In this case, refocusing on people leads the mediator to turn up the heat or call for a five-minute break so that the parties can reenergize themselves before reengaging in another round. Second, crossing arms might also mean that the party is feeling disconnected from the conversation or even adversarial, upset that it isn't going as well as planned: the party has "closed" himself off to the discussion. In this second case, the mediator has another series of process options that she can use: more questions, caucus, etc.

This "crossing arms" example suggests that practicing active sensing and leveraging visual clues helps prevent the mediators from making erroneous assumptions about the individual's emotional state, but instead allows them to follow up observations with an ensuing inquiry in order to subtly test various hypotheses. In the case above, disconnection was one of at least two possible interpretations. *Active* perceiving, like *active* listening, requires testing one's interpretations of what was sensed, and not settling on the first hypothesis. This enhanced "empathy loop" (Mnookin & al., 1996) helps mediators improve their capacity to detect complementary information, including the presence of specific emotions.

While active listening engages one of our senses, it overemphasizes the importance of hearing words, often favoring only verbal and logical forms of intelligence in mediators, which can fall short in assessing the complexity of human reality and its expression. Active sensing asks mediators to increase emotional awareness and intelligence (Goleman, 2005). This encourages them, in turn, to mobilize other forms of intelligence, in themselves and with others, i.e. more of the intra- and inter-personal intelligence (Gardner, 2006). Because the majority of communication is nonverbal, mediators have an interest in not being lost in their papers or in their

thoughts, but in keeping gentle eye-contact with all parties at all times. By doing so, they maintain a strong connection with the parties, as full human beings. They broaden their scope of perception, and activate more of their senses and intelligence forms in a meeting. With sharper observation, they understand better what people transmit beyond words. They start leveraging the nonverbal.

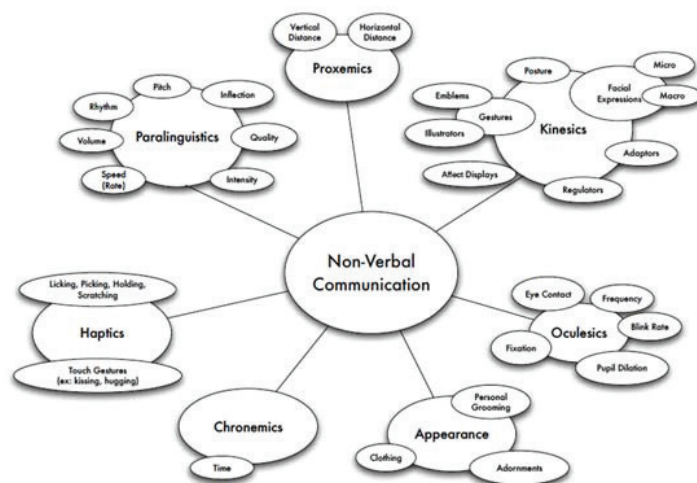
IV. Scan Emotion Presence through the Nonverbal

At its core, mediation involves a collection of people striving to solve their problems with the help of a third party. It means trying to find mutually agreeable solutions that parties can live with in the future. But before these possibilities are even envisioned, parties have to address the past, often reliving hard experiences and grievances. During this process of uncovering, parties inevitably feel painful emotions, whether they are aware of them or not. When one party proposes a possible solution, it might look so insulting to the other side that a new set of negative emotions may emerge. Many times, even when parties are in denial and trying to mask their feelings, emotions will be expressed nonverbally.

There is some debate amongst scientists as to whether or not humans are feeling emotions at every moment of the day (Ekman, 2003, p. 19), but there is consensus that emotions generate physical and chemical reactions that help us handle whatever stimulus has sparked the emotion. Those physical and chemical reactions are communicated with others, often through visible gestures and language. But since only a very small percentage of human communication is expressed verbally (Albert Mehrabian's original studies suggested only 7%), the majority of emotions will, in fact, be revealed nonverbally (Mehrabian, 1971).

The term nonverbal communication covers a whole host of aspects ranging from body movement to the tone of voice. Figure 1 illustrates the richness of nonverbal communication.

FIGURE 1



To summarize Figure 1, there are seven major subfields in nonverbal communication:

- *Paralinguistics:* This subfield refers to the components of speech, like the pitch, volume, speed or rhythm, which modify the meaning of words and convey emotion. For example, parties would raise their voice, when they become upset.
- *Proxemics:* Edward T. Hall (1966) first used this term to describe the study of the spatial separation individuals maintain between each other, and how this separation relates to environmental and cultural factors. For instance, a party can lean forward as a sign of interest in what the other says, but he can also get closer to another party as anger grows in a threatening position.
- *Kinesics:* A term first coined by Ray Birdwhistell (1952), kinesics comprises the gestures, movement, stance, and posture used to communicate with others. Often, a party who dislikes another person or his statement would cross her legs in the opposite direction, showing internal frustration or contempt.
- *Oculistics:* Although sometimes considered a subcategory of kinesics, oculistics is the study of eye behavior. Pupil dilation can show for example an intense interest in what is discussed. The lack of eye contact might indicate a sense of guilt.

- *Appearance:* This includes both the physical appearance of a person (such as choice in clothing, hair style, etc.) and the surrounding environment. Wearing a tie may indicate how important or formal the meeting is conceived.
- *Chronemics:* Thomas J. Bruneau (1980) studied how time unfolds in communication. For example, some deep analysis of a situation might look like a waste of time to a party and grow impatience. Long moments of silence, that might be useful to some, can be frustrating to others.
- *Haptics:* This refers to the various ways humans communicate with one another through touch. A person who is familiar with someone else and shares his views would gently touch his arm, as a sign of proximity and joy. A person who dislikes another person may not shake hands.

As emotions get expressed nonverbally in so many ways, only mediators who are looking for them through a technique like *active sensing or perceiving* can detect them. Such technique enhances the capacity to understand and integrate the different components of nonverbal communication. As mediators increase their awareness and knowledge from these seven subfields of nonverbal communication, they learn to progressively perceive more data and thus spot subtle flashes of emotions, even in unintentional and masked forms.

Mediators are privy to a whole rich view of human interaction, because parties are working through their conflict right before their eyes. A typical behavior of parties (and humans in general) is to try to withhold showing their emotions for fear that it will make them look weak, vulnerable, or indicate how much they care (Lempereur, Colson & Pekar, 2010). Sometimes, parties may not even be aware themselves of an emerging emotion. But emotion, once revealed, can become a helpful indicator of what is needed for parties to move beyond their current conflict state.

In Gitega (Burundi), in May 2004, I facilitated a workshop with commanders of the regular army and of the rebel groups. They had been fighting each other for the many years, and they were now asked to sit in the same room together, which at best was odd. The initial interactions were highly superficial. Participants were courteous, but they looked detached, distant, and hesitant to engage the other side. They were physically there, but not mindfully present, as if they were hiding something. Lack of trust prevented them from showing any indication of what was important to the other side. Everyone was reluctant to show their cards, their real self.

At some point, the mediation team realized that parties were wasting their time and so were we. As mediators, we proposed to leverage role reversal. We asked the commanders of each side to change roles, and to put themselves in the other's shoes in order to understand what the other side really thought and felt of them. And there it was, we started hearing the "real stuff," like "I doubt that if this rebel becomes a general, I will ever become one," or "I fear their contempt, that if we, as rebels, integrate the army, we will always be considered as second class citizens in the army, because we did not graduate from the military academy," or "He is upset that now he has to divide the already scarce resources of the army with us," or "He believes I never learnt anything serious in the bushes, and that I am just a country boy stealing his job," etc. There it was: many emotions, like fear, contempt or anger, were out in all their forms, and underneath, parties expressed meaningful worries about the future. Now, as emotions had surfaced, they could address these underlying concerns in order to strengthen the creation of an integrated army. (AL)

This real-life scenario shows that when mediators are able to spot disengagement, get participants to expose their underlying concerns in creative ways, and reorient parties in joint construction that allowed a healthy expression of emotions, parties become able to move on to the next steps. It is important to scan the room and watch how parties occupy, or evolve in, the space around them; i.e. how

their gestures and body language capture their thoughts and moods. As mediators refine their perceptiveness through active sensing, in this instance, they are better able to ascertain parties' levels of confidence and their fears or aversions to one another. By watching the nonverbal expressions in their daily practice and by learning to boost interpretation of clues through gentle questioning, mediators become aware of the greater picture that is offered to them and they are more likely to guide parties through deeper common understanding towards mutual acknowledgement and responsible agreements.

The point we are making here is that even before connecting visual data to a specific emotion, before unpacking what they see, mediators need to be aware *there might be an emotion present* and increase their readiness to spot its signs. It is critical that mediators become more conscious of how emotions adopt multiple shapes of expressions – gestures, space moves, tone of voice, facial expressions, mimics, etc. Being aware of emotion presence is only the first step however, because it is equally as important to detect the emotions in a timely fashion.

V. Detect Emotions as Early as Possible

In the fall of 2003, in Ngozi (Burundi), the Burundi Leadership Training Program was running a leaders' workshop to support the peace process after the Arusha agreement between all Burundian factions. As one of two head facilitators, my role was to permanently ensure fluid conversation among the leaders. Many in the room were former belligerents and fought each other in the field. One day, a conversation became heated and although it is difficult to recall the specifics of the discussion, it was obvious that one participant was disconcerted. His gestures were ample and his voice was strong. He was a man of large stature, and he held a significant position in the Burundian establishment. He started arguing loudly, demonstrating his power in front of others, and directed his arguments directly at me, as facilitator. My responding comments

*unfortunately further polarized the conversation and when it was time to change topics, the man would not desist. This led to an increase in tension. Finally, I asked my co-facilitator to take over, but I wish I had done this earlier. (AL)*⁵

No doubt stakes were high that day, and so were associated emotions, like a strong sense of self-righteousness and impatience. It was a dangerous cocktail and the mediator let emotions run the show, and take over the conversation. Although passing the relay was a good move, it came too late. In a matter of seconds, the facilitation became a spectacle. The problem is that the mediator did not *see* it coming. Fortunately, after he removed himself from the conversation for a time, the process could resume more smoothly, but other scenarios do not end so well. Had the mediator detected the escalating emotions earlier, he might have been able to explore other options to ensure a smoother process.

Mediators have all experienced emotional surges similar to the one just described. When negative emotions get in the driver seat and go from mild to strong, they can quickly lead to a temporary madness. But do humans really go from unemotional to emotional that fast? Or before emotions become patent, should we look for their latent signs? Consider the *timeline of emotions* (Lempereur, Colson & Pekar, 2010, p. 164) to be a continuum that a party may experience: discomfort leads to being upset, which might evolve to frustration, anger, and possibly, rage. In some ways, the emotion “anger” has its degrees, and anger management is easier at the early stages. Mediators need to watch for the transformation cues of an emotion, as it progressively intensifies.

Of course, from general observations in our lives, we note that certain people are slower to show intense forms of emotions, whereas others turn more quickly. We also realize that some behaviors, issues or people trigger us faster than others. However,

⁵ For more information about this workshop: see Wolpe and al., 2003.

scientific reports (Ekman, 2003) assure us that each emotion has unique signals most easily seen in the face and that we can learn to identify emotions, as they are just beginning and when they are being suppressed.

We call on active sensing to help mediators explore parties' nonverbal communication, whether through facial expression or body gestures, and within facial expressions, between micro- or macro-expressions. Sometimes *seeing* that there is an emotion, even if we do not know which one it is, is already a step forward on the awareness path, and in active perceiving. If mediators do not know which emotion it is, they can gently probe and ask questions. Because our sensing might be misleading, this is one more reason to be subtly inquisitive and open to learn from a party what she is going through. She might not want to share it with the mediators, but at least, she is offered a platform to do so. If the "emotional state" persists, maybe a break or caucus might be a safer space to explore it in confidence between one party and the mediator.

Needless to say, if someone's anger has turned to rage and they are expressing it by suddenly standing up, shouting and slamming the door, it is likely that anger was leaked earlier in the conversation. Although some mediators are still capable of guiding the parties through extremely emotional periods, often, cases of rage will hurt the relationship and create deadlocks because trust, if any even existed, has vanished and the mediator will need to start over, and rebuild a connection not simply between parties, but with each one. If emotions are perceived earlier, mediators can potentially refocus on people as such, on their underlying emotions, and avoid starting over from the beginning.

The goal therefore remains for mediators to spot *emotions in general* in the room as soon as possible. A final skill that mediators need to develop is the ability to recognize and name the *exact emotion* expressed in nonverbal communication, including when it first emerges.

VI. Decipher Emotions as Accurately as Possible

It may seem logical that if mediators should strive to detect the presence of emotions, and do so in a timely manner, they should also learn to identify the emotions correctly. This is why research on facial expressions and body language is very important to learn about. However, depending on the person, the identification of the right emotion may be harder to decode than it seems. How many times, when the conversation gets heated, do we not hear a person tell the other emphatically: “Gosh, you are SO emotional!”? So often, we might get the fact that someone is getting “emotional,” but the very word “emotional” becomes so imprecise that it lacks usefulness and precision. Again, active sensing helps mediators move past the basic recognition that a party is becoming “emotional” and helps mediators look for several clues indicating more specifically which emotions are at stake.

For instance, Paul Ekman has identified universal expressions for seven emotions: surprise, happiness, fear, anger, sadness, contempt, and disgust (2003). Though display rules vary, these emotions can be read on the faces of all humans, no matter their ethnic or cultural backgrounds. Macro-expressions last between one-fourth and four seconds, whereas micro-expressions last only one-twenty-fifth of a second and happen when a person is deliberately or unconsciously trying to conceal an emotion. “Most people don't recognize the emotions shown in these micro-expressions. But people can learn to see them.” (Ekman, 2009) Macro-expressions are naturally easier and faster to read than micro-expressions, and like for any new language, we need to start with the easy reading first.

We urge mediators to develop a sharper approach and learn to identify the exact emotion a party is feeling. As mentioned, different people show different abilities in recognizing emotions, which can be tested. Anyone who is interested in evaluating his or her skills in recognizing facial expressions, for example, might consult a micro-

expression expert website to get a better sense of how skilled they are. Here, they can also work on improving their capacity. As with anything, some people are naturally more gifted in this domain and others need to put in more effort. In the same way that some people are colorblind, some might be emotion-blind; they might have a hard time differentiating within the spectrum of various emotions. In any case, with the appropriate tools, anyone can improve their recognition of emotions in facial expressions.

Because the reading of emotions is crucial for their mission, mediators must learn to move past the sheer recognition that a party becomes “emotional” and pinpoint the emotion expressed in a particular moment. The same way they should focus on the correct interests to “problem solve,” they should focus on the correct emotions to “people solve.” The capacity to figure out what a person feels in exact terms goes a long way in acknowledging a person. It is a powerful tool helping to work through conflict, as emotions are also connected to the issues and priorities of the party. Once the mediation is focused on a double set of motivations – the people’s emotions and their interests – it becomes possible to grasp the complex identity and motivations of each party, and there is a greater likelihood for a responsible outcome, both in terms of agreement and of a working relationship to ensure proper implementation.

In a divorce case, parties are often stuck on issues of assets and kids. These substantive issues become a battlefield that is hiding the extensive frustrations felt by husband or wife. When, for example, a spouse considers she was never truly recognized for her contribution to the marriage and feels she has been humiliated for years, she may fight to be granted full custody of the children and substantial sums of money in the name of making a point. However, all the money in the world and full custody of the children will not address the true causes of the emotions, such as anger and sadness experienced by the divorcee. The mediators, by insisting that the parties “remain calm and rational,” by focusing only at the surface

on assets and kids, instead of uncovering the exact underlying emotions at stake, may have lost an opportunity for the spouses' growth, both as people and as problem-solvers. Even if they finally get what they wanted out of mediation, spouses may leave a session, feeling as if they were never heard, i.e. frustrated and unhappy about the process, because they did not get what they needed.

If left unaddressed, emotions often escalate and fester, ultimately restricting a person's field of vision and ability to accept new information. "When we are gripped by an emotion we discount or ignore knowledge we already have that could disconfirm the emotion we are feeling, just as we ignore or discount new information coming to us from our environment that doesn't fit our emotion." (Ekman, 2003, p. 39)

On the contrary, learning to spot emotion early and accurately allows the mediator to explore and discuss what is sparking the emotions before they intensify. Their precise identification equally contributes to an increase in the mediator's process options.

I will never forget a conversation that I witnessed between two members of the Hutu and Tutsi communities in Gitega, Burundi. They were standing in front of each other, exchanging at a cocktail party. Apparently everything looked normal, but after a few minutes, I noticed how one of the men was staring at the other. He was smiling, almost smirking, with one side of the mouth, slightly higher than the other. This particular expression is an indicator of contempt. This person was looking at the other with disdain, a sense of superiority, as if the other did not matter.

I decided to take him aside and then we had a long conversation. I asked him what he really felt about the other side and first he pretended he had no clue what I was alluding to. But then I told him that I may have been mistaken, but somehow I had sensed a derisive smile. It was a difficult conversation, where there was probably some denial, but the risks of one party's contempt towards another

could have blocked the process and it was important that this be addressed in private caucus. I did not want to let it go, as if I had not seen it, as if it did not happen. It could have poisoned the entire process. (AL)

Tensions might take place at a macro-level between communities, but then trickle down into a micro-level between individuals, and reversely. The risks of displaying arrogance (even unconsciously) towards a member of the other community can enlarge the gap between individuals and perpetuate conflict indefinitely between communities. In this case, the mediator was able to read the nonverbal signs and made the conscious decision that the party should be confronted about the particular emotion he exhibited and the potentially unintended consequences on the process.

Spotting the relevant emotion provides mediators and parties with additional information on which they can build. It is as much about self-discovery or validation for a party, as it is about venturing into the complexity of a human being's identity for the other party and the mediator. This extensive active sensing work that the mediators can embark on can also lead them to new tactics for mutual acknowledgement of emotions before, and with a view of problem-solving.

VII. Conclusion on Finding the Calm in the Storm

Mediators are eyes in the storm. Because of what they see around them by scanning the nonverbal, they have this unique opportunity to act as *mitigators of toxic emotions* – the parties', and sometimes their own. At other times, because they can help the parties move from the conflict zone and enter the peaceful zone of coexistence, mediators can also act as "*catalysts*," helping parties to surface and release their emotions, to vent and to put them past them, to detach themselves from them so that they can join the mediator in the eye of the storm, where it is calmer. By so doing the mediator can help them explore a future away from the storm.

In general, as a facilitator of group conversations, I like to walk and move around in the room in order to get closer to anyone who wishes to speak. Sometimes I even hand over the microphone so that everyone can hear the person, leaving me side-by-side the speaker. This dynamic approach has worked pretty well over the years. It ensures a spatial proximity to all the parties for me as the moderator, that I find particularly effective to maintain the connection with them. But once, I was faced with an unusual situation. In a meeting with about twenty people in a small room, a person asked to speak. When it was his turn, instead of talking from his chair as everyone else had done before, he moved forward and decided to stand up. He was literally facing me, like in a boxing match. I immediately sensed posturing and negative emotion of anger and contempt attached to the gesture.

I realized that two people standing in front of each other, like we were, might look like a potential contest between us. Instead of helping move the conversation forward, this competitive posturing could derail the whole conversation as a contest of wills. So, I did something I never do. I decided to sit in my own chair. In retrospect, I believe that in doing so, the situation deescalated. (AL)

In order to be these gentle eyes in the storm, we are calling for a renewed *people focus* and its *nonverbal shift*, to go beyond words and active listening, and incorporate active sensing or perceiving, i.e. at least to look and listen, to gather comprehensive information from parties in real time, including their emotional state. We hope mediators are pushed to evaluate their awareness, timeliness and sharpness in this new world beyond words. They can be curious and explore it further, themselves and with the parties. They can do more than mitigate emotions, they can leverage them, when they are still manageable, on their journey to responsible agreements. Learning to better grasp the nonverbal and emotions is a lot like learning a new language. It takes repetition and practice, as well as some proper training. But mediators all have the potential to improve their

ability in this other language, to make visible what often remains invisible.

However, as mediators begin experimenting with active sensing and engaging the emotions through the nonverbal, we must remain humble. It can take years to develop the ability to read emotions correctly. And even when we have identified the right emotion, we must remain cautious, because reading an emotion does not yield perfect knowledge of why a party is feeling it. Continuous inquiry and feedback remains necessary to test hypotheses and question each assumption. *Knowing what people are feeling does not mean knowing what they are thinking.*

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Risk Analysis, Reality Testing and Mediation

Tae Joon Chang

Disputes naturally arise between parties that seek competing objectives with different underlying interests. The parties are somewhat ossified in their positions and come to the mediator to seek resolution. If mediators can ground the discussions between parties with more open communication of risk analysis, the parties may be able to better explore projected costs and benefits so that they can achieve fully informed, mutually beneficial outcomes. More specifically, there are at least three functional roles that risk analysis plays during mediation. Risk analysis can help the parties to gather more detailed information that they may be otherwise inured to during positional bargaining. Effective risk analysis helps parties to reconceptualize their own interests and the other party's interests. Through cost-benefit analysis, parties can then perceive the potential value of settlement or trial in concrete terms.

Much of a mediator's work involves promoting discussion between parties so that they can make informed decisions when resolving a dispute. A mediator can help inform the parties' decisions through risk analysis and by communicating these risks through strategies such as reality testing. A mediator can "reality-test" a party when she asks questions that prompt the parties to think about the strengths and weaknesses of their options. Many mediators use the reality test to encourage the parties to critically analyze the assumptions they bring to the mediation so that their expectations and positions change. The reality test is a way for the mediator to help the parties analyze their options and the assumptions underlying those options. In communicating risk, the mediator must also be sensitive to cognitive biases that influence decision-making. The sophisticated mediator will consider these factors when determining when and how to engage in risk analysis during the mediation. Risk analysis through reality testing can also help the parties reconceptualize their own interests and the other party's interests.

The reality test involves questions designed to poke and prod at the strengths and weaknesses of a party's case. This requires the parties to take on an objective perspective to analyze the strengths and weaknesses of their own cases as well as the other party's case. This is typically followed by an analysis of best-case and worst-case scenarios and the likelihood of these outcomes. This series of questions works to bring the parties out of their positional inertia to better view and understand the dispute.

A mediator might be able use the reality test as a means of not merely assessing the strength of a case, but also exploring options that meet unsatisfied needs or interests. If the mediator can accomplish these goals through joint session, then the parties may be able to see each other think and be able to understand the reasoning that motivates these decisions. By bringing clarity to a party's motivations, an opposing party might be able to develop options that were previously left neglected or unaddressed.¹

The traditional role of risk analysis is encompassed by litigation risk analysis. Litigation risk analysis can be roughly defined as the process of determining the likelihood of a positive outcome at trial and the cost-benefit analysis of pursuing trial. For example, one clear model of litigation risk analysis describes the process as follows: the projection of litigation outcome, the calculation of damages, the projection of litigation costs, and the calculation of expected value of the action.² Through a precise rundown of costs and benefits, parties can better understand both tangible and intangible costs of trial or settlement. This type of analysis is different from reality testing, although some mediators treat reality testing as a form of litigation risk analysis. In this paper, I treat reality testing as an analysis of the merits and interests of the

¹ 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, 328 (“A dollop of induced guilt may help disputants come to terms more fully with the negative effects of their behaviors on others, thereby developing greater objectivity.”).

² MICHAELA KEET, HEATHER HEAVIN, AND JOHN LANDE, *LITIGATION INTEREST AND RISK ASSESSMENT: HELP YOUR CLIENTS MAKE GOOD LITIGATION DECISIONS* (2020).

parties, while litigation risk analysis is an analysis of the risks associated with trial.

But parties and their counsel are often reluctant to engage in risk analysis during the joint session. Lawyers may not even gauge the likely outcomes of their clients' cases with their clients in pre-mediation talks either. Lawyers tend to couch judicial outcomes in terms of subjectivity and uncertainty and downplay the possibility of clear prediction. Part of this reluctance stems from the inherent uncertainty of litigation. But another part of this reluctance comes from the inherent difficulty of communicating risk beyond vague generalities. A mediator can ask a variety of questions about the costs and benefits of litigation without specifically asking about them. The mediator must be creative in asking the right questions so as to obtain enough information to help the parties with their decision-making.

However, there are a number of cognitive biases that might undermine risk analysis. A mediator can mitigate risk of communication breakdown within the mediation by helping the parties gather more detailed and accurate information about the context surrounding the dispute. The mediator can do this by recognizing, addressing, and correcting for cognitive biases, e.g., anchoring, overconfidence, and sunk costs. These biases structure the discussion in hidden ways that deter the clear and accurate communication of information between parties. A mediator can correct for these biases by first recognizing these biases and then correcting these biases.

A mediator can guide the parties to settlement through risk analysis by addressing potential cognitive biases and engaging in a reality test with the parties. By analyzing risk throughout the process, the mediator can ensure that the parties gather information, define their interests, and consider the costs of trial and the benefits of settlement.

In the first part of this paper, I will explore the role of risk analysis and the reality test in mediation. In the second part of this paper, I will discuss the psychological research of cognitive biases and how they affect risk assessment in mediation and negotiation.

In the third part of this paper, I will provide some brief comments on how these ideas can be applied to mediation.

I. Risk Analysis

Although not traditionally conceptualized as part of reality testing, I argue that risk analysis is central to reality testing. A mediator tests the reality of a party's claims by reminding them, through a series of questions that speak to the risk factors underlying their arguments. In this way, the mediator invokes reality to inspire movement—"to ensure that their [the parties'] respective claims are reasonable under the circumstances and tied to some set of facts available to both parties."³ By creating a shared conception of reality, the parties will have greater room with which to discuss their options and with which the mediator can foster agreement.

A. Reality Testing

Reality testing, as a mediator technique, consists of questions that encourage the parties to examine their assumptions and expectations of the case. Professor Anne C. Dailey describes reality testing as "the process of negotiating the psychological boundary between subjective meaning and objective reality."⁴ By navigating opposing alternatives, parties are encouraged, if not forced, to confront information that they may not have considered. The psychological effects of the reality test, Dailey argues, promote the imaginative faculties within parties to the mediation that produce alternatives they might not have considered. When done effectively, Professors David Hoffman and Richard Wolman suggest that reality testing "helps [] people recognize that their own view of reality is not the only way of looking at their situation."⁵

³ Michael Benjamin & Howard Irving, *Money and Mediation: Patterns of Conflict in Family Mediation of Financial Matters*, 18 *MEDIATION Q.* 349, 352 (2001).

⁴ Anne C. Dailey, *Imagination and Choice*, 35 *LAW & SOC. INQUIRY* 175, 179 (2010).

⁵ David A. Hoffman & Richard N. Wolman, *The Psychology of Mediation*, 14

On a more concrete level, John Livingood describes the process thusly: “At its simplest, reality testing involves questioning the parties about the logic of a position or proposal. At its most focused, the mediator questions a specific party position, perhaps relying on certain facts or a prevailing legal theory.”⁶ Some common examples include: What is your best-case scenario? Your worst-case scenario? What is the likelihood of each scenario? What would you be able to achieve at trial? What is the probability of winning at trial? These questions prompt reaction because they poke and prod at the internal reality of the parties.⁷

As an empirical matter, parties to mediation seem to appreciate some form of reality-testing.⁸ In a study of over 200 parties to a mediation, one of the most important mediator process skills was “providing useful evaluations and/or ‘reality checks.’”⁹ In a study of over 900 civil case mediations in Ohio, “mediators assisted the parties in evaluating the case (such as by reality testing, using risk analysis . . .) in 89% of the cases. In contrast, the mediators evaluated the merits of the case for the parties in 31% of cases.”¹⁰ This suggests that some form of risk analysis is inherent to at least a significant percentage of mediations. The results are consistent even when the mediation program is broadly described as facilitative. In a study of over 600 employment law cases where mediators had varying self-reported mediation styles, “in a mediation program labeled as facilitative, a substantial number of mediators engage in evaluative behavior . . . [M]ost of the behavior

CARDOZO J. CONFLICT RESOL. 759, 768 (2013).

⁶ John Livingood, *Addressing Bias in Conflict and Dispute Resolution Settings*, 62 DISP. RESOL. J. 53, 59 (2007).

⁷ *Id.*

⁸ Stephen B. Goldberg & Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three*, 23 NEGOT. J. 393, 401 (2007).

⁹ *Id.* at 407.

¹⁰ Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What we Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 656 (2002).

was reality checking.”¹¹ Reality-testing thus appears to be consistently employed across different mediation styles in different regions.

The specific type of questions that might be asked during reality-testing, however, might differ across styles. Professors Lela Love and Kimberlee Kovach characterize the difference between facilitative reality-testing and evaluative reality-testing as a fine line perhaps distinguished by subtlety.¹² If a mediator’s question is designed to spark perspective taking, then it is more facilitative. If the question merely supplies information, then it is also facilitative. But if the mediator provides their own assessment in order to bring another factor into the party’s consideration, then it is more evaluative.¹³ The distinction is subtle when the phrasing of a question could be viewed as an implicit assessment of the case itself. The evaluative style of reality-testing also raise concerns about mediator neutrality.¹⁴ It is, of course, within the mediator’s discretion to choose the style they seek to employ, whether it be evaluative or facilitative. Regardless of specifics, reality-testing should be a tool that remains available to both evaluative and facilitative mediators.

Mediators, regardless of doctrinal leanings, will find value in the reality-test as a form of risk analysis. Proper risk analysis represents the constraints imposed by the real world. Risk analysis can help combine various hunches into a logical structure.¹⁵ When a mediator poses questions that strike at a party’s expectations of subjective reality, the party must confront the objective aspects of

¹¹ E. Patrick McDermott & Ruth Obar, “What’s Going On” in *Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit*, 9 *HARV. NEGOT. L. REV.* 75, 95 (2004).

¹² Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process*, 2000 *J. DISP. RESOL.* 295, 304 (2000).

¹³ *Id.*

¹⁴ Stark and Frenkel, *supra* note 1, at 304 (“A mediator’s rhetorical questions are often indirect evaluative efforts to overcome overconfidence by instilling doubt or even fear”).

¹⁵ Jeffrey M. Senger, *Decision Analysis: Decision Analysis in Negotiation*, 87 *MARQ. L. REV.* 723, 733 (2004).

the case and the issues or sub-issues nested within the case.¹⁶ By addressing a party's perceptions of objective reality and subjective experience, the mediator can help shape prior assumptions and expectations away from the adversarial frame of mind towards the integrative.¹⁷ By engaging in joint reality-testing in the general session of a mediation, the mediator can allow the parties to cooperatively construct a joint reality with the various mutually beneficial options available to them. But such joint reality-testing requires some forethought and preparation.¹⁸ If the mediator has developed sufficient rapport with the parties, then reality-testing can be quite fruitful. I argue that a mediator can use risk analysis in conjunction with reality testing to move parties to think about their options in an analytically rigorous way through the use of rudimentary decision trees.

B. Litigation Risk Analysis

Professors Michaela Keet, Heather Heavin, and John Lande provide a helpful framework for analyzing litigation risks in terms of "litigation interest and risk assessment" (LIRA).¹⁹ The overall goal of their analysis is to determine the *net* expected value of a court outcome. The "net" in *net outcome* refers to what remains of a damage award after taking costs into consideration. This is determined by weighing a combination of outcomes, probabilities, and costs.

In the first stage of LIRA, the decision-maker determines the *expected value of the court outcome*.²⁰ This first stage consists

¹⁶ Dailey, *supra* note 4, at 189.

¹⁷ Harry L. Munsinger & Donald R. Philbin, Jr., *Why Can't They Settle? The Psychology of Relational Disputes*, 18 *CARDOZO J. CONFLICT RESOL.* 311, 348 (2017) ("Treating the other party as a problem-solving partner rather than an adversary also fosters trust").

¹⁸ *Id.* at 333 ("A client in denial will not face reality until they feel safe enough to lower their defensive shields.").

¹⁹ Keet, *supra* note 2.

²⁰ *Id.* at 75.

primarily of calculating the beneficial outcomes without regard to costs. In the second stage of LIRA, litigation costs are deducted from the court outcome to determine an adjusted net value that represents the *net expected value* of that outcome.²¹ This second stage consists primarily of calculating costs that are deducted from the beneficial outcomes to yield the net, or actual, outcome that a litigant would obtain. By combining cost and benefit analysis in a structured way, the final result will reflect the various possible outcomes available to a litigant. But each stage itself comprises of multiple steps. I will detail them in turn.

As mentioned before, the first stage consists of calculating the *expected value of the court outcome*. In step 1, one estimates the risks regarding liability to yield the *probability of liability*.²² In step 2, one estimates damages to yield the *amount of estimated damages*.²³ In step 3, one multiplies the *probability of liability* by the *amount of estimated damages* to yield the ***expected value of the court outcome***.²⁴ In essence, by multiplying probability and benefit, one yields the expected value for a given decision.

As mentioned before, the second stage consists of calculating the *net expected value of the court outcome*. In step 4, one estimates the value of costs of trial to yield the *estimated costs of trial*.²⁵ In step 5, one calculates the ***net expected value of the court outcome***.²⁶ This result yields an estimation of the net benefit of trial.

The LIRA that Keet and colleagues put forward is useful for complex litigation. The distinction between the [gross] court outcome in stage 1 and the net court outcome in stage 2 allow for a separate analysis of costs and benefits. In step 2 of their analysis, they determine the amount of *estimated damages* as the damage

²¹ *Id.* at 78.

²² *Id.* at 70.

²³ *Id.* at 73.

²⁴ *Id.* at 75.

²⁵ *Id.* at 75.

²⁶ *Id.* at 78.

award that the court would enter. Broadly speaking, this is the “benefit” of a cost-benefit analysis. In step 4, they determine the *estimated costs of trial*. Broadly speaking, this is the “cost” of a cost-benefit analysis. By separating the cost from benefit, parties who use this tool will be able to identify unrealistic assumptions that might factor into their calculations.

The framework that Keet and colleagues provide is one useful way to conceptualize litigation risk. Another way is through the use of decision trees. Decision trees have increased in popularity within some sectors of the legal community, particularly for actions that naturally involve more numerical analysis, e.g., partition actions in property, preference actions in bankruptcy.²⁷ Legal software has also been developed to assist law firms and lawyers in tabulating the numerical information into usable decision trees. Two popular decision tree software programs include TreeAge Pro™, and Dual View Case Assessment™.²⁸ TreeAge Pro™ charts a decision tree that utilizes complex mathematical algorithms such as Markov models and Monte Carlo simulations to predict case outcomes depending on the variables that affect a node of uncertainty. Dual View Case Assessment™ analyzes net present expected value in terms of component parts (including, for example, liabilities, contingencies, damages, and costs) to determine weighted averages that can be compared across branches of the decision tree. Both software programs, although there are certainly more available on the market, are capable of helping clients arrive at informed decisions about their litigation risks.

²⁷ For a discussion of decision trees in property law, see, e.g., Roger J. Brown, *The Case for Decision Trees in Partition Actions*, 35 *CAL. REAL PROP. J.* 27, 33 (2017); in bankruptcy law, see R. Stephen McNeil, *Applying Decision Tree Analysis to Expedite Preference Settlements*, 34 *AM. BANKR. J.* 32 (2015).

²⁸ See Heather Heavin & Michaela Keet, *A Spectrum of Tools to Support Litigation Risk Assessment: Promise and Limitations*, 15 *CAN. J.L. & TECH.* 265 (2017) (discussing a variety of tools available on the market for litigation risk assessment in general).

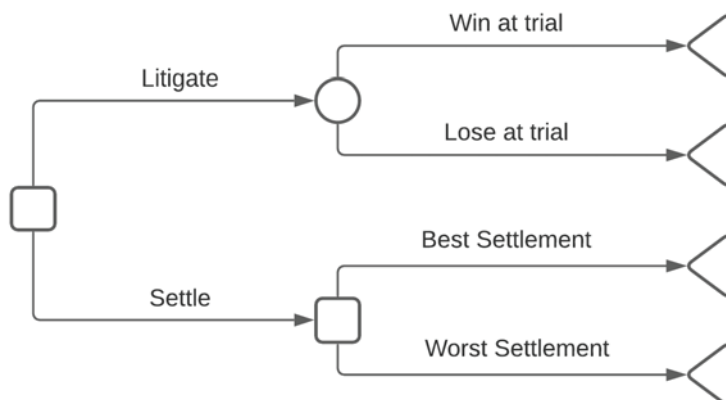


Figure 1. A Decision Tree for Litigation or Settlement.

A decision tree can be a useful visual representation of the outcomes in litigation risk analysis.²⁹ Consider a simple decision tree that starts with the decision to litigate or to settle (see Figure 1). By convention, each square represents a *decision node*, each circle represents a *chance node*, and each triangle represents an *end node*. A decision refers to some action within the control of the decision-making party. A chance refers to some uncertainty that is typically outside the decision-maker's control. From any given decision or chance, multiple outcomes are possible; these outcomes are represented by branches. When a given branch ends, it is marked by an end node. Although decision trees can be mapped across various issues and elements of a cause of action, it might be best to start with a simple case.

In a decision tree, the first decision creates two possible branches.³⁰ There is the scenario in which the parties bring the action to trial. And there is the scenario in which the parties go to a

²⁹ HOWARD RAIFFA, *DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICES UNDER UNCERTAINTY* 271 (1968) (“The spirit of decision analysis is divide and conquer: Decompose a complex problem into simpler problems.”).

³⁰ These branches can be thought of as separate hypotheticals, scenarios, situations, worlds, etc.

settlement conference, whether through mediation or direct negotiations. If the case is brought to trial, there are two distinct outcomes: winning at trial or losing at trial. If the case is brought to settlement, there are two distinct outcomes: the best settlement offer and the worst settlement offer. Although there are multiple possible offers possible for a settlement, the best- and worst-case scenarios are useful to mark the reservation points of the negotiation.

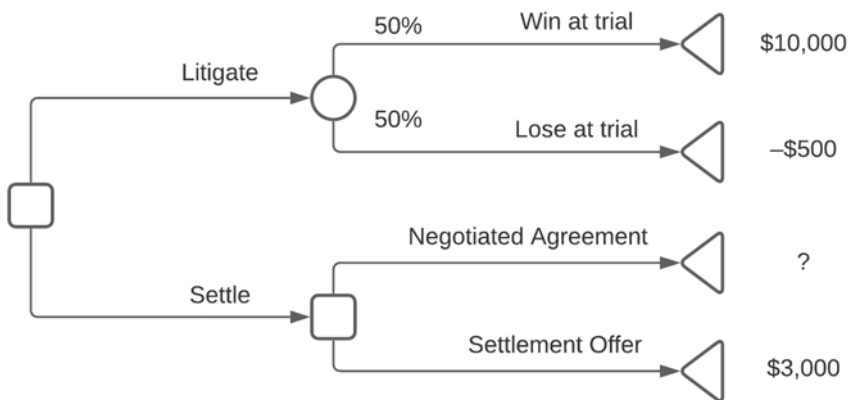


Figure 2. An Example of the Choice between Litigation and Settlement.

To bring these ideas to focus through an example, see Figure 2. At the start, the party has the option to litigate or to settle. If they go to court, they think they have a 50% chance of winning and a 50% chance of losing. If they win, they will likely get \$10,000. If they lose, they will likely incur costs of \$500. If they settle, the other party has offered \$3,000. If they go to a settlement conference with a mediator, then they might be able to arrive at a negotiated agreement with some offer to be determined at that mediation. Given this set of circumstances, the party might very well ask: what would be an appropriate negotiated agreement such that litigation would no longer be an attractive option?

To answer this question requires looking to the same sort of

mathematical analysis that Keet and colleagues outlined but on a simpler level and with the use of decision trees as visual schematics. For a given branch (i.e., scenario), multiply probability and value to yield the *expected value* of that scenario. Here, the probability of winning is 50% and the value is \$10,000. The expected value of winning at trial is therefore \$5,000. Here, the probability of losing is 50% and the value is -\$500. The expected value of losing at trial is therefore -\$250.

The combined expected value of litigation equals the sum of the expected value of its constituent scenarios. Because the litigation scenario consists of two scenarios, winning and losing, to obtain the expected value of litigation, add up the expected values of winning and losing. Adding up the \$5,000 and -\$250 yields \$4,750. Thus, the expected value of litigation is \$4,750.

Comparing the expected value of litigation (\$4,750) with the fixed value of the settlement offer (\$3,000) indicates that, if assumptions are correct, litigation is still the better option for this party. All things being equal, the negotiated agreement would only be worthwhile if the party could receive some offer above \$4,750. The mediator can use these numerical figures to therefore guide the discussion.

C. Uses of Decision Trees

The hesitance towards numerical analysis of litigation stems in large part from the uncertainty inherent in litigation. Although sophisticated mathematical analysis of damage awards is possible, the value of even a rough, preliminary analysis of litigation risk factors and outcomes can be enough to help ground the discussion.

The decision tree thus provides simplified map of possible outcomes that allows the mediator to visualize how the parties see reality. Through reality testing questions, the mediator and the parties together sketch these outcomes and draw a more coherent

understanding of how the parties view the important issues.³¹ Each branch represents an opportunity for the mediator to investigate the assumptions nested within. If a party thinks they have a good probability of winning, the mediator can ask what “good” means in quantitative terms. Afterwards, the mediator can ask what reasons justify that probability estimate. What risk factors went into the liability analysis? What would you need to prove to prevail? How did you arrive at that damage award? And so on.

It is worth noting that judges that become mediators can be quite effective at reality testing, almost past the point of becoming evaluative mediators. One particular evaluation notes that “[h]is [the former judge mediator’s] success is not just knowing the facts, but extrapolating those facts to your case in understandable terms. He’s not afraid to say how the facts are going to play out in a way that makes you think about your case.”³² Empirical data from mediator evaluations suggest that former judge mediators can utilize their prior judicial experience to build confidence that the parties might have in their mediator.³³

A mediator without judicial experience can utilize risk analysis to walk the parties through their own cases so that they can better understand the options they have. Mediators do not need to supply judicial predictions.³⁴ Instead, experienced mediators can use the decision tree and risk analysis framework to help the parties clarify the risks and benefits of litigation. By providing the parties these cognitive tools to capture their thoughts, the mediator can inspire confidence in the mediation process. Professor Katrina Lee nicely summarizes some of these benefits: decision trees can help lawyers counsel clients on their decisions by supplementing their intuition, providing transparency in communication, illustrate risks more fully, slow the thought process down to allow for reflection,

³¹ *Munsinger and Philbin Jr.*, *supra* note 17, at 319.

³² *Goldberg*, *supra* note 8, at 286.

³³ *Goldberg*, *supra* note 8, at 288.

³⁴ *And if the mediator has a facilitative style, then they would likely not supply judicial predictions.*

and to separate the analytical from the emotional.³⁵

D. Limitations of Decision Trees

As a tool, the decision tree is powerful. But it is also limited. The decision tree is not able to easily capture the intangible costs of litigation. The data that come out of any analysis are limited by the data that are put into the analysis.³⁶ The value of decision trees, in the complex mathematics that can be used to calculate optimized outcomes, is dressed in a sheen of authority even where the inputs may be lacking.³⁷

The tangible costs are apparent as they consist mostly of financial considerations, e.g., legal fees from the lawyers and litigation expenses from discovery and trial. The aforementioned software programs are created to specifically address such issues. But the intangible costs are harder to describe as they consist of client-specific costs. Claimants unaccustomed to the legal system will likely bear the stresses involved with going to trial. Other costs include the opportunity costs of litigation and the possibility of reputational harm.

Stress borne out of litigation can stem from the seeming lack of control that parties have over the process. Professors Cohen and Vesper argue that litigation stress can be so severe that it ought be included as a diagnostic category of psychiatric condition termed “forensic stress disorder.”³⁸ Much of their reasoning rests on the lack of control that parties have over the process and the resulting anxiety, confusion, and anger at this process.³⁹ The outcome is

³⁵ Katrina Lee, *Decision Tree Analysis for Law Practice*, 35 *OHIO ST. J. ON DISP. RESOL.* 405, 415-16 (2020).

³⁶ MARJORIE CORMAN AARON, *RISK & RIGOR: A LAWYER'S GUIDE TO DECISION TREES FOR ASSESSING CASES AND ADVISING CLIENTS* 70 (2019) (decision trees offer “the lure of over-complexity”).

³⁷ *Id.* at 142.

³⁸ Larry J. Cohen & Joyce H. Vesper, *Forensic Stress Disorder*, 25 *LAW & PSYCHOL. REV.* 1 (2001).

³⁹ *Id.* at 5.

determined by a judge and jury, while the process is steered by lawyers. The client is thrust into an unfamiliar world within the legal system, even with the guidance of counsel, as the client goes through meetings with counsel, hearings, depositions, other discovery requests, and the trial itself.⁴⁰

Beyond the individual level, Professor Michaela Keet and colleagues describes some of the organizational costs of litigation: harm to internal operations, loss of opportunities, and damage related to public image.⁴¹ In particular, small businesses and non-profit advocacy groups are uniquely affected by pending litigation. If a small-sized organization takes part in litigation, the employees within the company will have to deal with liability concerns themselves rather than the work of the organization itself.⁴² The organization is typically unable to distribute the litigation-related discovery tasks across employees. Employees are frequently asked to respond to liability concerns through witness testimonies, depositions, and trials.⁴³ This can result in weakened employee morale and faulty decision-making, thereby harming internal operations. Furthermore, the potential stigma and negative publicity that emerges from litigation, let alone discovery, can impose significant reputational harms to the organization. Although organizations may face these costs on a larger scale, individuals will also have to bear the opportunity costs and reputational harms of litigation as well.⁴⁴

These intangible costs are not easily included in litigation risk analysis or in a decision trees. To utilize risk analysis, parties will have to make appropriate conversion of intangible costs into tangible costs. Professors John Hammond, Ralph Keeney, and Howard Raiffa utilize the idea of “even swaps” to simplify multi-

⁴⁰ *Id.*

⁴¹ Michaela Keet et al, *Indirect and Invisible Organizational Costs: Making Informed Decisions about Litigation and Settlement*, 20 *CARDOZO J. CONFLICT RESOL.* 49 (2018).

⁴² *Id.* at 53.

⁴³ *Id.* at 54.

⁴⁴ *Id.* at 56.

factor decision-making processes in terms of fewer factors.⁴⁵ Although the methodology behind even swaps is somewhat more complicated, the idea can be boiled down to an exchange rate between different objectives. If a decision involves multiple objectives, it will be easier to decide if one objective is described in terms of the other. That is to say, instead of thinking about time and money, it is easier to think about one's time in terms of money.⁴⁶ This simplifies the decision-making process. If intangible cost can be swapped for tangible costs, then the intangible cost can be more effectively evaluated. For example, the intangible cost of time can be swapped for the tangible cost of money. If a day's worth of time is equal to a day's worth of wages, then the risk analysis is simpler. Of course, these even swaps must be calibrated to the parties' discretion. But this is one more tool available to the mediator.

Notwithstanding the problems associated with intangible costs and the complexity inherent to risk analysis, the comparative utility of risk analysis might very well be worth the effort. Professor Michael Moffitt asserts that the use of litigation risk analysis tools such as decision trees “hold[] the prospect of helping lawyers and clients to understand the impacts of probability distributions, unearthing situations in which clients are sensitive to particular outcomes or ranges of outcomes.”⁴⁷ Indeed, Moffitt considers the failure of lawyers to adequately inform their clients as malpractice which could be adequately remedied through litigation risk analysis. Thus, the development of ideas and possible outcomes that can be cultivated through the use of litigation risk tools such as a decision tree are worth implementing—so long as mediators take their limitations into account.

Other limitations, such as cognitive biases, are not unique to decision trees. The cognitive biases that might affect and thereby

⁴⁵ John S. Hammond, Ralph L. Keeney & Howard Raiffa, *Even Swaps: A Rational Method for Making Trade-offs*, 76 *HARV. BUS. REV.* 3 (1998).

⁴⁶ *Id.* at 6 (“If, for example, American Airlines charged \$100 more for a New York to San Francisco flight than did Continental, you might swap a \$100 reduction in the American fare for 2,000 fewer American frequent-flyer miles.”).

⁴⁷ Michael Moffitt, *Settlement Malpractice*, 86 *U. CHI. L. REV.* 1825, 1863 (2019).

introduce error into the calculus are ever-present and must be addressed as well.

II. Cognitive Biases that Undermine Risk Analysis

Despite the utility of structured risk analysis, many lawyers and mediators are reluctant to engage in the task. But there are good reasons to employ a structured and reasoned approach to risk analysis. The intuitions of lawyers can lead negotiations astray through psychological biases and heuristics that short-circuit the mediation process.⁴⁸ In particular, there are some common biases worth noting: anchoring, overconfidence, sunk costs, and framing effects.

A. Anchoring Numbers

Anchoring refers to the phenomenon wherein the initial presentation of information will influence subsequent decisions towards that focal point. The information that is first presented will become the focal point, the standard of reference. The common examples of anchoring involve numbers. For example, a negotiator might make an initial offer of \$50,000. Subsequent offers will be judged based off the initial anchor of \$50,000, even if the other party makes a counteroffer of \$200,000. That is, subsequent offers will be closer to \$50,000 than to \$200,000.

In an alarming study, Judge Andrew Wistrich and colleagues conducted an experiment on how judges made damage awards based on a hypothetical fact pattern.⁴⁹ In one condition, judges were asked to give a damage award based simply on the facts given to them. On

⁴⁸ *Munsinger and Philbin Jr., supra note 17, at 355* (“During mediation, a lot of things get in the way of this ideal decision-making process and, as a result, participants . . . are easily influenced by emotions and cognitive biases.”)

⁴⁹ *Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 *U. PA. L. REV.* 1251, 1286-90 (2005).

the facts presented to them, the judges in the first condition gave an average award of \$1.249 million. In the second condition, judges were given one additional piece of information: the lawyer for the opposing side made a motion to dismiss for lack of diversity jurisdiction. More specifically, the lawyer argued that the case failed to meet the required jurisdictional minimum of \$75,000 for a diversity case. The context of this case made it clear that a damage award in excess of \$75,000 was virtually guaranteed and the motion to dismiss was properly denied. But the judges in the second condition gave an average award of \$882,000. The anchor of \$75,000 influenced the judges in the second condition to give a lower damage award than they would otherwise. In sum, judges that were presented with a high anchor gave a higher award, while judges presented with a low anchor gave a lower award.⁵⁰ The impact that extraneous information through numerical anchors has on judicial outcomes underlies the power that initial presentations of numbers and information can have on decision-making.⁵¹ In the context of mediation, the mediator must be able to remedy aggressive anchors.

To correct for the effect that anchoring has on negotiations, Professor Kevin Johnston observes that, in patent negotiations, common methods of dealing with a numerical anchor include countering the anchor with a new anchor, ignoring the anchor, and outright rejecting the anchor altogether.⁵² In analyzing patent negotiations, Johnston found that excessive anchors often damage the working relationship between patent examiners and applicants.⁵³ The corollary to the mediation setting is that anchors, even when redressed through counter-anchors, might harm party relationships. When that occurs, collaboration between parties may be difficult.

The mediator can ask hypothetical questions about settlement offers including a range of numbers. Correcting for aggressive anchoring is imperative if the anchor is outside the zone

⁵⁰ *Id.* at 1291.

⁵¹ *Id.* at 1293.

⁵² Kevin Johnston, *Reasons to Avoid the Anchor: Negotiation in Patent Prosecution*, 2020 J. DISP. RESOL. 467, 472 (2020).

⁵³ *Id.* at 475.

of potential agreement.⁵⁴ The mediator must thereby work towards encouraging talk away from aggressive anchors and towards a more reasonable number range.

B. Sunk Costs

A sunk cost is a lost cause. It is an expense that has been incurred in the past and should not be calculated in the future. This temporal distinction is critical to the proper use of a decision tree. The decision tree is intended for prospective forward-looking analysis. The decision nodes and uncertainty nodes are events that could happen in the future. The decision tree would be inaccurate if sunk costs were considered in net outcome calculations of damage awards. Thus, sunk costs should *not* be calculated as part of net deductions. The litigation expenses deducted from a damage award consist of expenses if that outcome were pursued. Despite this, lawyers are prone to the sunk cost fallacy.

Professors Wistrich and Rachlinski conducted research on settlement rates when different sunk costs were presented to insurance lawyers.⁵⁵ If lawyers were presented with a sunk cost of \$90,000 for a settlement of \$480,000, then 76% of the lawyers advocated for settlement. However, if lawyers were presented with a sunk cost of \$420,000 for a settlement of \$480,000, then only 45% of the lawyers advocated for settlement. The statistically significant difference between the two groups speaks to the loss aversive behavior that sunk costs can impose on lawyers and clients. Wistrich and Rachlinski suggest that this occurs because of the psychological need to avoid cognitive dissonance.⁵⁶ From a pragmatic perspective, the sunk cost should not factor into the settlement analysis because

⁵⁴ *Id.* (“Anchoring decisions . . . depend heavily on a negotiator’s knowledge of the zone of possible agreement and assessment of the other party’s knowledge of the same.”).

⁵⁵ Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers’ Intuitions Prolong Litigation*, 86 *S. CAL. L. REV.* 101, 165 (2013).

⁵⁶ *Id.* at 145.

it is already incurred. The economically rational option is to not consider the sunk cost. However, this would mean admitting a prior action was incorrect; hence, the cognitive dissonance. These lawyers' assessment of the future possibility of settlement was influenced by the sunk cost bias. Allowing for sunk costs to enter into the decision-making calculus renders irrational conclusions.

Mediators should thus mitigate the effect of sunk costs on parties' decision-making as much as possible by focusing on the forward-looking aspect of mediation.⁵⁷ The emotional difficulty of abandoning sunk costs can prove to be a challenge because of a party's cognitive dissonance. The time and resources that have already been spent on previous litigation efforts, especially discovery, are likely to hinder rational thinking. The use of decision trees is therefore crucial as it allows for "deliberate processing [which] might mitigate, if not entirely eliminate, errors caused by the cognitive illusions we have tested."⁵⁸

C. Overconfident Positions

Overconfidence is another bias that tends to cloud the judgment of lawyers and parties to a mediation. When two parties arrive to mediation, the aggrieved party is likely to be overconfident in their position.⁵⁹ More than that, the aggrieved party is also likely to be overconfident in attributing blame and culpability on the other party's disposition.⁶⁰

In a study of over 400 attorneys, Professor Goodman-

⁵⁷ Hal R. Arkes & Laura Hutzler, *The Role of Probability of Success Estimates in the Sunk Cost Effect*, 13 *J. BEHAV. DECISION MAKING* 295, 295 (2000) ("such decisions should be based solely on future costs and benefits, not ones which have already occurred").

⁵⁸ Wistrich and Rachlinski, *supra* note 55, at 152.

⁵⁹ Richard Birke, *Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications*, 25 *OHIO ST. J. ON DISP. RESOL.* 477, 521 (2010) ("While litigation risk analysis can help ballpark an offer, it suffers from problems related to inability to accurately forecast probabilities . . . and from pervasive overconfidence and optimism.").

⁶⁰ *Id.*

Delahunty and colleagues sent out questionnaires to attorneys before and after case outcomes.⁶¹ In the pre-case questionnaire, interviewees were asked to describe what a winning scenario would look like for them and what their probability estimate was for that outcome. After their respective cases were decided, they were then sent post-case questionnaires to determine whether their probability estimates were consistent with their case outcomes. According to these surveys, 44% were overconfident (i.e., they received a less satisfactory outcome than they had predicted), 32% were appropriately confident (i.e., roughly the same outcome as predicted, and 24% were underconfident (i.e., a more satisfactory outcome than predicted).⁶² Of note, “lawyers with more experience were not better calibrated than less experienced lawyers.”⁶³ Thus, overconfidence does not speak to how experienced parties to the mediation might be. The resilient strength of the overconfidence bias is not easily rectified by accumulated wisdom. More experienced lawyers were just as prone to incorrect evaluation as were those less experienced.

Interestingly enough, Goodman-Delahunty and colleagues also asked a group of participants to include reasons why they might win or lose at trial.⁶⁴ By elaborating on reasons why or why not, the researchers hypothesized that the interviewees would be better grounded with reality or less biased by overconfidence. However, this group did not exhibit any greater predictive capacity and were as overconfident and, notably, as incorrect, in their predictions.⁶⁵

After surveying the empirical landscape of overconfidence research, Professor Robert Adler found that overconfident parties tended to be overconfident despite lack of sufficient information.⁶⁶

⁶¹ *Jane Goodman-Delahunty, et al., Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 *PSYCHOL. PUB. POL'Y & L.* 133 (2010).

⁶² *Id.* at 141.

⁶³ *Id.* at 149.

⁶⁴ *Id.* at 148.

⁶⁵ *Id.*

⁶⁶ *Robert S. Adler, Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 *OHIO ST. J. ON DISP. RESOL.* 683, 726 (2005).

Moreover, this overconfidence produces attribution effects in which parties overemphasized negative dispositional characteristics in others.⁶⁷ These attribution errors make mediation difficult by undermining the relationship between parties and imputing the difficulties inherent in the conflict to the dispositions and motives of the other party.⁶⁸ Thus, overconfidence is deleterious in at least two ways: by creating fixed attitudes about outcomes and by creating negative attributions of the other party.

These two byproducts of overconfidence undermine the collaboration necessary for mediation and the hope of a mutually beneficial agreement. Reality-testing serves as a means that seems particularly conducive as a remedy to overconfidence. In a survey that the Minnesota ADR Review Board distributed to local attorneys, “57.7 percent of the lawyers . . . reported that ‘mediation provides a needed reality check for my client . . . 46.2 percent of the metropolitan lawyers noted that mediation provides a needed reality check for opposing counsel or party.’”⁶⁹ When phrased in this way, the appeal of the reality test is to diminish or otherwise correct for overconfident positions that parties might hold.

To correct for overconfidence, the mediator should try to instill, within the parties, a so-called “outside view.”⁷⁰ This is contrasted with the natural approach of the “inside view,” the view of events as unique, particular, and specific to the circumstances.⁷¹ By adopting the outside view, “the problem at hand is treated as an instance of a broader category, [which] will generally reduce the optimistic bias and may facilitate the application of a consistent risk policy.”⁷² This, however, does not necessarily mean the same thing

⁶⁷ *Id.* at 721.

⁶⁸ *Id.* at 723.

⁶⁹ Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 *HAMLIN L. REV.* 401, 429 (2002).

⁷⁰ Daniel Kahneman and Dan Lovallo, *Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk Taking*, 39 *MGMT. SCI.* 17 (1993).

⁷¹ *Id.*

⁷² *Id.* at 29-30.

as considering the other party's perspective.⁷³ Rather, the "outside" perspective requires looking beyond the specifics so that the parties can adopt a view outside of their own perspective.⁷⁴

D. Framing the Issues

Taken together, anchoring numbers, sunk costs, and overconfidence can cloud reasoned judgment. The experienced mediator should take note of these psychological phenomena so as to counteract these forces. So far, I have described specific strategies that mediators should use to correct for anchoring numbers, sunk costs, and overconfident positions. But more important than that, the mediator should work to frame the discussion so as to facilitate negotiation. This is imperative because the frame in which information is presented can ultimately influence the choice that is made.

When bankruptcy judges were presented with a chapter 11 reorganization plan for a company, the way in which the plan was framed affected their ultimate choice.⁷⁵ Professor Rachlinski and colleagues used the same bankruptcy plan but presented the plan in different ways. In the 'gains frame,' the plan provided, in relevant part: "there is a 1/3 probability that all of the unsecured debt will be paid."⁷⁶ In the 'loss frame,' the plan provided: "there is a 1/3 probability that none of the unsecured debt will remain unpaid."⁷⁷ Ultimately, both plans gave the same expected value to creditors. However, there was a marked difference of 18.5% between judges presented with the gains frame and judges presented with the loss

⁷³ Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 *OHIO ST. J. ON DISP. RESOL.* 597, 624 (2006) ("inside de-biasing strategies like the consider-the-opposite strategy provide only limited protection").

⁷⁴ Kahneman and Lovallo, *supra* note 70, at 29.

⁷⁵ Jeffrey J. Rachlinski & Andrew J. Wistrich, *Gains, Losses, and Judges: Framing and the Judiciary*, 94 *NOTRE DAME L. REV.* 521 (2018).

⁷⁶ *Id.* at 568.

⁷⁷ *Id.*

frame.⁷⁸ The way that a result is framed, as either a gain or a loss, can lead to substantially different outcomes.

Another example that Rachlinski and colleagues studied dealt with breach of contract claims.⁷⁹ When a breach of contract was framed as a gain to the defendant, judges awarded comparatively more to plaintiff. When a breach was framed as a loss to defendant, judges awarded comparatively less to plaintiff.

The above examples of framing are from the perspective of someone other than the actor in question. That is, judges were asked to evaluate someone else's actions. But in mediation, parties will have to contend with their own actions leading up to the mediation. How the parties perceive their own actions leading up to the mediation can thus influence how they will act within the mediation. Professor Noah Susskind suggests that some factors are critical in determining the risk aversion that a party might be attuned to: whether the decision was the result of something they did, whether they were responsible for the decision, and how nearly they lost on something preferable.⁸⁰ If the mediator can understand the particulars of the parties' circumstances, then the mediator will be able to be sensitive to these considerations.

Because the positive or negative connotations associated with an option can influence subsequent decision-making, mediators must take care to note the language in which they present the information to the parties. Professor Daniel Weitz notes that mediators frame issues in neutral language in part to counteract inadvertent framing effects.⁸¹ The positive or negative framing of particular issues might skew one or both parties against agreement. However, when a mediator frames negotiable issues in neutral language, the parties are moved away from the adversarial positional

⁷⁸ *Id.*

⁷⁹ *Id.* at 551.

⁸⁰ Noah G. Susskind, *Wiggle Room: Rethinking Reservation Values in Negotiation*, 26 *OHIO ST. J. ON DISP. RESOL.* 79, 103 (2011).

⁸¹ Daniel Weitz, *The Brains Behind Mediation: Reflections on Neuroscience, Conflict Resolution and Decision-Making*, 12 *CARDOZO J. CONFLICT RESOL.* 471, 481 (2011).

bargaining of litigation to the interest-based discussion of mediation.⁸² As a practical matter, the mediator must continually work to reframe the parties' language into neutral, nonhostile language. Furthermore, the neutral perspective that a mediator cultivates within the parties helps de-bias the parties towards adopting an "outside" perspective and thereby situates them with a more rational, analytic frame of mind.⁸³

III. Applying Risk Analysis to Mediation

A. Draw the Decision Tree by Asking Reality-Testing Questions

The mediator can ask the usual reality testing questions to chart a decision tree with the help of the parties. This decision tree does not need to actually be drawn, although that may help. To simplify the process, it is probably best to limit the decision tree to four end nodes: winning at trial, losing at trial, best settlement, and worst settlement. As the mediator asks questions, the discussion will fill out the various branches of the tree. The tree therefore becomes a visual representation of the discussion. For each of these outcomes, the mediator can ask detailed questions about (1) the possible *value* of an outcome and (2) the *probability* of that outcome.

1. Questions about Value

The mediator can ask questions about what the value of the various outcomes might look like on the decision tree. What does a best-case scenario look like? How would you achieve that? How did you arrive at that damage award? Are there any litigation costs that reduce the net value of that damage award? Roughly speaking, these

⁸² *Id.*

⁸³ *Kahneman and Lovallo, supra note 70, at 29.*

questions about outcome can be further subdivided as questions about costs, benefits, and steps.

The costs of trial refer to both the tangible and intangible costs of trial.⁸⁴ Tangible costs oftentimes include the monetary costs associated with court and attorneys' fees. Intangible costs include litigation stress, opportunity costs, and possible reputational harm, among other things. For example, the mediator might ask the following: If you did not pursue litigation, what other projects would your organization be working on? How has the litigation process made you feel? What additional attorneys' fees would you have to pay? Are there any other costs that you would be incurring as part of this litigation?⁸⁵ However, given the de-biasing advantage of the "outside" perspective, it would be better to frame the questions in terms of an external observer.⁸⁶ For example, it might make sense to speak generally about actions of this type instead of the specific action that the party is involved in.

The benefits of trial refer to both the damage award and other nonmonetary benefits accrued from winning (or losing) at trial. The damages award is usually an amount that is requested by the party. But additional damages, e.g., punitive damages, might need to be factored in. Nonmonetary benefits depend on the context of the case. If the case is a defamation action, then a victorious plaintiff might gain intangible reputational benefits and social vindication. Here are some examples of questions that involve benefits: If you won as much as you hoped for at trial, what would that look like? What is the lowest damage award that you would feel satisfied with? What do you think is the likely amount of compensation the jury will award you?

The steps involved with a particular outcome refer to the actions that are required to achieve a given outcome. Although a victory at trial is represented as a single branch, there are numerous

⁸⁴ See Keet et al., *supra* note 2, 29-64 (discussing intangible costs generally).

⁸⁵ Keet et al., *supra* note 2, 191-194 (discussing neutrals' questions about litigation risk generally).

⁸⁶ Kahneman and Lovallo, *supra* note 70, at 29.

steps involved in arriving at that outcome, including, for example, hearings, depositions, oral arguments, brief submissions, and jury deliberations. These are not costs or benefits per se, but actions that need to be performed for an outcome to be obtained.

2. Questions about Probability

The mediator can ask questions about the probability determination associated with a given outcome. What is the probability of a win? How did you arrive at that probability? What legal issues are involved in determining whether this case wins?

In a thorough reality testing session, a mediator might ask about the strengths and weaknesses of both sides. By asking about the strengths and weaknesses of the party's own arguments, the party is prompted to think critically about the merits of their claims. This is particularly true when the mediator encourages the party to look at their own weaknesses. By shifting the focus at potential vulnerabilities in their case, the party will be more inclined to veer towards settlement.⁸⁷

By asking about the strengths and weaknesses of the other party's arguments, the party is prompted to think about their own case differently.⁸⁸ This type of extrospection and perspective shifting can help the parties gain a new understanding of the opposing party's interests.

After a thorough evaluation of the strengths and weaknesses of both sides, parties will be better equipped to determine a realistic assessment of the probability of victory at trial. As mentioned earlier, this will also require some debiasing by the mediator to correct for overconfidence.

⁸⁷ Lee, *supra* note 35, at 415 (“A decision tree gives the client a fuller picture of potential risk”).

⁸⁸ Munsinger and Philbin Jr., *supra* note 17, at 356.

B. Run the Numbers by Calculating Expected Outcomes

After sketching out the decision tree through reality testing questions, the mediator can use this data to the parties' benefit. This requires adding quantitative terms to the reality testing questions. Although mediators do not typically employ numbers in their mediation sessions, the simplified decision tree framework I have provided should allow mediators to conveniently assess the possible outcomes of the decision tree for each party. However, this is optional and may be unnecessary if the reality testing questions were already effective. If the parties are unable to provide clear numbers or if they suggest hesitation at their estimates, then running the numbers would likely not be an effective use of mediation time. The mediator should have the discretion to utilize mathematical risk analysis to elucidate a party's options if they believe it would help inform the parties' decision-making.⁸⁹

1. The Net Outcome of Litigation

If the mediator seeks to promote settlement, then they must convince the parties that even the worst settlement branch is a better option than the best litigation branch, i.e., the BATNA. If settlement results in a better monetary outcome with a higher probability, then the party would rationally choose settlement. If, however, litigation results in a better monetary outcome with a higher probability, then the party would rationally choose litigation. If the mediator can prompt the parties to assign specific numerical values to their probability estimates, then the mediator may seek to run the numbers and explain to the parties how they would rationally behave.

In doing so, the mediator runs the risk that the numbers

⁸⁹ Paul Prestia & Harrie Samaras, *Beyond Decision Trees: Determining Aggregate Probabilities of Time, Cost, and Outcomes*, 28 *ALTERNATIVES TO HIGH COST LITIG.* 94, 98 (2010) ("As a practical matter, using these methods in the context of a real negotiation or mediation environment necessarily requires a facility for quickly and repetitively performing this manipulation as different scenarios or estimates are addressed.").

would point to litigation as the better option. At that point, the mediator should highlight the uncertainty inherent to assumptions that undergird the decision tree.

2. The Zone of Possible Agreement

If the mediator is able to convince the parties that settlement is superior to litigation, she is then tasked with forging a zone of possible agreement between the parties. The upper bound of this zone is already marked as the reservation point, i.e., the net outcome of litigation. Everything below this reservation point would be a possible point of agreement. As a result of mathematical decision tree analysis, the mediator has a better, clearer grasp on the zone of possible agreement. Further questioning can allow for a more precise narrowing of this zone, but much of the hard work has already been done in identifying the reservation point.

The mediator can sketch a new decision tree with the parties about various possible offers. After using a decision tree to show the utility of settlement, the parties would likely be more receptive to using the same set of risk analysis tools to understand how to optimize their negotiated agreement.

Conclusion

Risk analysis is not merely one set of tools, but a panoply of tools available to the mediator. Structured risk analysis can help guide the discussion and frame important issues that might otherwise go unnoticed or unappreciated due to psychological biases or judgment heuristics. Thus, a knowledgeable mediator should be aware of and familiar with the decision tree, risk analysis, the reality test, and cognitive biases. A skilled mediator might draw a decision tree with the parties through reality testing questions. Furthermore, they should be aware of various cognitive biases and correct for them to ensure that the risk analysis can be performed on a reasoned basis. This collection of risk analysis tools, when used together, can

move parties towards mutually beneficial outcomes grounded in rational sense.

Mediation Ethics after the Singapore Convention

Zachary Calo

I. Introduction

On August 7, 2019, representatives from 46 countries convened in Singapore to sign the United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the Singapore Convention on Mediation (“Convention” or “Singapore Convention”). Signatories included China, India, the United States, and several other leading global economies that also account for over half the world’s population.¹ As of this writing 53 countries are signatories and 6 countries have become parties (Belarus, Ecuador, Fiji, Qatar, Saudi Arabia, and Singapore).² The Convention entered into force on September 12, 2020.

The Singapore Convention provides a mechanism for recognition of cross-border commercial mediated settlement agreements. The Convention authorizes a settlement agreement to be employed both as a “shield” when invoked as a defense against a claim under Article 3.2, and as a “sword” when invoked for the purpose of enforcement under Article 3.1.³ The Convention applies only to mediated settlements that are international and commercial in nature and thus excludes from its jurisdiction not only domestic mediated settlements but also settlements arising from any non-

¹ “Singapore Convention on Mediation Enters in Force,” (September 12, 2020) <https://www.singaporeconvention.org/media/media-release/2020-09-12-singapore-convention-on-mediation-enters-into-force>

² “Status: United Nations Convention on International Settlement Agreements Resulting from Mediation (2018) https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg_no=XXII-4&chapter=22&clang=en

³ On using mediated settlement agreements as a sword and shield see Elisabetta Silvestri, “The Singapore Convention on Mediated Settlement Agreements: A New String to the Bow of International Mediation?” *Access to Justice in Eastern Europe* 3:4 (2019): 6.

commercial dispute such as family, consumer, employment, and personal law matters.⁴ In this respect, the Convention responds to the need of the international business community to have an efficient and predictable enforcement mechanism for mediated settlement.⁵ By providing such a framework, the Singapore Convention aims to realize for international commercial mediation what the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) accomplished for international commercial arbitration.

Whether the Singapore Convention will have a similarly transformative effect remains uncertain, it has the potential to advance the use and practice of mediation. There is survey data suggesting that international commercial parties are more willing to use mediation when there is an effective enforcement mechanism in place.⁶ Lack of certainty as to enforcement, divergent standards for across jurisdictions, and inefficient enforcement regimes have mitigated against the use of mediation within the international commercial sphere. By establishing uniformity of process and enhancing predictability of outcome, the Singapore Convention

⁴ *United Nations Convention on International Settlement Agreements Resulting from Mediation* (adopted on 20 December 2018, entered into force 12 September 2020) [Hereafter *Singapore Convention*], art I(2).

⁵ See generally, Michel Kallipetis, "Sponsored Briefing: The Mediator's Perspective," (27 March 2020), <https://www.legalbusiness.co.uk/analysis/disputes-yearbook-2020/sponsored-briefing-the-singapore-convention-the-mediators-perspective>. Kallipetis observes that the "Singapore Convention responds to the demand from a growing body of mediation users for an enforcement mechanism applicable to mediated settlement agreements in cross-border disputes."

⁶ *Singapore International Dispute Resolution Academy, "International Dispute Resolution Survey: Currents of Change 2019 Preliminary Report,"* 11, 19. https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/documents/SIDRA2019_IDR_Survey_Preliminary_Report.pdf

The survey found that in selecting international commercial mediation, users did not rate enforceability as a particularly high factor. However, the authors of the survey report hypothesize that the enforcement options created by the Convention might draw in users of litigation and arbitration who value ease and certainty of enforceability.

remove the most serious structural obstacles to the use of mediation within international commercial disputes.⁷

Beyond making international commercial mediation more attractive to users in these functional ways, the Convention also serves an important legitimizing function. George Lim has proposed that the Convention already has had a legitimizing effect on attitudes towards mediation in signatory countries.⁸ The Convention grants a powerful symbolic imprimatur to commercial mediation, placing it onto the international agenda as well as the domestic agenda of some states that had heretofore not given mediation sustained consideration.⁹ The Convention embeds mediation more deeply into the legal architecture of international commercial law and practice and, alongside the New York Convention and the 2005 Hague Convention on Choice of Court Agreements, completes the infrastructure for a transnational system of commercial dispute resolution.

Mediation ethics have only a small role in the Convention text itself. Issues concerning mediator conduct are addressed briefly in Article 5 in connection with rules concerning when a competent authority may refuse enforcement of a settlement agreement. The Convention does not contain a mediator code of conduct nor take a position on contested questions concerning mediation ethics. Still, one of the most debated topics during the Convention drafting process concerned these grounds for refusing enforcement and thus by implication the place of ethics and standards within the Convention framework.¹⁰ While the Convention does not directly

⁷ Mark E. Appel, "A 'Done Deal' for States and Investors? The New UNCITRAL Convention on International Settlement Agreements Resulting from Mediation," *The Journal of Enforcement of Arbitration Awards* 1:2 (2019): 4.

⁸ See, "Mediation Symposium 2020: Mediation as a multidisciplinary practice," Chartered Institute of Arbitrators (December 9, 2020), <https://www.ciarb.org/news/mediation-symposium-2020-meditation-as-a-multidisciplinary-practice/>

⁹ The Singapore Convention, for instance, has generated significant new interest in Qatar in the development of commercial mediation. See, "Sheikh Khalifa: Qatar is at the forefront of signatories of Singapore Convention on Mediation," *Gulf Times* (16 September 2020).

¹⁰ See Kallipetis, "Sponsored Briefing: The Mediator's Perspective."

engage existing regulatory schemes, indeed it merely incorporates these schemes into its framework, it has more to offer debate about mediation standards that might seem apparent. Even in its silence, the Convention has an essential role in shaping evolving standards of global mediation ethics. Mediation has long been subject to various regulatory schemes just as there are longstanding debates mediation ethics. The Singapore Convention does not fundamentally upend basic normative understandings about mediator conduct but it should nevertheless inform the field. Reassessing mediation ethics in light of the Convention offers new insights into both the regulatory standards and mechanisms that might optimally govern an increasingly internationalized practice.

The aim of this essay is to consider the shape of mediation ethics after the Singapore Convention. It assesses the role of ethics with the Convention framework, as well as how the Convention can inform broader conversations about mediation ethics. The international commercial mediation landscape initiated by the Convention commends certain approaches to ethics for its effective and efficient operation. In particular, it is argued that the Convention system is best complemented by codes of ethics that are clear and standardized in their norms as well as modest in the scope of their regulatory ambitions. An ethical system defined by these twin characteristics of universality and modesty is best suited to complementing the needs of mediators and parties operating within a post-Singapore Convention context. The essay does not argue for the displacement of existing regulatory models nor the totalizing harmonization of ethical norms under an international framework, an objective that is as impractical as it is imprudent. It rather considers more limited ways in which existing codes of ethics, particularly as adopted by leading organizations, can be further developed so as to constructively interface with the emerging Singapore framework.

II. The Problem of Ethics for Mediation

Mediation hardly exists in an “ethical no man’s land,” to borrow the phrase Catherine Rogers used to characterize the state of international arbitration.¹¹ In other words, the problem is not that mediation is unregulated or underregulated. Mediation is already widely regulated by different legal and institutional regimes, resulting in a diverse range of applicable norms. This diversity reflects the fact that mediation is utilized by different types of parties, in different types of disputes, with different methodologies.¹² At the same time, this diversity complicates the regulation of mediation. Mediation ethics is not a hopeless enterprise, but it does mean that ethical standards need to work with the grain of this diversity and not stifle it under an inflexible and suffocating uniformity.

The discussion below identifies three main types of diversity that complicate the task of mediation ethics: diversity in process, diversity in culture, and diversity in regulation. Some of these considerations bear more directly than others on the Singapore Convention itself, but they all inform the general context within which a workable post-Singapore ethic will need to be devised.

1. Diversity in Process: Diversity of process can be understood in several ways. There is methodological diversity characterized by different approaches to the conducting of a mediation.¹³ This includes choices about employing a more

¹¹ Catherine A Rogers, “Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration,” *Michigan Journal of International Law* 23 (2002): 341.

¹² Bobette Wolski, “An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making,” *Law in Context* 35:1 (2017): 64-65.

¹³ *The practice of mediation varies markedly from context to context, whose procedures are more fixed and predictable. This makes mediation at once both more and less difficult than arbitration to regulate. On one hand it lacks the procedural formalities of arbitration and need not be as strictly rulebound. The rules governing arbitration on such matters as production of evidence or use of witnesses and experts are designed to structure a fair adversarial process. Arbitrators operate in a different relation to the parties than do mediators. They*

facilitative or evaluative approach, although that binary fails to capture the full range of options. Laurence Boulle, for instance, identifies four mediation methods - settlement, facilitative, therapeutic and evaluative.¹⁴ One can find any number of other such typologies that attempt to bring order to the methodological diversity within mediation practice. All of these are ultimately limited, for within the boundaries of general procedural and ethical norms mediation can be infinitely flexible.

Diversity of process also refers to the different dispute contexts within which mediation is used, which might demand different techniques. A mediator will approach a court-ordered mediation between two unrepresented parties differently than a commercial dispute between two parties with legal representation. A family dispute requires different tactics than a healthcare dispute. These different contexts invite different strategies and even objectives. The different contexts also bring different ethical considerations. In what sense, for instance, is it appropriate for a mediator to be “neutral” when working with vulnerable parties?¹⁵ Should a mediator facilitate a settlement agreement that might result

are decision-makers imposing a judgment rather than a third parties facilitating a settlement. Similarly, counsel representing parties in an arbitration serve a different function than those representing parties in a mediation. There is a certain degree of overlap in the concepts that inform ethics within arbitration and mediation respectively - conflicts of interest, confidentiality, and so forth - that serve to protect the integrity of the process and the rights of the parties. Yet these concepts serve quite different functions and indeed have different meanings within the two contexts. While much can be illuminated by comparing these two forms of dispute resolution, there are limits to the translatability of insights from one field to the other.

¹⁴ Laurence Boulle, *Mediation: Principles, Process, Practice*, 3rd ed. (LexisNexis Australia, 2010): 43-47.

¹⁵ These are complicated and disputed questions, but such considerations have led some commentators to adopt critical postures towards certain accounts of mediator neutrality and party autonomy as overarching ethical ideals. See, for instance, Ronit Zamir, “The Disempowering Relationship Between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic,” *Pepperdine Dispute Resolution Law Journal* 11:3 (2011): 1-51; Carrie Menkel-Meadow, “Ethics and Professionalism in Non-Adversarial Lawyering” *Florida State University Law Review* 27 (1999): 167-168.

in an unjust outcome?¹⁶ General codes of conduct can inform mediation practice but cannot ultimately account for all the ethical issues that will arise within any given context. As Robert Bush aptly observes, “it has become well accepted that the mediation process does not follow a single, uniform approach.”¹⁷ The same can be said of mediation ethics.

2. Diversity in Culture: Another form of diversity within mediation arises because of culture, context, and nationality. The expectations of parties can vary across cultures, demanding variations in the approach that a mediator adopts.¹⁸ It can also mean that parties have different understandings of what constitutes “ethical” conduct. Even something as established as mediator impartiality, in which the mediator is expected to adopt a veil of neutrality with respect to outcome, is not necessarily a universalizable ethical norm. In certain contexts, mediators are chosen precisely because they have an understanding of the needs and goods of the parties.

Given the dynamics of cultural diversity Schonweille and Lack propose that, “It is difficult to extract any clear standards of processes for mediation when two parties come from different jurisdictions, especially when the expectations, styles and

¹⁶ This raises the question of the relationship between procedural fairness and substantive fairness. Many of the norms of mediation ethics are designed to ensure a fair process but not to shape the justice of the outcome, so long as it reached through the free consent of the parties. However, the lines between procedural and substantive fairness are not always so clear and concerns about power and fairness can come into play particularly in certain kinds of disputes. See, MaryAnne Noone and Lola Akin Ojelabi, “Ethical Challenges for Mediators around the Globe: An Australian Perspective,” *Washington University Journal of Law & Policy* 45 (2014): 179-182. See also Omer Shapira, “Exploring the Concept of Power in Mediation: Mediators’ Sources of Power and Influence Tactics,” *Ohio State Journal on Dispute Resolution* 24:3 (2009): 535-569.

¹⁷ Robert A. Baruch Bush, “A Pluralistic Approach to Mediation Ethics: Delivering on Mediation’s Different Promises,” in *Mediation: Mediators’ Sources of Power and Influence Tactics*, *Ohio State Journal on Dispute Resolution* 34:3 (2019): 462.

¹⁸ See generally, Ana Maria Maia Goncalves, François Bogacz and Daniel Rainey, “Beyond the Singapore Convention,” *International Journal of Online Dispute Resolution* 2 (2019): 164-169.

approaches to mediation vary greatly from country to country.”¹⁹ We can take this point further and propose that cultural contingency also makes it difficult to devise a standardized ethic for mediation that can fully account for different cultural dynamics. There are standards that can and should be imposed as general norms, and cultural contingency is less of an issue international commercial context. All the same, it is important for ethical schemes to account for potential tensions between universal and particular norms that might arise due to cultural factors.

3. Diversity in Regulation: Mediation is regulated in a variety of ways and at a variety of levels, both within and across jurisdictions. Mediators can be subject to regulatory standards that arise through legislation, court rules, professional licensing bodies, mediation service providers, and accrediting organizations, among others.²⁰ A mediator might simultaneously be subject to several such codes of conduct. The diversity of mediation results in a pluralistic ethical and regulatory landscape.²¹

The contested professional categorization of mediation adds additional challenges. Mediation exists in a nebulous space in which it intersects with other regulated professions such as law, social work, and psychology. It is, at least in many systems, not a fully independent profession but one that is ethically derivative of other professions. Particular issues arise for lawyer-mediators. In many jurisdictions it is not necessary to be a lawyer in order to be a mediator, although legal regulatory bodies might issue special

¹⁹ Manon Schonewille & Jeremy Lack, “Mediation in the European Union and Abroad: 60 States Divided by a Common Word?,” M. Schonewille and Fred Schonewille, eds., *The Variegated Landscape of Mediation. A Comparative Study of Mediation Regulation and Practices in Europe and the World* (Eleven International Publishing, 2014).

²⁰ Bobette Wolski, “An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making,” *Law in Context* 35:1 (2017): 72.

²¹ “Article 5(1)(e)–(f). Mediator Conduct-Related Grounds for Refusal” in Nadja Alexander and Shouyu Chong, eds., *The Singapore Convention on Mediation: A Commentary, Global Trends in Dispute Resolution, Volume 8* (Kluwer Law International 2019) at §5.51.

ethical guidelines for lawyers who are mediators.²² These standards exist alongside other guidelines that apply to the mediator. Given this complex state of affairs, a certain degree of regulatory diversity is unavoidable.

These three dynamics, rooted in the very nature of mediation, present problems for mediation ethics. They also present problems for integrating ethics into the Singapore Convention system. As discussed further in the next section, the Singapore Convention incorporates existing regulatory schemes into its framework.²³ It does not adopt its own code of ethics nor attempt to refashion or harmonize existing regulatory schemes. By adopting a light touch in its approach to ethics, it might be argued that the Convention exhibits little concern with ethical standards and the regulatory challenges described above. From a certain perspective this is right. At the same time, while the Convention text provides little guidance on ethics, mediation standards bear directly on the operation of the Singapore Convention. As such, it is critical to consider how ethics function within the Convention and what approach to regulation best facilitates its objective of providing an efficient international settlement enforcement system.

III. Ethical Standards and the Singapore Convention

The Convention touches on mediator misconduct and ethics in connection with rules concerning when a competent authority can refuse enforcement of a mediated settlement agreement. While the overriding objective of the Convention is to establish a mechanism for cross-border enforcement of mediated settlement agreements, enforcement is not absolute.²⁴ Under the terms of the Convention, the competent authority can deny enforcement of a mediated

²² *The Singapore Convention on Mediation: A Commentary*, 5.49.

²³ *The Singapore Convention on Mediation: A Commentary*, 5.54.

²⁴ Héctor Flores Senties, "Grounds to Refuse the Enforcement of Settlement Agreements Under the Singapore Convention on Mediation: Purpose, Scope, and their Importance for the Success of the Convention," *Cardozo Journal of Conflict Resolution* 20 (2019): 1235.

settlement agreement in the jurisdiction only on the grounds set forth in Article 5. Article 5(1)(a)-(d) addresses contract-related grounds, which include incapacity, the settlement agreement being null and void, and the obligations of the settlement agreement having already been performed or lacking clarity. Article 5(2) addresses public policy and subject-matter related grounds. Of concern to this essay is Article 5(1)(e)-(f), which addresses mediator-conduct related grounds for refusal.

Article 5(1)(e)-(f) provides that:

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

With respect to certain of these grounds for refusal, Article 5 of the Singapore Convention maps directly onto provisions in Article 5 of the New York Convention.²⁵ However, the provisions in (e) and (f) concerning misconduct are unique to the Singapore Convention.²⁶

²⁵ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958)* 21 U.S.T. 2517 (hereinafter *New York Convention*), art. 5.

²⁶ Natalie Morris-Sharma, "Constructing the Convention on Mediation: The Chairperson's Perspective," *Singapore Academy of Law Journal* 31 (2019): 511.

Subsections (e) and (f) address mediator misconduct from two different angles. The provision in (e) references external ethical norms. By speaking of “standards applicable to the mediator or the mediation,” the Convention draws external standards into its boundaries. Rather than stipulating its own standards by which a competent authority assesses a “serious breach,” the Convention relies on standards already otherwise applied to the mediation. The Convention adopts no position on what these standards are to be or from where are to be derived.²⁷ They might arise through governing law, applicable codes of conduct, or election by the parties. The “standards applicable to the mediator or the mediation” are derived from principles established by the parties or imposed by other authorities. As the Singapore Convention system expands and matures, there will be complicated questions concerning how courts will interpret the provision in (e). For now, the best that can be done is to refer to existing domestic jurisprudence.

Subsection (f) is a freestanding rule addressing mediator “impartiality and independence.” These are the only two specifically enumerated conduct norms in the Convention. Unlike the rule in (e), this rule makes no recourse to other external standards, although it might well be that the “standards applicable to the mediator or mediation” under (e) also address provisions regarding impartiality and independence. The rule in (f) is drafted at a high level of abstraction. It provides no detail regarding the definition of “impartiality and independence” nor what

²⁷ *It is significant that the Singapore Convention rejected the notion of a “seat.” Unlike the New York Convention system as applied to international arbitration, the Singapore Convention “freed mediated settlements from the legal requirements of any given place of mediation.” The lack of a seat complicates the application of Article 5(1)(e)-(f) because it means that there is no set governing law applicable to be applied in connection with enforcement actions. See, Anthony B. Ullman and Dora M. Ziyaeva, “The Singapore Mediation Convention and its Potential Impact on Mediation in the Americas,” *The Arbitration Review of the Americas 2021*, available at <https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2021/article/the-singapore-mediation-convention-and-its-potential-impact-mediation-in-the-americas>*

“circumstances” might give rise to justifiable doubts. It is structured both to establish a governing principle of neutrality and to address conflicts of interest, yet it comprehensively treats neither. The objectives in (f) are more limited.

The Convention’s concern with mediation ethics is highly circumscribed. The aim of these provisions, after all, is not to impose general ethical standards on mediators but only to establish the limited grounds on which a competent authority may refuse enforcement of an otherwise valid international mediated settlement agreement. It is not even proper to characterize Article 5 as directly concerning mediation ethics. It is rather an enforcement provision that incidentally considers standards of conduct. The conceptual challenge in drafting (e) and (f) was to determine extent to which ethics and enforcement would overlap. In other words, what types of misconduct impact not only the fairness of the mediation process but the substance of a mediated settlement agreement such that it becomes material to the Convention framework.²⁸ Ethics matter to the Convention only at these narrow points of intersection.

Articles 5(1)(e) and (f) are drafted in a way that establishes an exceedingly high barrier that must be overcome before an authority can deny enforcement to a mediated settlement agreement. The language in these provisions emerged as a result of compromise following extensive deliberation, and its intention was that the grounds for refusal would be only serious misconduct by the mediator and that the provisions would apply only in exceptional circumstances.²⁹ Most importantly, it is not mediator misconduct as such that warrants a competent authority to refuse enforcement, but only misconduct “without which” the party would not have entered into the settlement agreement. Under both provisions the competent authority must establish that the ethical breach led a party to accept terms of settlement it would not have otherwise. In addition, the

²⁸ As a member of the Working Group put it, “The issue was whether these matters, such as impartiality and neutrality of the conciliator and fair treatment of the parties, which are questions of due process in the dispute resolution context, should be the subject of specific defences of refusal.” Morris-Sharma, “Constructing the Convention on Mediation,” 512.

²⁹ Morris-Sharma, “Constructing the Convention on Mediation,” 511.

breach of a standard under (e) is limited to those which are “serious.” Although the term is not defined, the inclusion of this adjective ensures more frivolous claims are not actionable.³⁰

The standards in (e) grant the competent authority only a small degree of interpretive space. The situation in which (f) would apply are perhaps even more limited given that a failure to disclose certain circumstances related to impartiality and independence must give rise to “justifiable doubts” as to the mediator’s impartiality and independence and have a “material impact or undue influence on a party.” As with (e), the inclusion of these qualifying phrases adds additional barriers that only the most serious and impactful violations can overcome. Such barriers support the Convention’s goal of creating an effective and predictable enforcement mechanism for international mediated settlement agreements.

In addition to the evidentiary challenges with establishing a claim under either (e) and (f), there is a nettlesome conceptual barrier. No value is more central to mediation than party autonomy.³¹ Party autonomy is understood to establish the framework in which parties act freely to reach a settlement (or not reach a settlement) that comports with their own needs and interests. Party autonomy is connected to the companion values of mediator neutrality and independence. The mediator is to avoid harboring, much less expressing, any substantive preference as to outcome. A just outcome is simply that which the parties freely reach as an expression of their autonomy and will. There is debate as to whether such pure neutrality on the part of a mediator can be ever be achieved and whether such a concept is in fact a useful way to define the mediator’s role. These criticisms aside, autonomy and neutrality

³⁰ Michel Kallipetis, “Singapore Convention Defences Based on Mediator’s Misconduct: Articles 5.1(e) & (f),” *Cardozo Journal of Conflict Resolution* 20 (2019): 1201.

³¹ It has been argued that the Singapore Convention adopts this dominant understanding of autonomy. See, for example, Peretz Segal, “Autonomy of the Parties and the Mediation Convention,” <https://imimmediation.org/2018/08/02/autonomy-of-the-parties-and-the-mediation-convention/>

continue to dominate the ethical understanding of the mediation process.

Autonomy and neutrality are relevant to Article 5 because they color the background meaning of “without which” in subsections (e) and (f). In order for a party to enter a settlement agreement it would not have *but for* the mediator misconduct, the misconduct must in some sense have impacted the party’s self-understanding. That is to say, the misconduct pierced the party’s autonomy and induced that party to enter into an agreement based on a false understanding of its own needs and interests. While it is plausible to envision facts that generate such a result, it is unlikely that most forms of misconduct, including even partiality by the mediator, could have such a dramatic effect. This is even more so when dealing with sophisticated commercial parties. The strong notion of autonomy at the center of mediation ethics mitigates against the ethics provisions in Article 5 having widespread application.

IV. The Shape of Mediation Ethics

The Singapore Convention seems to render ethics irrelevant except insofar as they bear on enforceability of mediated settlement agreements. The Convention places ethics largely outside its scope of concern and adopts an agnostic posture with respect to what standards should govern international commercial mediations. The Convention refers only to “standards applicable to the mediator or the mediation” without identifying what standards ought to apply. Yet its silence on this matter does not render the determination irrelevant. It makes it an even more critical task.

Mediation will continue to be regulated in diverse ways by diverse authorities. The Singapore Convention does nothing to disrupt the basic structure of the existing regulatory system. At the same time, mediation ethics matter in the ways detailed above and can be structured in a manner that complement the Convention. To this end, it is proposed that mediation ethics be informed by the following characteristics. These are general considerations, not

recommendations about the specific content of rules in a code of conduct. That determination is a prudential exercise of a different nature. However, formulating rules that effectively complement the Convention and the needs of international commercial mediation requires first identifying the broad characteristics that should inform a code of conduct.

1. Universality: Efforts should be made to agree on core common standards that define ethical mediation practice. As discussed more fully in Section V below, there is already significant agreement around foundational standards, even though differences exist in the formulation of these standards. Although the Convention does not require such universality, and indeed seems to expressly permit ethical pluralism, greater synchronicity benefits the system created by the Convention.³² Universality promotes predictability. Lack of clarity and consistency in governing ethical norms injects uncertainty into the system. It makes it more difficult to predict if a competent authority would find a serious breach and might even increase the likelihood of parties challenging recognition. Moreover, even if the standards provisions in Article 5 are rarely invoked, international commercial mediation benefits from greater harmonization of standards across organizations and jurisdictions. A high degree of harmonization minimizes ethical uncertainty as well as the chance a mediator could be subject to simultaneous conflicting norms.³³

2. Minimalism: When it comes to codes of mediator conduct, less is often more. The governing ethical principles in a

³² *Gonclaves et al.*, argue that Article 5(e) “could create an expectation of uniformity” by referring to “standards applicable to mediation.” Viewed in its broader context, however, it seems clear that the text of Article 5 neither imposes nor anticipates uniformity of ethical standards. *Gonclaves, et al.*, “Beyond the Singapore Convention,” 165.

³³ *Cather Rogers* terms this the problem of “double deontology.” It is more likely to arise in connection with lawyering in international arbitration, though it exists as a potential problem for mediators. *Catherine Rogers, Ethics in International Arbitration* (Oxford: Oxford University Press, 2014): 107.

code should be limited to essential foundational norms. In international commercial mediations all the more, the aim of a code of ethics is to facilitate a fair and predictable process and not to make mediation moral in a broader sense. In this respect, it is appropriate that there be aspects of the mediation process not subject to express regulation. More regulation comes at the expense of stifling flexibility. More rules also mean more opportunities for a settlement agreement to be challenged on the grounds of misconduct under the applicable standards. As such, a disposition toward liberality in regulation is preferable. While more detailed regulations might be appropriate in certain specialized contexts, it is generally counter to the needs of parties engaged in an international commercial mediation and does not enhance the operation of the Singapore system.

3. Rules over Values: Ethical principles should be clearly defined and take the form of rules that relate to specific mediator conduct. There is a tendency at times within mediation ethics to speak in terms of general values, which can lead codes of ethics to become aspirational texts ambiguous as to their actual application. Even widely accepted concepts such as impartiality and neutrality, which are expressly referenced in Article 5(1)(f), straddle the line between normative principles and general values. When not connected to delineated obligations, ethical concepts can become problematically vague. For instance, does the principle of impartiality prohibit expressed bias or does it commend a specific psychic disposition towards the parties and the process? Such ambiguities can be minimized through clear drafting but, as a more general matter, it is preferable to structure codes around deontological rules rather than more abstract values.

Rules are also more effective when they are defined in terms of conduct rather than outcome. To put the point differently, rules defined in terms of party rights rather than mediator obligations are more difficult to apply and more subject to interpretive variation. By way of illustration, Rule 4.2 in the CEDR Code of Conduct for Third Party Neutrals provides that the neutral “will ensure that the

parties and their representatives all have adequate opportunities to be involved in the Process.” While the general aim of the rule is clear enough, its application is riddled with potential uncertainty. How does one “ensure” that parties are involved in the process? And involved in what way and to what end? How does one measure whether a mediator has met this obligation? A requirement such as this could be valuable and necessary in certain contexts (e.g. family law disputes), but as applied to international commercial mediations it merely injects ambiguity with little associated benefit.

V. Ethics after Singapore: A Modest Proposal

This concluding section takes the analysis further by considering what norms should govern international commercial mediation and how such norms should be developed and promulgated.

Goncalves, Bogacz, and Rainey argue that “there are no universally accepted ‘standards’ for the mediator’s conduct, and even less for the mediation practice as a whole.”³⁴ This claim is correct in important respects. After all, this essay has stressed the extent to which the field of mediation is defined by ethical pluralism, both in terms of the governing norms themselves and the diverse sources from which such norms are derived. At the same time, it would be inapposite to assert that there no universal standards. To the contrary, there is a high level of consensus around certain foundational ethical principles of mediator conduct. It is not a thin consensus but a deep shared understanding of what Noone and Ojelabi term the “core values” of mediation.³⁵

Indicative of this consensus are the similar principles that appear time and again in the codes of conduct of leading mediation providers and accrediting bodies. The degree of harmonization around these concepts is striking. For instance, the American Bar

³⁴ Goncalves, et al., *"Beyond the Singapore Convention,"* 165.

³⁵ Noone and Ojelabi, *"Ethical Challenges for Mediators around the Globe,"* 161. The authors identify neutrality, self-determination, voluntariness, and confidentiality as four central ethical principles for mediation.

Association Model Standards of Conduct for Mediators is organized around the principles of self-determination, impartiality, conflicts of interest, competence and confidentiality.³⁶ The CEDR Code of Conduct for Third Party Neutrals identifies competence, independence, neutrality, and confidentiality as its central ethical concepts.³⁷ The Australian National Mediator Accreditation System Practice Standards are structured around competence, self-determination, informed consent, impartiality, and confidentiality.³⁸ The International Mediation Institute (IMI) Code of Conduct names impartiality, confidentiality, and competence (under the heading of diligence) as its cornerstone principles.³⁹ Across organizations there exists a high degree of shared understanding as to the principles around which a code of mediation ethics should be structured.

There are differences, of course, in how these concepts are framed. Similarity in name does not necessarily entail full agreement in meaning. Sometimes differences in language or conceptualization are significant. Yet even amidst such diversity, the codes rest on a common nucleus of ethical understanding.

Differences among the codes often relate to the methodology employed in defining core concepts. Some codes like CEDR Code of Conduct for Third Party Neutrals present principles at a rather high level of abstraction. The CEDR Code, for instance, requires that a neutral “will at all times act and endeavour to be seen to act fairly, independently and with complete impartiality towards the Parties in the Process, without any bias in favour of, or discrimination against, any of the Parties.”⁴⁰ This is a straightforward definition albeit one that hinges on the meaning of

³⁶ *American Bar Association Model Standards of Conduct for Mediators, Standards 1-5.*

³⁷ *CEDR Code of Conduct for Third Party Neutrals, Articles 2, 4.*

³⁸ *Australian National Mediator Accreditation System Practice Standards, Articles 2, 5, 6, 7.*

On the core ethical categories in the Australian National Mediator Accreditation System see Wolski, “An Ethical Evaluation Process for Mediators,” 72-81.

³⁹ *International Mediation Institute Code of Conduct, Articles 2, 3, 5.*

⁴⁰ *CEDR Code of Conduct for Third Party Neutrals, Article 4.1.*

key terms such as fairness, independence, impartiality, bias, and discrimination that are not examined or defined.

The ABA Code goes further in developing the meaning and application of its core principles. For instance, the Code defines impartiality as “freedom from favoritism, bias or prejudice.”⁴¹ It adds that a mediator shall act in an “impartial manner” that includes avoiding “partiality or prejudice based on any participant’s personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.”⁴² Nothing about these provisions contradicts what is provided in the CEDR Code, but they do grant an additional layer of detail and explication.

The 2018 Code of Ethics for Mediators in Israel offers yet another approach to conceptualizing norms. This Code provides particularly detailed definitions of concepts along with guidance on how the provisions are to be applied in practice. For instance, the Code defines impartiality in terms of “freedom from external manifestations of favoritism of one party over another in word or action.”⁴³ The Code then proceeds to offer a nuanced account of how a mediator should exercise impartiality prior to and during the conducting of a mediation. According to the Code, a mediator shall refuse to accept a case if there exists a “reasonable concern that he will not be able to conduct the mediation impartially or without an appearance of partiality, in circumstances that could jeopardize the standing of the profession, process, or mediation center and public trust in them.”⁴⁴ Moreover when conducting a mediation, the mediator shall avoid conduct that favors a party or “might appear as an act of favoritism in the eyes of a reasonable person.”⁴⁵ The Code expressly provides that a mediator not prefer a party “because of his race, ethnicity, sex, age, religion, nationality, sexual orientation, personal characteristics, background, values and beliefs, or conduct

⁴¹ *American Bar Association Model Standards of Conduct for Mediators, Standard II(A)*.

⁴² *American Bar Association Model Standards of Conduct for Mediators, Standard II(B)(1)*.

⁴³ *Code of Ethics for Mediators in Israel, Standard II*.

⁴⁴ *Code of Ethics for Mediators in Israel, Standard II(A)(2)*.

⁴⁵ *Code of Ethics for Mediators in Israel, Standard II(B)(1)*.

at the mediation.”⁴⁶ The Code then proceeds to provide that impartiality is not an “absolute principle.”⁴⁷ There is “an exception to the principle of impartiality” in which the mediator might treat parties “differently in circumstances where same treatment will result in an advantage to a party or in harm to a party and preference is required to ensure the ethical right of a party to self-determination or other right in accordance with the Standards.”⁴⁸ This provision marks a notable qualification absent from other codes, which seem to vest the concept with a veneer of absoluteness.

These different approaches to defining core ethical principles such as impartiality reveal the extent to which there is diversity amidst unity among existing codes of conduct. The differences are to some extent stylistic in nature, but also reflect strategic decisions by drafters about language, theoretical exposition, and amount of detail. These varied accounts of the mediator’s duty of impartiality do not display facial inconsistencies, although they do invite the possibility of different interpretations. This has led Goncalves, Bogacz, and Rainey to argue that there is significant variation in how ethical concepts are understood.⁴⁹ The authors, for instance, argue that such principles as self-determination, objectivity, fairness and justice that frequently appear in codes of conduct “not only...differ in detail” but “can also be interpreted radically differently, depending on applicable cultural and legal norms.”⁵⁰ While it fair to consider the ways in which these codes project different forms of meaning, or least afford space for different interpretations, this is ultimately an overstated concern. In the end, existing codes of ethics, particularly from leading mediation organizations, are defined much more by what unites than divides. These codes certainly are not characterized by “radical” difference.

⁴⁶ *Code of Ethics for Mediators in Israel, Standard II(B)(1)(a).*

⁴⁷ *Code of Ethics for Mediators in Israel, Standard II(B)(2).*

⁴⁸ *Code of Ethics for Mediators in Israel, Standard II(B)(2).*

⁴⁹ Ana Maria Maia Goncalves, François Bogacz and Daniel Rainey, “Create a Universal Code of Disclosure,” (June 26, 2020) <https://imimmediation.org/2020/07/09/7-keys-profession-create-a-universal-code-of-disclosure/>

⁵⁰ Goncalves, et al., “Create a Universal Code of Disclosure.”

The basic conceptual understandings are similar, although expressed at times in divergent ways.

Even with this synchronicity across codes, there are reasons to push forward with the development of an even more uniform set of ethical norms for international commercial mediation practice. The conceptual resources for doing so are already in place. The challenge is to establish a mechanism for granting these shared norms greater reach and legitimacy.

There are a number of approaches that might be taken. One is achieving greater ethical harmonization through top-down legislative initiatives, such as through adoption of a model law on mediator conduct. This has in a limited way already been pursued with the UNCITRAL Model Law on International Commercial Conciliation. The first such model law of 2002 contains a section on Conduct of Conciliation (Article 6), though it is not in any significant respects a code of conduct.⁵¹ The Model Law of 2002 also addresses confidentiality in Articles 8 and 9.

The 2002 Model Law was amended by the 2018 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation. Provisions regarding Conduct (renamed Conduct of Mediation and now Article 7) remain unchanged. Most significantly, the 2018 Model Law is designed to be used in domestic implementation of the Singapore Convention. As such, it addresses issues such as enforcement not considered in the 2002 Model Law. The 2018

⁵¹ Article 6, *UNCITRAL Model Law on International Commercial Conciliation (2002)* provides:

1. *The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the conciliation is to be conducted.*
2. *Failing agreement on the manner in which the conciliation is to be conducted, the conciliator may conduct the conciliation proceedings in such a manner as the conciliator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.*
3. *In any case, in conducting the proceedings, the conciliator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.*
4. *The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.*

Model Law does this, in significant part, by incorporating as Article 19 the provisions of Article 5 of the Singapore Convention regarding grounds for refusing enforcement of a mediated settlement agreement. As with Article 5, Article 19 in isolation does not address the question of mediator conduct. It only creates a circularity problem by adopting Convention provisions regarding breach of mediator standards without providing guidance on the content of such standards. As such, the governing ethical standards with respect to the 2018 Model Law, like Article 5, are simply the “standards applicable to the mediator or the mediation.”

Even if a desirable strategy, standardizing international commercial mediation ethics through a model law is unlikely to prove successful. The 2002 Model Law, for instance, has only been adopted in 33 states and 45 jurisdictions.⁵² Iris Ng has proposed that lack of success with the 2002 Model Law might not indicate the same fate for the 2018 Model Law and the Singapore Convention. Still, widespread adoption of any model law is at best a slow and unpredictable process.⁵³

There is an additional problem with developing a model code of conduct within the existing UNCITRAL framework. Because Article 19 of the 2018 Model Law and Article 5 both employ the applicable standards approach, various norms might apply to the mediation by operation of law, choice of the parties, or as required by a mediation organization.⁵⁴ To connect the Model Law to any specific code of conduct would run counter to the text

⁵² “Status: UNCITRAL Model Law on International Commercial Conciliation (2002),”

https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status

⁵³ Iris Ng, “The Singapore Mediation Convention: What Does it Mean for Arbitration and the Future of Dispute Resolution?” (31 August 2019)

<http://arbitrationblog.kluwerarbitration.com/2019/08/31/the-singapore-mediation-convention-what-does-it-mean-for-arbitration-and-the-future-of-dispute-resolution/>

⁵⁴ “Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018),” Section 160

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/guide_to_mediation_model_law_draft.pdf

of the Singapore Convention itself. Nothing about the UNCITRAL Model Law, nor any other such model law, can overcome the problem of overlapping regulatory norms arising from different sources. Strict uniformity will remain elusive.

A second approach to harmonization is through a bottom-up process of party agreement. The idea is to promote baseline uniformity by developing a widely accepted code of ethics that parties could agree to adopt. A version of this tactic has been advanced Goncalves, Bogacz, and Rainey in advocating for development of a Universal Code of Disclosure. These authors propose that an international working group create a uniform disclosure statement containing a list of governing ethical principles. The Code of Disclosure would include such principles as independence, neutrality, impartiality, and confidentiality, and would also include disclosure of the mediation style, the mediator's role, conflicts, and the applicable complaint process. Application of these principles could be tailored to the needs and circumstances of any given dispute through agreement. The burden would rest on the mediator to inform the parties of such intentions and to seek consent.

The Universal Code of Disclosure would operate alongside other codes of conduct to which the mediator is beholden. The aim is not to displace existing codes but rather to bring greater overall clarity to the mediation process. The Universal Code of Disclosure thus seeks to standardize ethical norms while maintaining the intrinsic flexibility of the mediation process. It operates in a similar way to the idea of an "ethical checklist," a concept which has gained some traction in discussions of counsel ethics within international arbitration.⁵⁵ The concept behind the ethical checklist is that parties agree at the outside of an arbitration on the rules that govern attorney conduct and thereby give the tribunal clear authority to enforce violations. As with the ethical checklist, the Universal Code of Disclosure combines a list of standardized norms with flexibility to create bespoke arrangements within the governing framework.

⁵⁵ See Cyrus Benson, "Can Professional Ethics Wait? The Need for Transparency in International Arbitration," *Dispute Resolution International* 3:1 (March 2009): 78-94.

This is an intriguing proposal for inching mediation ethics towards greater universality. At the same time, it is a proposal that it is both unduly ambitious and unnecessarily complex. It seeks to achieve a form of ethical universality, particularly by implementing a standardized baseline that would inform the mediation process. Yet the ethical principles are presented at such a high level of generality, requiring the mediator and the parties to determine their meaning and application on a case-by-case basis, that the cumulative result is hardly universality. The “flexible and adaptable” Code of Disclosure is not a traditional Code of Conduct and will not replace such instruments.⁵⁶

A standardized Code of Disclosure could well prove a useful tool for bringing transparency to the mediation process and engaging parties in shaping the norms of the process. It would not, however, achieve greater uniformity. The authors envision that a Universal Code of Disclosure would contribute to the operation of the Singapore Convention by providing “a judge a set of mutually agreed ‘case-specific standards’ against which he or she will be able to measure ‘serious breaches’”⁵⁷ It might well have the opposite effect. Insofar as each mediation would be governed by a unique agreement and not a fixed standardized code of conduct, the result could be even greater diversity in language and interpretation. This would result in more opportunities for a competent authority to establish a serious breach. The inclusion of matters such as mediator role and style in the Code of Disclosure transforms professional techniques into ethical norms and likewise creates more opportunity for breach.

A third approach, and the one advocated in this paper, involves moving gradually towards a soft universality by building on existing organizational codes of conducts. The main actors in the development of international mediation standards are organizational providers, accrediting agencies, and other institutional actors within the dispute resolution and legal fields. These institutions, domestic

⁵⁶ *Goncalves, et al., “Create a Universal Code of Disclosure.”*

⁵⁷ *Goncalves, et al., “Beyond the Singapore Convention,” 168.*

and international alike, exert a preponderant norm-shaping influence over mediation practice. They also develop the rules and norms that govern a significant number of international mediations. They should take the lead in developing codes of conduct properly tailored to transnational profession in the post-Singapore context.⁵⁸

A truly universal code of mediation ethics is not realizable. It also neither necessary nor necessarily prudent. A degree of ethical pluralism is inevitable and reflective of the flexibility and dynamism of mediation. Still, greater synchronization around core foundational ethical norms – long-established concepts such as neutrality, independence, impartiality, autonomy, confidentiality that are widely shared – is a beneficial project. Thus, rather than pursuing strict uniformity, even of the more flexible sort envisaged in the Universal Code of Disclosure, a more realistic goal is to pursue enhanced collaboration at the organizational level in order to promote a shared understanding of mediation standards in light of the Singapore Convention framework. Such efforts could lead eventually to a common code of ethics, but this need not be the goal in order for such initiatives to be useful.

The notion that a bold proposal is needed to reshape the field of mediation ethics belies reality on the ground. The field does not need radical transformation but only modest nudging to reconceptualize norms in light of evolving circumstances. This work is already happening, for instance, through efforts by the International Mediation Institute and the International Bar Association to revise codes of conduct. These initiatives notably involve cross-representation of committee members, which will facilitate some degree of conceptual coordination. The sort of progress that could emerge out of these and other such efforts might be subtle but also exactly the sort of incremental adjustment that is required.

⁵⁸ *The sort of representative organizations would include, but certainly not be limited to, AAA-ICDR, ADR ODR, CEDR, IBA, IMI, JAMS, SIDRA, SIMC, and RICS. It would also be important to have engagement from more regional bodies who might offer distinct perspectives on ethical norms.*

These are modest aims. There is no urgent need to develop a universal code of mediator conduct and an accompanying enforcement institution, as has been proposed within the international arbitration community. For instance, the Swiss Arbitration Association called in 2014 for the creation of a Global Arbitration Ethics Council.⁵⁹ This proposed Council, composed of representatives from arbitration associations, would develop a code of core ethical principles and have enforcement and sanctioning power. Such a framework, arguably useful in the arbitration context, is ill-suited for mediation. Transformative change of this sort is not needed. The existing international system of regulation works rather well, especially in accommodating the diverse needs of the profession. It is possible that the Singapore framework will make challenges to enforcement more common and that ethical and regulatory schemes should therefore be devised with an eye towards minimizing undue interference with cross-border recognition.⁶⁰ Yet this is unlikely to be a significant problem given the restrictive posture of Article 5.⁶¹ The Convention is not a threat but an

⁵⁹ "ASA Proposes Global Arbitration Ethics Counsel to Apply and Enforce Ethical Principles," (16 September 2014) <https://www.arbitration-ch.org/en/asa/asa-news/details/979.asa-proposes-global-arbitration-ethics-counsel-to-apply-and-enforce-ethical-principles.html?querystart=11>

⁶⁰ *The Singapore Convention on Mediation: A Commentary*, 5.86. The authors note the possibility that "With the growth of commercial and investment international mediation practice, disgruntled parties will look increasingly not just to their professional advisers but to their mediators for redress."

⁶¹ Survey data revealed that there was not significant concern about enforcement challenges under an international mediation framework. For instance, survey participants were asked "Would you prefer that a Uniform Global Mechanism for Enforcement of mediation settlement include limited defenses similar to Article V of the New York Convention such as invalidity of the award under the law or incapacity?" 54% responded "yes" and 22% "no." See, David S. Weiss and Michael R. Griffith, "Report on International mediation and Enforcement Mechanisms,"

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjM7e6cz47wAhXbfH0KHYY6BDK4QFjAAegQIBBAD&url=https%3A%2F%2Fwww.imimediation.org%2Fdownload%2F72%2Fimi-private-libraries%2F3897%2Fimi-njcuidr-wgii-report2017v4-0-pdf.pdf&usq=AOvVaw1BlSqYMGzRq0Fhj-cBby9nD>

opportunity to think anew about the regulatory and ethical needs of the profession. The modest proposal advanced herein offers a way to begin developing a measured response to the emerging international framework.

Introduction

In Volume 11 (2018) of The American Journal of Mediation, I wrote a forward for the paper entitled “Rethinking the Limitations of Online Mediation.” That article gave us renewed energy to explore the wonderful opportunities available in supplementing our traditional approach of resolving disputes. This year, I want to highlight another example of a writer giving us practical ideas on how to further use and expand our mediation skills. Although this article focuses on community mediation programs and centers exclusively in Ohio, the purpose and value can be extended to your own jurisdiction. As correctly identified in the article, the goal of the mediation process is to “give each party a better understanding of one another.”

I encourage you to read this article. I hope this thoughtful paper will challenge all mediators to use their skills to help their communities solve problems of local and national importance. I invite you to challenge yourself to implement or encourage similar programs in your area. Giving individuals and organizations a better understanding of each other through mediation would certainly be a valuable outcome.

I thank **Keri Richardson** for her well-written paper “*Expanding Dispute Resolution in Ohio to Meet the Needs of Neighborhoods and to Strengthen Relationships Between City Officials and the Public*” and implore our readers to consider how using mediation can assist your community in tackling issues related to social justice and community relations.

Allen Schreiber
Editorial Board

**Expanding Dispute Resolution in Ohio to Meet the Needs
of Neighborhoods and to Strengthen Relationships
Between City Officials and the Public**

Keri Richardson

Introduction

Research studies reveal that community mediation centers are a powerful resource for productive conflict prevention, intervention, and response.¹ Disagreements among people are inevitable. When citizens learn to utilize constructive methods for resolving disputes, such as mediation, there can be a positive impact on interpersonal relationships and the community.² The key is connecting people to intervention resources before the conflict becomes detrimental.

The need for community dispute resolution is not a new concept. Since the late 1970s, community dispute resolution programs have emerged across the United States to facilitate community relations.³ Reasons for such need of community dispute resolution derive from conflicts that occur in neighborhoods. Conflicts range in severity from barking dogs to criminal assaults.

There is perhaps no greater instigator of community-based conflict than issues regarding police and the citizens they serve.⁴ Between 2014 and 2019, police in the United States killed 6,557

¹ *Community Mediation Basics*. Resolution Systems Institute. Available at: <https://www.aboutrsi.org/special-topics/community-mediation-basics> (Last Accessed December 4, 2020).

² *Id.*

³ Lawrence E. Susskind and Sarah McKernan. "The Evolution of Public Policy Dispute Resolution." 16 *J. OF ARCHITECTURAL AND PLANNING RESEARCH* (1999) 96-115.

⁴ Nejeeba Syeed-Miller, "Developing Appropriate Dispute Resolution Systems for Law Enforcement and Community Relations: The Pasadena Case Study." 22 *OHIO ST. J. ON DISP. RESOL.* (2006) 83-104.

people.⁵ Over twenty-five percent of those killed were Black although Black Americans make up less than five percent of the overall population.⁶ The most prominent names, Philando Castile, Mike Brown, Eric Gardner, Breonna Taylor, and George Floyd spurred community outrage and nationwide press coverage. The public's reaction to the result of investigations, the release of livestream video and body-camera footage, and the acquittal of certain officers, led to protests, multiple subsequent arrests, and community upheaval.

The purpose of this paper is to evaluate the need for community dispute resolution in Ohio (using Cleveland, Dayton, and Columbus as case studies) and assess how existing community resolution centers are facilitating services to meet the need. Specifically, within minority communities, feelings of being unprotected by law enforcement have heated up and gained traction during the summer of 2020. The need for community dispute resolution at the initial stages of conflict is imperative to maintain strong community relations between city officials and the public. Thus, this paper will also focus on strengthening community relations between city officials and the public through mediation and provide recommendations for mediation centers to implement a citizen/police mediation program.

Specifically, community mediation centers in Ohio should consider expanding their services to offer dispute resolution processes that will strengthen relationships between public officials and citizens. This includes developing processes that provide an opportunity for dialog between police officers and the citizens they are policing. An open line of communication between police and citizens allows for healthier communal relationships. In developing such processes, this paper recommends a set of standards to be followed.

⁵ Amanda Rapace, "Philadelphia police killing reminiscent of Perth Amboy tragedy." *NJ Today* (October 28, 2020) Available at: <http://njtoday.net/2020/10/28/philadelphia-police-killing-reminiscent-of-perth-amboy-tragedy/> (Last Accessed December 4, 2020).

⁶ *Id.*

Background on Community Dispute Resolution in Ohio and the United States

In the late 1960s and early 1970s, the Civil Rights movement created a social climate ripe for dispute resolution.⁷ During this time, a community dispute resolution movement developed as a nexus for empowering communities and spreading a culture of peace.⁸ The Civil Rights movement was an important concept in community dispute resolution: "when people develop, change, or modify any social programs, there will be an impact on society beyond its immediate scope."⁹ Under the Civil Rights Act of 1964, the U.S. Community Relations Service (CRS) was established to help amicably resolve racial and ethnic disputes in communities.¹⁰ The CRS initially served a conciliatory function (an approach in negotiation that seeks to overcome the distrust or animosity of one's counterpart) and later added a mediation component (intervention in a dispute in order to resolve it).¹¹

In 1971, the first Ohio dispute resolution program was founded in Columbus.¹² The Night Prosecutor program was started by John Palmer, a law professor at Capital University Law School, and James Hughes, City Attorney.¹³ The program operated at night with law students working under faculty supervision. Resolved disputes mainly consisted of low-level offenses that did not amount to a criminal offense.¹⁴ The parties typically had a relationship such

⁷ Kelsey Schwarzrock, "The Process of Peace: Using Community Dispute Resolution to Improve the Relationship Between Police and Community in Minnesota." 39 MITCHELL HAMLIN L.J. OF PUB. POL'Y & PRAC. (2018) 88-123.

⁸ *Id.*

⁹ *Id.* at 91.

¹⁰ *Id.*

¹¹ *Id.* at 92.

¹² John Palmer, Eileen Pruett, Scott Dewhirst interview. "Dispute Resolution: A History of Ohio's Leadership in Court-Connected Dispute Resolution." *The Ohio Channel* (2018) Available at: <http://www.ohiochannel.org/video/dispute-revolution-a-history-of-ohios-leadership-in-court-connected-dispute-resolution> (Last Accessed December 4, 2020).

¹³ *Id.*

¹⁴ *Id.*

as neighbors, friends, or roommates. During the first year, approximately four thousand cases were mediated with a 97% success rate, success being measured by how many people came back within a two-month period to file new charges.¹⁵

By 1978, when only about a dozen community dispute resolution programs existed nationwide, the United States Department of Justice issued grants for neighborhood justice centers in Los Angeles, Kansas City, and Atlanta.¹⁶ Subsequently, the community dispute resolution movement steadily grew. In 1980, the American Bar Association Standing Committee on Dispute Resolution reported over 100 neighborhood and community dispute resolution centers.¹⁷

Mediation activists came to Columbus to learn about dispute resolution in order to replicate programs in other parts of Ohio. The Night Prosecutor program expanded from just Capital Law students to include Ohio State University law students. The Columbus program served as a basis for the Multi-Door Dispute Resolution intake model.¹⁸ The project was funded through a block grant from the Federal Law Enforcement Assistance Administration (LEAA) to the Ohio State Planning Agency – the Administration of Justice Division (AJD).¹⁹

In the early 1980s, Ohio courts were participating in a form of dispute resolution, which at the time, was called settlement conferences. In 1986, Settlement Week began in Columbus, through the efforts of James Readey, president-elect of the Columbus Bar Association, and Harold Paddock, chair of the Columbus Bar Association Alternative Dispute Resolution Committee, and a court referee.²⁰ By 1988, The Ohio State Bar Association and Supreme

¹⁵ *Id.*

¹⁶ James Coben, "Community-Based Dispute Resolution." 12 *HAMLIN J. PUB. L. & POL'Y* 13 (1991) 13-34.

¹⁷ *Id.*

¹⁸ 1 *OHIO ST. J. ON DISP. RESOL.* 7.

¹⁹ *Citizen dispute settlement: The Night Prosecutor Program of Columbus, Ohio: a replication manual - 1974*

²⁰ Harold Paddock, Frank Motz, David Doyle, Art Marziale interviews; "Settlement Week in Ohio" by Kathleen M. Mahoney, 10 *Ohio Law.* 14, 1996.

Court of Ohio joined the effort to encourage Settlement Week programs throughout the state.²¹

The Wall Street Journal sent a reporter to do a story on the first settlement week in May of 1986. Afterward delegations from Texas came up to observe settlement week. Eventually South Carolina, Montana, and several other places got settlement week going locally. Some other states started settlement week in their jurisdiction, using the Columbus program as a model for their process and forms.

Today there are over 300 mediation centers in at least forty-eight states and the District of Columbia.²² The past decade has seen not only a growth in mediation programs, but also larger budgets and increasing institutionalization.²³ More and more frequently, community centers formally ally with courts, the criminal justice system, or other public agencies.²⁴ In 2011, Justin Corbett, Executive Director of the National Association for Community Mediation stated, “Community mediation moves us beyond conflict. These mediation programs keep our communities moving forward through emotional, relational, and all manner of seemingly impassable difficulties. They engage with great humility and skill hundreds of thousands of our worst communal and personal moments; finding within, the promise of empowered, enlightened tomorrows. Community mediation takes the worst of where we occasionally sometimes find ourselves and helps us clear a path toward where preference and progress favor.”²⁵

²¹ “Settlement Week in Ohio” by Kathleen M. Mahoney, *10 Ohio Law. 14*, 1996.

²² James Coben, “Community-Based Dispute Resolution.” *12 HAMLINE J. PUB. L. & POL’Y 13* (1991) at 13.

²³ *Id.*

²⁴ *Id.*

²⁵ Justin R. Corbett and Wendy H. Corbett. “2011 The State of Community Mediation.” *The National Association for Community Mediation.* Available at: https://cdn.ymaws.com/www.nafcm.org/resource/resmgr/State_of_Community_Mediation.pdf (Last Accessed December 4, 2020)

Community Dispute Mediation Across Minority Neighborhoods

Community dispute resolution focuses on the future and how social and societal impact can be made as a result of the resolution of disputes.²⁶ At its onset, alternative dispute resolution was a response to the monopolization of formal legal institutions and dispute resolution processes by the upper-class.²⁷ This monopolization prevented lower-class community members from “learning how to master their own environments and ultimately, their own lives.”²⁸ As a reaction to these tensions, a community empowerment movement surfaced to improve lower-class communities.²⁹ Concurrently, the support of community justice gained momentum in response to the alienation and disempowerment of Black Americans during the mid-1960s, which echoed the ideals of President Lyndon Johnson’s “war on poverty.”³⁰ This parallels other community justice efforts that occurred around the same time.³¹

Community mediation as means for lower-class community empowerment has manifested itself through local city council community boards that sought to set up an “alternative governance structure,” which included dispute resolution. These community responses during a time of isolation and disapproval of Black Americans in the 1960s mirrors disparity among races today. African Americans, other people of color, and those in poverty did not have ready access to courts, and therefore did not have ready access to justice. “Separate but equal was ‘the law,’ but it was not justice.” This movement was about bringing to light inequity and focusing on justice.

²⁶ Kelsey Schwarzrock, “The Process of Peace” 39 MITCHELL HAMLINE L.J. OF PUB. POL’Y & PRAC. (2018) at 91.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

Community justice centers are collaborative court programs in partnership with city agencies and community groups.³² Community justice centers represent progressive reform to the current criminal justice system by addressing the primary issues facing the individual and not just their crime.³³ Community justice centers adopted mediation, likely with the direct intention of “nurturing positive relationships within the community,” because it was “characterized by its supporters as antithetical to adversarial dispute resolution processes.”³⁴

States across the nation, have effectively used community dispute resolution services to strengthen relationships between city officials and the public. The mission of the Western Justice Center Foundation (WJCF) in Los Angeles County, California is to work with children, schools, communities, courts, and government to assure peaceful conflict resolution and improve access to justice.³⁵ In 2005, Pasadena Police Chief Bernard Melekian approached the WJCF after an officer-involved shooting to develop some method for engaging the community in constructive conversations on mutual concerns.³⁶

The overall purpose of the program was "to partner with the Pasadena Police Department and the Pasadena Community to improve the lives of citizens and police officers, through mutual conflict resolution processes and engaging everyone within the community."³⁷ Two methods of engagement were identified to serve this purpose: (1) Provide the Pasadena community and police department with an effective method of resolving situations that emerge between police and community members, through a neutral third-party intervention of mediation; (2) Provide the Pasadena

³² *Community Justice Center. The Superior Court of California: County of San Francisco.* Available at: <https://www.sfsuperiorcourt.org/divisions/collaborative/community-justice> (Last Accessed December 4, 2020).

³³ *Id.*

³⁴ *Id.*

³⁵ Nejeeba Syeed-Miller, “The Pasadena Case Study.” 22 *OHIO ST. J. ON DISP. RESOL.* (2006) at 84.

³⁶ *Id.*

³⁷ *Id.*

community and police department with an effective method of engaging one another on community-wide issues through a dialogue process that is both responsive for particular situations and also available as an ongoing tool for discussing issues.³⁸

Similar to what the WJCF set out to accomplish in Pasadena, other communities have tried to strengthen relationships between the community and law enforcement. In February 2012 the City of Sanford Florida suffered the tr loss of Trayvon Martin. As a result of the tension and the barrage of national media coverage, the already strained relationship between the Sanford Police Department and the community (the Black community in particular) reached crisis levels as communications and negotiations between City Officials and concerned citizens deteriorated turning into accusations, demands and threats. Community leader and retired dispute resolution professional, Andrew Thomas Sr., created the Community Relations Enhancement Initiative to prevent discrimination by ensuring that all people in the City of Sanford are treated fairly and have equal access to opportunities in employment, housing and certain public accommodations; and to promote mutual respect amongst groups through education and collaboration.³⁹

The initiative established a nine-point plan to enhance community relations between the public and police. The action plan included: establishing a formal working relationship with the Florida Commission on Human Relation, requesting the DOJ to conduct an investigation of the Sanford Police Department's overall pattern and practice for civil rights violations, and creating a Director of Community/Human Relations staff position to be responsible for follow-through, coordination and implementation of the next step action plans.⁴⁰ In the two-year progress report issued

³⁸ *Id.* at 85.

³⁹ *Community Relations Enhancement Initiative: Mission, Vision & Core Values. City of Sanford Florida. Available at: <https://www.sanfordfl.gov/residents/community-relations> (Last Accessed December 4, 2020).*

⁴⁰ *Nine Point Plan. City of Sanford Florida. Available at: <https://www.sanfordfl.gov/residents/community-relations/nine-point-plan> (Last Accessed December 4, 2020).*

in 2014, the City of Sanford established a collaborative working relationship with the Holocaust Memorial Resource and Educational Center of Central Florida and the Islamic Society of Central Florida Center for Peace.⁴¹ Although their plans and results varied, both Pasadena and Sanford took initiative to strengthen and repair relationship between city officials and the community.

Current Community Mediations Services in Ohio

For over 35 years, the cities of Columbus, Dayton, and Cleveland have sustained community mediation programs. This section of the paper will discuss each mediation center individually. The purpose of this section is to assess how mediation programs are servicing each community and their effectiveness.

Cleveland Mediation Center

The Cleveland Mediation Center (CMC) is a 501(c)3 non-profit organization founded in June 1981 as the Community Youth Mediation Program (CYMP).⁴² The first mediation class trained 18 community members and peer mediation began in Cleveland Public Schools.⁴³ By 1990, CYMP increased its community involvement beyond youth-related disputes and changed its name to CMC to reflect its broader services.⁴⁴ The CMC now offers community members access to mediation services to help resolve conflicts within their neighborhoods and communities.⁴⁵ In 2011, the CMC began receiving grants from United Way for a Community and

⁴¹ *Nine Point Plan | Action Plan for Reuniting the Community One City – Many Communities Two Year Progress Report April 2012 - April 2014*. Available at: <https://www.sanfordfl.gov/home/showpublisheddocument?id=11455> (Last Accessed December 4, 2020).

⁴² *CMC's 35 Year History*. Cleveland Mediation Center. Available at: <https://www.clevelandmediation.org/history> (Last Accessed December 4, 2020).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Mediation Services*. Cleveland Mediation Center. Available at: <https://www.clevelandmediation.org/community-mediation> (Last Accessed December 4, 2020).

Family Mediation program so clients can use mediation to avoid the court system. Under the CMC, located at 1701 Payne Ave. in Cleveland, community members can mediate neighborhood conflicts such as noise, pets, property, trespassing, or disagreements between neighbors or roommates at little to no cost.⁴⁶ Community members can also mediate landlord/tenant issues like payment of rent, repairs, property damage, guests, noise, communication, and other disputes.⁴⁷

The Director of the CMC is Danielle Cosgrove.⁴⁸ Cosgrove has 18 years of experience working in the non-profit sector with over 10 years working in the field of mediation and conflict resolution.⁴⁹ She is responsible for overseeing the day to day operations of CMC, developing relationships with new community partners, expanding and publicizing CMC's training offerings, and exploring new areas of expansion.⁵⁰ The CMC is operated by three full-time staff: Tracy Callahan is the Shelter Mediation Advocate, Steven Molnar is the Mediation/Diversion Advocate, and Victoria Niles is the Mediation Advocate.⁵¹

In addition, the CMC provides many internship and volunteer opportunities.⁵² Individuals who have taken CMC's Fundamentals of Mediation Training are invited to sign-up to become a volunteer mediator.⁵³ All volunteer mediators are trained by CMC staff through face-to-face learning, observation, co-mediation, and reflective practice to discuss how the mediation process is going. CMC volunteers are required to commit to volunteering at CMC for a certain length of time and to assist with

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Staff Directory. Cleveland Mediation Center. Available at: <https://www.clevelandmediation.org/staff-and-board-directory> (Last Accessed December 4, 2020).*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Volunteer Opportunities. Cleveland Mediation Center. Available at: <https://www.clevelandmediation.org/volunteer-opportunities> (Last Accessed December 4, 2020).*

⁵³ *Id.*

other agency needs and programs. Other responsibilities may include office work, research, and data entry.⁵⁴

Each year the CMC issues an annual report that reviews each program's success for the year. 'Access to Justice' Community Mediation program decreased its reach over the period of 2012 to 2014 (2014 is the last annual report on their website). In 2012, CMC expanded its training to includes topics such as work-place disputes and served over 206 clients.⁵⁵ The next year in 2013, CMC served 197 clients.⁵⁶ The following year, in 2014 CMC through its "Access to Justice' Community Mediation Program provided conflict coaching and/or mediation services to only 182 people.⁵⁷ The decrease in reach correlates with CMC's reduced funding. In 2012, CMC received \$893,318 in public funding.⁵⁸ That number reduced to \$884,566 in 2013.⁵⁹ However, regardless of reduced funding, the CMC promotes just and peaceful community in Northeast Ohio by honoring all people, building their capacity to act, and facilitating opportunities for community members to engage in conflict constructively.

Dayton Mediation Center

The City of Dayton established the Dayton Mediation Center (DMC) in 1987 through a partnership between the City of Dayton's Division of Citizen Participation and Wright State University.⁶⁰ The vision for the DMC was to ease the impact of community conflicts

⁵⁴ *Id.*

⁵⁵ 2012 CMC Annual Report. Available at: https://f1d4f8dc-35ec-4256-af9e-bd6cbbf27fdb.filesusr.com/ugd/fe2715_bc6bc50505ce4b05bd24a63bcead582a.pdf (Last Accessed December 4, 2020).

⁵⁶ 2013 CMC Annual Report. Available at: https://f1d4f8dc-35ec-4256-af9e-bd6cbbf27fdb.filesusr.com/ugd/fe2715_241a9331ab2944859721e03b55312df8.pdf (Last Accessed December 4, 2020).

⁵⁷ 2014 CMC Annual Report. Available at: https://f1d4f8dc-35ec-4256-af9e-bd6cbbf27fdb.filesusr.com/ugd/fe2715_2a97e6c138f4424d9a80dc775cd8dfb7.pdf (Last Accessed December 4, 2020).

⁵⁸ See 2012 Annual Report.

⁵⁹ See 2013 Annual Report.

⁶⁰ Dayton Mediation Center. Available at: <https://www.daytonmediationcenter.org/> (Last Accessed December 4, 2020).

on public resources.⁶¹ The DMC intervenes in more than 1,000 conflict situations annually. The Center's services have been utilized by residents, neighborhood organizations, businesses, employers and employees, schools, law enforcement agencies and court systems.⁶²

Michelle Zaremba is the Director of the DMC.⁶³ Zaremba is an experienced conflict mediator with expertise as a practitioner, trainer, and consultant.⁶⁴ She is also a Certified Transformative Mediator and Fellow with the Institute for the Study of Conflict Transformation, Inc.⁶⁵ Aside from Zaremba, the DMC team consist of 9 full-time staff members.⁶⁶ The DMC additionally offers volunteer opportunities. According to its website, the DMC conducts more than 1,000 mediations annually with the support of community volunteers. Intervention specialists have trained more than 1,500 citizen volunteers from diverse backgrounds and interests.⁶⁷

The DMC's Community Mediation Programs provides the environment to help people feel heard and support people in finding their way through conflicts with neighbors, family members, broken relationships, workplace situations, and others.⁶⁸ General mediation is free for those who live, work, or attend school in the City of Dayton and for others is \$200 per case or \$100 per case for non-profits.⁶⁹ The DMC works closely with the Montgomery County

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Our Team.* Dayton Mediation Center. Available at: <https://www.daytonmediationcenter.org/staff>. (Last Accessed December 4, 2020).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Become a vital part of the process and volunteer.* Dayton Mediation Center. Available at: <https://www.daytonmediationcenter.org/getinvolved> (Last Accessed December 2, 2020).

⁶⁸ *Community Mediation Program.* Dayton Mediation Center. Available at: <https://www.daytonmediationcenter.org/community-mediation-program> (Last Accessed December 2, 2020).

⁶⁹ *Id.*

Court of Commons Pleas and receives a majority of their clients through court referrals.⁷⁰

Located at 371 West Second Street in Dayton, the DMC takes a transformative mediation approach. Transformative mediation is non-directive, where there the mediator is not in a control position.⁷¹ The parties control the process and the outcome.⁷² For an upcoming community mediation, the DMC encourages parties to prepare for the conversation by thinking about the following questions: What's the hardest part of this situation for you?; What do you want the other person(s) to understand about you that might help in resolving matters for him/her?; If you could only have one thing come out of your conversation, what would that be?; What are you willing to do to help that happen?; and What, if anything, do you want to understand about the other person?⁷³

In their 2017 community report, the DMC addressed the effectiveness of their conflict intervention services.⁷⁴ The DMC highlighted their expanded presence in the Dayton region and beyond as the leader in conflicts intervention services. Local achievements of the DMC include collaboration with Community Mediation Services of Central Ohio for the Collaboration/Eviction Mediation Program in 2014 and Montgomery County Sheriff's "Moving On" program in 2016.⁷⁵ The DMC's state-wide successes include developing the state of Ohio Workplace Mediation Program in 2013 through 2016 and Dayton's Correctional Institution Peer Mediation Program in 2017.⁷⁶

⁷⁰ *Id.*

⁷¹ *Transformative Mediation video. Available at: <https://www.youtube.com/watch?v=9hzU1AmtMCU> (Last Accessed December 5, 2020).*

⁷² *Id.*

⁷³ *What to expect during a mediation. Dayton Mediation Center. Available at: <https://www.daytonmediationcenter.org/whattoexpect> (Last Accessed December 2, 2020).*

⁷⁴ *2017 DMC Annual Report. Available at: https://0a71d5ac-eee4-4dd0-bb12-8d6066e399be.filesusr.com/ugd/9e0409_60ac9ecc1ed64eb0b24c84106426a90c.pdf (Last Accessed December 3, 2020).*

⁷⁵ *Id.*

⁷⁶ *Id.*

Community Mediation Services of Central Ohio

The Community Mediation Services of Central Ohio (CMS) has been servicing the greater Columbus area since 1989.⁷⁷ CMS was created by the Columbus Bar Association and a coalition of diverse community leaders from law enforcement, the courts, business community, public and private human services, and the schools.⁷⁸ Located on the historic campus of the Jefferson Avenue Center, CMS provides mediation services to individuals, groups, and organizations.⁷⁹ Conflict mediation services focus on four types of conflicts: tenant/landlord, neighborhood disputes, family conflicts, and workplace disputes.⁸⁰ CMS is partially funded by the American Arbitration Association (AAA). AAA has provided CMS with over \$25,000 annually to support on-site mediators.⁸¹ Additional CMS funders include: the Columbus Bar Foundation, the City of Columbus, Franklin County Commissioners, the Siemer Family, and Harry C. Moore's Foundation.⁸²

Shelley Whalen is the Executive Director and Lead Trainer of CMS.⁸³ Whalen has successfully mediated hundreds of disputes including complex cases involving elected government officials, fortune 500 companies, entire neighborhoods and school districts.⁸⁴

⁷⁷ *History. Community Mediation Services of Central Ohio. Available at: https://communitymediation.com/about_us/what_we_do/history.html (Last Accessed December 4, 2020).*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Mediation Services. Community Mediation Services of Central Ohio. Available at: <https://communitymediation.com/mediation/> (Last Accessed December 5, 2020).*

⁸¹ *Make a donation. Community Mediation Services of Central Ohio. Available at: <https://communitymediation.com/support/donate.html> (Last Accessed December 5, 2020)*

⁸² *Id.*

⁸³ *Shelley Whalen, Executive Director. Community Mediation Services of Central Ohio. Available at: https://communitymediation.com/about_us/who_we_are/executive-director.html (Last Accessed December 7, 2020).*

⁸⁴ *Id.*

She also regularly designs and conducts conflict resolution and mediation training programs for attorneys, government and business representatives, educators and mental health professionals throughout the country.⁸⁵ CMS is governed by a seven independent member Board of Directors. Volunteers assist with activities such as administrative support, fundraising and community outreach events. Some CMS volunteers also provide mediation services. A pool of approximately 25 highly skilled volunteer mediators are maintained to provide conflict resolution services to those in need of assistance in the Central Ohio community.⁸⁶

In the past CMS engaged in discussions with the City of Columbus to develop a mediation system between the Columbus Police Department and civilians who file complaints with internal affairs against officers. The purpose of the proposed mediation system would purpose be for the parties to voice their perspectives and concerns in order to reach a mutual understanding and strengthen relationships. Types of complaints that could possibly be mediated between citizens and police include allegations of police not answering questions and claims of disrespect. Participation in the program would be voluntary and there is hope that the mediation program will provide an opportunity for citizens and police to discuss the importance of good communication, including how demeanor and tone of voice can prevent, deescalate, or resolve conflict. The police/civilian mediation program has not yet been implemented and the future of the program remains uncertain. However, it is important to note that CMS is the only Ohio mediation center studied that has considered programming for disputes between police and citizens.

⁸⁵ *Id.*

⁸⁶ *Volunteers. Community Mediation Services of Central Ohio. Available at: <https://communitymediation.com/about-us/who-we-are/volunteers.html> (Last Accessed December 3, 2020).*

Developing a Sustainable Community Dispute Resolution System for Improved Relationships between City Officials and the Public

Although Columbus, Dayton, and Cleveland have extensive community mediation programs, each program focuses on individual conflicts. No city has a sustainable city-wide mediation process for disputes between public officials and its citizens. This is alarming given that Ohio has experienced numerous tragedies at the hands of police. The deaths of Samuel DuBose in Cincinnati in 2015, Tamir Rice in Cleveland in 2014, and John Crawford III in Dayton in 2014 have traumatized Ohioans and negatively affected community relationships with the police.

In order to address the impact of conflict and in an effort to restore community relations with law enforcement, each community mediation center should expand the services it offers to develop and implement dispute resolution processes to enhance relationships between public officials and citizens. The mediation program should be open to all residents, collectively or in an individual capacity, who bring a complaint against an officer or the department. Types of complaints to be resolved in the mediation program include but, should not be limited to excessive force, unnecessary pointing of firearms at persons, improper search and/or seizure, invasion of privacy, and discourtesy/unprofessional attitude. An invasion of privacy claim is defined as the unjustifiable intrusion into the personal life of another without consent.

Benefits of the mediation program for police officers include a better understanding of interactions with citizens, an opportunity to explain actions to citizens, greater satisfaction with the complaint process, and a chance to learn from mistakes. Benefits of the mediation program for citizens include a greater opportunity to connect with officers, greater satisfaction with complaint process, a better understanding of policing, and a sense of empowerment. The most important benefit overall is the opportunity for dialog between officers and the citizens they are policing. An open line of communication between police and citizens allows for a healthier

communal relationship. Community mediation centers across Ohio should consider the following recommendations when developing a city-wide mediation process.

A. Recommendation #1 – Community mediation centers should promote using appropriate language when mediating between city officials and the public

For any system to be effective in addressing conflicts between communities and police, the potency of language in its many forms must be explored and considered.⁸⁷ This recommendation is focused around how both community members and police should interact within the mediation process. Outreach and involvement of community members by engaging them in language-appropriate methods are necessary for the success of any program. One example of successful outreach is the Minneapolis Civilian Review Board, which issued brochures on complaints in eight different languages reflecting the diversity of the users of their program.⁸⁸ Developing programs that are easily navigated and understood by a wide range of users, including those users who need languages services (interpreters) or who have visual, auditory, motor, or cognitive disabilities is key to reaching all possible community members. Mediators and facilitators must be keenly aware of how words, body language, and appearance greatly influence community and police relations. Their success depends on being able to translate these factors that influence communication effectively from one side to the other. Mediators should also set expectations at the outset of mediations for respect of the other party, use of neutral language (such as not targeting a single officer), and avoiding incendiary language.

⁸⁷ *Nejeeba Syeed-Miller, “The Pasadena Case Study.” 22 OHIO ST. J. ON DISP. RESOL. (2006) at 87.*

⁸⁸ *Id. at 88.*

B. Recommendation #2 – Community mediation centers should engage stakeholders in the development of the program

In the development of a community dispute resolution system, it is useful to use dialogic processes before engaging in the intervention.⁸⁹ This includes spending a significant amount of time talking to community members while developing the program. Additionally, whenever possible, police unions and city official should be consulted and invited to work on the creation of the dialogue and mediation program. In addition, civil rights leaders, either locally or nationally, should be invited to assist with the development of the program and offer feedback.⁹⁰

The purpose of including community members in the development of a community dispute resolution program is so that those invested with the community's concerns can help ensure that the program furthers their interests and does not compromise their rights. Often the nature of citizen complaints against officers are viewed as adversarial in nature. One of the major failures of any community and police mediation program is the resistance by officers internally. By engaging unions from the beginning, the program creates incentives for officers to participate.

C. Recommendation #3 – Community mediation centers should use dialogue, a less formal conversation process and mediation simultaneously to increase utilization and creditability in the mediation program

The use of dialogue as a contemporaneous process is less common for resolving citizen complaints against officers.⁹¹ Dialogue is an unfolding process of transforming and deepening understanding of others through listening, sharing and

⁸⁹ *Id. at 90.*

⁹⁰ *Id. at 91.*

⁹¹ *Id. at 92.*

questioning.⁹² For most people it is a new experience to disagree with others but still to be heard and accepted and not to be argued with or disapproved. A less formal process such as dialogue, where no particular resolution is agreed to, can help to bolster the credibility and utilization of the mediation process.⁹³ In the first year, the change in personnel procedures and outreach to the community can pose great challenges for any new police and community mediation program; the lack of information about mediation by both community and law enforcement can contribute to a lack of support for such programs.

D. Recommendation #4 – Community mediation centers should promote accountability on the part of the community and the police department to create lasting results for the mediation program

The open process can instill confidence in a department if the agency listens and responds to the concerns of the community. For law enforcement, it can be a challenge to meet with individuals who can express their own views on issues that impact their lives; dialogue provides that one-on one-contact.⁹⁴ Mediation, as a process, is limited in its public impact because of the necessary mechanisms for confidentiality, but is still a mechanism that can promote accountability, especially in concert with public dialogues.⁹⁵

Community leaders are also held accountable by their constituencies who are invited to the dialogue sessions.⁹⁶ The voice of the person can be amplified beyond a monolithic conceptualization of what a particular leader says is the major concern of the community. For example, in one of the major dialogue sessions held in Pasadena, California the outcome of the

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id. at 93.*

dialogue session for one group was not the relationship with the police.⁹⁷ Rather, the group felt that internal conflicts between their own communities were the true barrier to resolving community and police issues.⁹⁸

There was far more interest in intra-group dialogue with leaders and ordinary people instead of dialogue with the police as the first step. Dialogue allowed this marginalized community to create an "interior" space to discuss vital issues, before moving into the exterior space to work on relationships with the police department.

E. Recommendation #5 – Community mediation centers should create policy changes that have a greater impact than mediation alone

Mediation sessions may be viewed as isolated incidents that, in their entirety, can change and have an impact on community and police relations.⁹⁹ If the mediators can rise to the occasion and resolve the dispute, the session may transcend the initial sources of discontent and move parties to a greater understanding of one another. By providing private and safe spaces for resolving conflicts, mediation can transform people at the individual level. In order to have an impact on greater community consciousness or law enforcement policies, the combination of such a program with a dialogue process can prove invaluable.¹⁰⁰ The "micro-policy" shifts in a mediation session can be mirrored in the larger "macro-policy" shifts within the community setting or a department regulation.¹⁰¹

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id. at 94.*

¹⁰⁰ *Id. at 95.*

¹⁰¹ *Id.*

**F. Recommendation #6 – Community mediation centers
should encourage voluntary participation for the
program**

The tone of both the mediation and dialogic processes must be one that encourages participants to attend but leaves the ultimate decision to the parties involved.¹⁰² Officers have an incentive to attend because the resolution of the complaint against them may have a positive effect on their personnel records. For community members, attending the mediation allows them personally to have a chance to meet face to face and receive a fair hearing with neutral parties.¹⁰³ If there is no resolution, the matter continues through the investigation process. The tone of the engagement is voluntary. The combination of formal and informal contacts (via phone and letters) allows the parties to ask questions before the mediation and feel comfortable with the process.

Conclusion

The deaths of Samuel DuBose in Cincinnati in 2015, Tamir Rice in Cleveland in 2014, and John Crawford III in Dayton in 2014 have traumatized Ohioans and negatively affected community relationships with the police. Community mediation centers around Ohio are powerful resources for productive conflict intervention between the community and police to strengthen and stimulate that relationship. Columbus, Dayton, and Cleveland mediation centers all have legitimate infrastructures dedicated to mediating community disputes amongst neighbors. However, no mediation center has a process to mediate disputes between city officials and the local community they serve. Ohio mediation centers should take the above listed recommendations within the paper to expand their community mediation program and create a system so citizens can mediate a claim with a local city officer. The recommendations,

¹⁰² *Id.* at 96.

¹⁰³ *Id.*

taken collectively, can effectively produce a trustworthy process where civilians and city officials can come to a mutual resolution.

The ultimate goal of the mediation process is to give each party a better understanding of one another. For example, in mediation, community members can develop a better understanding of policing and the local policies of the police department. City officials can develop a better understanding of the culture in the communities they police. In return of understanding, community relationships between civilians and police should increase and many Ohioans, especially within minority communities can begin the healing process. Thus, Ohio mediation centers should expand their community mediation programs and create a system with citizens can mediate a claim with a local city officer to strengthen and increase community relations.

Introduction

After close to 35 years as a dispute resolution professional, I thought I had heard of every conceivable application of mediation; at least until encountering this remarkably well written article *Applying Bioethics Mediation to End-of-Life Care* by **Ariel Alvarez** of Arizona State University Law School. Our professional community is well aware of the endless array of commercial, political, societal, and cultural disputes in which the forces of mediated problem solving can apply. It was an intriguing revelation, however, to consider the prospect of mediating end-of-life care concerns.

The complexity and scope of these issues is daunting. To begin with, the interested parties go beyond the patient and the immediate family; they also include the doctors, nurses, therapists, and hospitals, who carry health care provider bioethical concerns which compel them to become comfortable with the end-of-life decisions as well. As this extensively researched and provocative article clearly points out, identifying the issues these parties bring to the table in these situations can be formidable. In the years ACCTM has held this contest, this is clearly one of the best articles we have had the pleasure of reviewing. A great read!

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Applying Bioethics Mediation to End-of-Life Care

Ariel Alvarez

INTRODUCTION

End-of-life care presents patients and their family members with some of the most difficult choices that they will ever make. Deciding if, when, and how to proceed with care creates a highly emotional situation that is ripe for conflict. Siblings may disagree with one another over whether their parent should be removed from life support, or a husband may wish to discontinue treatment against his wife's wishes. Bioethics mediation is a form of alternate dispute resolution that allows parties to meet and discuss their positions with the goal of reaching a mutually acceptable agreement. When used in end-of-life situations, bioethics mediation is an effective tool to help parties come to an agreement when it may have otherwise seemed impossible.

I. WHAT IS BIOETHICS MEDIATION?

Mediation is a form of alternative dispute resolution, a process wherein parties come to an agreement outside of court.¹ In mediation, parties meet with a neutral third party—a mediator—who facilitates negotiation and communication between the parties.² The mediator helps the parties to find a solution that is mutually agreeable so that their dispute can be resolved without proceeding to trial.³ Mediation is a voluntary process, as parties are not required

¹ *Alternative Dispute Resolution*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/alternative_dispute_resolution (last visited April 17, 2021).

² Amy Moorkamp, *Don't Pull the Plug on Bioethics Mediation: The Use of Mediation in Health Care Settings and End of Life Situations*, 2017 J. DISP. RESOL. 219, 223 (2017).

³ *Id.*

to reach an agreement and can retain control over all aspects of the agreement if they do choose to reach one.⁴ Mediators, unlike judges or arbitrators, do not have the authority to make a decision for the parties.⁵ They are also not interested in determining who is right or wrong.⁶

There are several benefits of mediation versus litigation or other forms of alternative dispute resolution. Mediation offers the potential to resolve a case in just a few hours, while court cases can take months to years to resolve.⁷ Parties can not only find a resolution and move on faster, but will spend less money than they would by going through the traditional court process.⁸ Mediation is also a confidential process, whereas court documents are public record and may be publicized if the case or parties are high profile.⁹ Nothing that is said in mediation can be revealed if the case proceeds to trial and the mediator will not speak about what is said throughout the process.¹⁰ The confidentiality of the process therefore allows parties to speak candidly and genuinely try to reach a resolution.¹¹ Finally, mediation is informal, and parties do not need to have representation.¹²

Bioethics mediation is a branch of mediation wherein the mediator acts as a third party to help resolve disputes in clinical settings.¹³ This type of mediation may be used to resolve disputes among health care providers, or between providers and patients and

⁴ *Mediation*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/mediation/ (last visited April 17, 2021).

⁵ *Id.*

⁶ NANCY NEVELOFF DUBLER & CAROL B. LIEBMAN, *BIOETHICS MEDIATION: A GUIDE TO SHAPING SHARED SOLUTIONS* 9 (Vanderbilt University Press 2011) (ebook).

⁷ *Advantages of Mediation*, U.S. OFFICE OF SPECIAL COUNSEL, <https://osc.gov/Services/Pages/ADR-Advantages.aspx> (last visited April 17, 2021).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Carol B. Liebman, *Introduction to the Symposium Issue on Alternative Dispute Resolution Strategies in End-of-Life Decisions*, 23 *OHIO ST. J. ON DISP. RESOL.* 1, 9-10 (2007).

patients' family members.¹⁴ The process “combines the clinical substance and perspective of bioethics consultation with the tools of the mediation process, using the techniques of mediation and dispute resolution”¹⁵ Through mediation, parties meet on a level playing field to express their views and feelings about treatment options and provide any applicable justification for their positions.¹⁶ Bioethics mediation may be used to enhance patient autonomy, to find common values between parties, or to help clarify institutional policy.¹⁷ In these mediations, the goal “is to agree on a care plan with which families, physicians, nurses, and other health care professionals are comfortable.”¹⁸

A. History and Development

The field of bioethics mediation is relatively new, having gained traction in the early twenty-first century.¹⁹ The term bioethics refers to the study of ethical issues and obligations surrounding biological and medical developments.²⁰ There are several major tenets of bioethics which drive healthcare decisions: patient autonomy, beneficence, nonmaleficence, and distributive justice.²¹ Patient autonomy emphasizes the patient's own choices in their care, and obligates providers to respect patients' wishes.²² When the patient is no longer able to communicate their wishes, the principle of patient autonomy guides care through trying to figure out what the patient would have wanted.²³ Beneficence is the obligation for providers to act for the benefit of the patient.²⁴ This principle requires providers

¹⁴ *Id.*

¹⁵ Nancy Neveloff Dubler & Carol B. Liebman, *Bioethics: Mediating Conflict in the Hospital Environment*, 59 *DISP. RESOL. J.* 32, 35 (2004).

¹⁶ *Id.* at 36.

¹⁷ Dubler & Liebman, *supra* note 6, at 10.

¹⁸ Liebman, *supra* note 13, at 10.

¹⁹ Nancy Neveloff Dubler, *A “Principled Resolution”: The Fulcrum for Bioethics Mediation*, 74 *LAW & CONTEMP. PROBS.* 177, 178 (2011).

²⁰ *Id.* at 177.

²¹ Dubler & Liebman, *supra* note 6, at 32.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

to promote the patient's best interests when providing care.²⁵ Non-maleficence is the obligation to do no harm to patients.²⁶ This requires providers to avoid intentionally inflicting harm, and to ensure that patients are aware of any harms that treatment could cause.²⁷ Finally, distributive justice is the idea that the benefits and burdens of healthcare should be allocated fairly.²⁸ This means that resources and burdens should be allocated free from discrimination.²⁹ Each of these tenets plays a major role in bioethics mediation and the outcomes that will be possible in each case.

As medicine has become more advanced, the number of treatment options and opportunities available to patients have increased, creating choices to be made.³⁰ With those choices has come the question of who should make them, and how they should be made.³¹ In the late 1970's, hospitals and other healthcare institutions began developing clinical ethics committees, responsible for reconciling emerging methods of care delivery with providers' duties and obligations to patients and their families.³² Clinical ethics committees are standard in hospitals today, and are generally responsible for advising institutional policy, educating staff, and completing case review.³³ Where these committees are primarily responsible for developing and analyzing the institution's policies, clinical ethics consultants focus on individual cases and patient interventions.³⁴ Consultants may be used to clarify any relevant policies, help patients and providers explore care options,

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Dubler, supra note 19, at 178.*

³¹ *Id.*

³² *Id. at 179-180.*

³³ *Jonathan D. Moreno, Ethics Committees and Ethics Consultants, in A COMPANION TO BIOETHICS 571, 573-574 (Helga Kuhse & Peter Singer eds., 2d ed. 2009) (explaining that most hospitals now have ethics committees as a result of the Joint Commission for the Accreditation of Healthcare Organizations' requirement that hospitals have a way to address ethical disputes as a condition of accreditation).*

³⁴ *Id. at 575.*

or advise providers on their duties and obligations.³⁵ The primary purpose of clinical ethics consultation “is to improve the process and outcomes of patient care by helping to identify, analyze, and resolve ethical problems.”³⁶ Consultation can be requested by the provider, the patient, or a family member of the patient.³⁷

Clinical ethics consultants have begun to use bioethics mediation to help parties reach an agreement.³⁸ Consultants were increasingly called to weigh in on cases, bringing with them a unique understanding of the clinical procedures at play, the ethical obligations of the providers, and the interests of the patients and their families.³⁹ The consultants were able to act as neutrals in analyzing scenarios, as they came in to each call with no prior knowledge of the facts and were not personally involved in prior decision-making, therefore holding no stake in the outcome.⁴⁰ Nancy Neveloff Dubler and Carol B. Liebman recognized the value of the interventions made by clinical ethics consultants, and the progress that they were able to make by creating “neutral turf” upon which the parties could have a conversation.⁴¹ They developed a model of mediation in which the parties could discuss the dispute and attempt to reach an agreement, which became known as bioethics mediation.⁴²

B. Bioethics Versus Traditional Mediation

Bioethics mediation is a specialized form of mediation dealing with sensitive subjects. The unique and often life-or-death nature of the clinical setting requires bioethics mediation to differ from more typical mediations in several ways.

³⁵ Dubler, *supra* note 19, at 182.

³⁶ Dubler & Liebman, *supra* note 6, at 7.

³⁷ Dubler, *supra* note 19, at 182.

³⁸ *Id.* at 185.

³⁹ *Id.* at 184.

⁴⁰ *Id.*

⁴¹ Dubler & Liebman, *supra* note 15, at 36.

⁴² *Id.*

Although the mediator is neutral as to the result of the conflict like in classic mediation, here they are often employed by the hospital or other health-care entity involved in the dispute.⁴³ They may therefore be familiar with parties on one side of the dispute, as the members of the care team are likely to have been through mediations or ethics consultations before.⁴⁴ This may cause the other party to question their neutrality.⁴⁵ However, the mediator does not have any prior knowledge of the case or the patient's history and is neutral to the outcome.⁴⁶ Mediators employed by the institution are preferred over third-party mediators for several reasons. As employees of the institution, the mediator can understand the rules and procedures that are affecting the case and access relevant medical records.⁴⁷ These cases also typically arise quickly and need a resolution as soon as possible because patient care is involved, so it is difficult to find and bring in an outside mediator in time.⁴⁸ Because the mediator is employed by the institution, they also tend to be involved with implementing and enforcing the agreement.⁴⁹

Parties to bioethics mediations will almost always be on an unequal playing field when a patient is a party.⁵⁰ When the mediator is employed by the institution, they are likely to be more familiar with one side of the dispute.⁵¹ The mediator is likely to be familiar with the providers because they have been through the process, and the provider's may have more familiarity with the process of mediation than the patients do.⁵² Power imbalances are also likely to arise because of differences in sophistication between the patient and the providers.⁵³ These disputes involve the discussion of medical diagnoses and prognoses, of which the care team has special

⁴³ Dubler, *supra* note 19, at 187.

⁴⁴ *Id.* at 188.

⁴⁵ *Id.*

⁴⁶ Dubler & Liebman, *supra* note 6, at 20.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Dubler, *supra* note 19, at 187.

⁵⁰ Dubler & Liebman, *supra* note 15, at 36.

⁵¹ Dubler & Liebman, *supra* note 6, at 20.

⁵² *Id.* at 21.

⁵³ Dubler & Liebman, *supra* note 15, at 36.

knowledge whereas the patient typically does not.⁵⁴ The patient and their family may therefore be inclined to follow whatever the medical team says if the mediator does not ensure that the parties can meet on a level playing field.⁵⁵ They can do so by frequently ensuring that the patient is being heard, explaining any terms or procedures that may cause confusion, and stopping the process if a party becomes overwhelmed.⁵⁶

In traditional mediation cases, the mediator generally does not need to have specific knowledge of the underlying subject matter of the dispute. Bioethics mediators, however, should have expertise in the fields of bioethics or medicine, as well as understandings of the legal obligations at play and the culture of the institution.⁵⁷ These disputes involve discussions of the patient's current condition, history of care, and future options, and it is important that the mediator understand so they can help facilitate the discussion between physician and non-physician parties.⁵⁸ The mediator should therefore have extensive experience in bioethics issues, and should have knowledge of health law and local health policy.⁵⁹ Bioethics mediators must also be comfortable dealing with highly emotional conflicts, as many of these cases literally involve life or death matters, and must be sensitive to cultural and religious differences.⁶⁰ This field provides a good opportunity to use co-mediators because of the special knowledge and experience requirements.⁶¹ It may be helpful to have one mediator with significant subject matter expertise, and another with general mediation or legal experience who can facilitate procedural aspects of the mediation.⁶²

Typically, parties to mediation appear voluntarily, are free to stop at any time, and can choose whether they wish to come to an

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Dubler & Liebman, supra note 6, at 20.*

⁵⁸ *Id.*

⁵⁹ *Liebman, supra note 13, at 10.*

⁶⁰ *Id. at 11.*

⁶¹ *Dubler, supra note 19, at 187-188.*

⁶² *Id. at 188.*

agreement. In bioethics mediations, when a patient's health outcome is the subject of the dispute, the process is less flexible.⁶³ If a decision is not made in mediation, the institution will have policies in place for what will happen next and how further decisions will be made.⁶⁴ The subject matter of these disputes also means that the parties are under stricter time constraints than they would be in a more traditional process, where they would typically be able to stop and come back to the dispute at any time.⁶⁵ Medical conditions may advance or change rapidly so the dispute must be resolved before changes in the patient's condition render discussions or agreements moot.⁶⁶

While typical mediations may involve the mediator memorializing the parties' agreement in a formal mediation agreement, resolutions in the bioethics mediations are memorialized through a note made in the patient's chart.⁶⁷ The chart note communicates the agreement and its reasoning to any providers that may not have been present at the mediation, so the patient receives cohesive care at all times.⁶⁸ It should clearly explain what happened, how it happened, and who was involved, so that anyone reading the chart can develop a clear picture of why and how the resolution was reached.⁶⁹

Furthermore, mediation is traditionally a confidential process for everyone involved. Confidentiality is a fundamental element of the traditional mediation process, upheld by statutes in many states and by the Federal Rules of Evidence. However, bioethics mediations involve disputes that impact patient care, and therefore the process is not entirely confidential. This is possible because parties to bioethics mediations do not sign agreements to mediate.⁷⁰ In bioethics mediations, there is limited confidentiality covering only

⁶³ See *id.* at 178.

⁶⁴ Dubler & Liebman, *supra* note 6, at 22.

⁶⁵ Dubler, *supra* note 19, at 178.

⁶⁶ Dubler & Liebman, *supra* note 6, at 24.

⁶⁷ Dubler & Liebman, *supra* note 6, at 88.

⁶⁸ *Id.* at 94.

⁶⁹ *Id.*

⁷⁰ Dubler & Liebman, *supra* note 6, at 26.

information that is not relevant to patient care, but any information that is relevant to care is not protected.⁷¹ This allows providers to discuss the outcome with any members of the care team that were not present at the mediation, as delivery of care would be difficult without discussing aspects of the mediation and any agreement that was made.⁷² However, because much of these mediations relies upon the discussion of patient care, there is often little remaining confidentiality.⁷³

Finally, whereas most typical mediations are comprised of two parties in conflict, bioethics mediations are often large mediations with multiple parties involved.⁷⁴ There are typically multiple members of the patient's care team present, who may or may not have the same interests.⁷⁵ The patient's side may also have multiple parties present, typically family members who are have an interest in the outcome.⁷⁶ The presence of large groups on either side of the dispute further supports the use of co-mediators to facilitate the discussion.

C. The Mediation Process

Bioethics mediation begins when the institution's mediator is requested to review the case, either by a member of the care team, the patient, or a family member of the patient.⁷⁷ The mediator may also hear about a dispute and approach the parties for a consultation.⁷⁸ The mediator then reviews the patient's chart, often by meeting with the care team to discuss any relevant medical

⁷¹ Liebman, *supra* note 13, at 14.

⁷² Haavi Morreim, *Mediating in Healthcare's Clinical Setting: Time for a Course Correction*, 35 *OHIO ST. J. ON DISP. RESOL.* 81, 94 (2019) (quoting Nancy N. Dubler & Carol B. Liebman, *Bioethics Mediation: A Guide to Shaping Shared Solutions* (Vanderbilt Univ. Press, rev. & expanded ed. 2011)) ("Good medical care requires that all providers share information about the patient's condition and care with each other across disciplines and between shifts.").

⁷³ *Id.*

⁷⁴ Dubler, *supra* note 19, at 187.

⁷⁵ Liebman, *supra* note 13, at 11.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Dubler & Liebman, *supra* note 6, at 44.

history and the patient's current status and prognosis.⁷⁹ If members of the care team disagree as to the best course of treatment, the mediator will work with them at that time to try to resolve the dispute.⁸⁰ The team and the mediator will also decide who will meet with the patient or family, taking into account which members of the team will most effectively communicate the medical issues and procedures influencing their position.⁸¹ The entire care team is typically not brought to mediation to avoid overwhelming the patient or further contributing to an existing power imbalance.⁸² The mediator will also typically have a preliminary meeting with the patient or family to introduce themselves and give a brief explanation of how the process will proceed.⁸³ In these preliminary meetings, the mediator will get a sense of what is causing the dispute.⁸⁴

After the initial review of the medical facts and meetings with the parties, the parties will be brought together in a formal mediation.⁸⁵ Like typical mediations, the parties are introduced and the mediator explains their role and how the process works.⁸⁶ The members of the care team will then explain the relevant medical facts of the case, as reviewed with the mediator. There are multiple advantages to beginning the mediation with the care team's summary of facts. This opening allows all parties to work from a common set of information, preventing the patient's family from stating positions based on false facts.⁸⁷ Beginning with the medical background also provides an initial opportunity for any party to ask questions about medical facts that they may be unsure about, or to ask for any more information that they may want.⁸⁸ Finally, a thorough explanation of the medical facts may lead to the

⁷⁹ Liebman, *supra* note 13, at 11.

⁸⁰ *Id.*

⁸¹ *Id.* at 12.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Dubler & Liebman, *supra* note 6, at 45.

⁸⁵ Liebman, *supra* note 13, at 12.

⁸⁶ *Id.*

⁸⁷ Dubler & Liebman, *supra* note 6, at 56.

⁸⁸ *Id.*

elimination of the conflict.⁸⁹ Sometimes, disputes arise from a lack of effective communication between the providers and the patient or their family members.⁹⁰ When they are given an opportunity to sit down and have their questions clearly answered, they may discover that they actually did not disagree or an agreement may be easier than they thought.⁹¹

Depending on the situation, the mediator may decide to have other members of the care team expand on the medical facts and their position after the initial presentation, or they may allow the patient or their family to speak next.⁹² When the patient or their family speak, the mediator uses typical mediation techniques to ensure that they are heard, such as asking open-ended questions and summarizing their views.⁹³ The mediator should give the parties a chance to consider any relevant non-medical factors, as it is likely that only medical data had been taken into account prior to mediation.⁹⁴ While listening to the parties, the mediator will identify the interests driving parties' positions and try to unearth any unspoken issues.⁹⁵ It is also important for the mediator to acknowledge that the parties are likely experiencing strong emotions, as bioethics mediations often involve life-and-death decisions.⁹⁶ The mediator should give the parties ample time to express and work through their emotions, and encourage discussion of what they are feeling.⁹⁷

The mediation will continue as a discussion between the parties until they are able to reach a resolution that is mutually agreeable.⁹⁸ The mediator must also ensure that any agreement fits within applicable legal requirements and does not abridge the patient's

⁸⁹ *Id.* at 57.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Liebman, *supra* note 13, at 13.

⁹³ *Id.*

⁹⁴ Dubler, *supra* note 19, at 186.

⁹⁵ Dubler & Liebman, *supra* note 6, at 60.

⁹⁶ *Id.* at 61.

⁹⁷ *Id.*

⁹⁸ Liebman, *supra* note 13, at 13.

rights or provider's obligations.⁹⁹ If an agreement is reached, it is noted in the patient's chart so that members of the care team not present at the mediation can be made aware of and comply with the agreement.¹⁰⁰ If the parties do not reach a decision in mediation, the next steps will vary based on the institution. In many situations, the case will be brought to the full ethics committee or to the legal department.¹⁰¹ Parties may also make progress without reaching an agreement, and choose to reconvene in further mediation sessions.¹⁰² In these cases, the mediator should ensure that parties are aware of any tasks they should complete between sessions, such as gathering additional information, and should be diligent about keeping in touch with the parties to ensure that everyone is up to date at all times.¹⁰³ At the end of mediation, regardless of the outcome, the mediator should review the decision that the parties came to and confirm that the parties are comfortable with it.¹⁰⁴ They should also close the session by thanking the parties and commending their efforts.¹⁰⁵

After mediation, the mediator will follow up with the parties and provide them with whatever support is necessary.¹⁰⁶ The mediator should remain in touch with the care team to ensure that the resolution is implemented, and to inform them of their ongoing legal and ethical obligations.¹⁰⁷ Depending on the outcome, the providers or family may also need someone to talk to to express their emotions.¹⁰⁸ The mediator may support them if needed by providing a space to express those feelings.¹⁰⁹

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Ellen Waldman, *Bioethics Mediation at the End of Life: Opportunities and Limitations*, 15 *CARDOZO J. CONFLICT RESOL.* 449, 460 (2014).

¹⁰² Dubler & Liebman, *supra* note 6, at 67.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 68.

¹⁰⁵ *Id.*

¹⁰⁶ Waldman, *supra* note 101, at 460.

¹⁰⁷ Dubler & Liebman, *supra* note 6, at 70.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

D. Mediation Techniques

Mediation is a flexible process and does not have rigid formalities or procedures. Because of this, different techniques and approaches have developed. There are a variety of mediation techniques that are best-suited for bioethics mediation.¹¹⁰

In their bioethics mediation model, Nancy Neveloff Dubler and Carol Liebman outline their STADA technique.¹¹¹ STADA is an acronym for the various steps of the process: Sit down, Tell me about Mama, Admire, Discuss, and Ask.¹¹² “Sit down” gives the parties a chance to sit down together and have a full and attentive discussion.¹¹³ In a clinical setting, patients are exposed to many providers and often have short conversations with different people throughout the day, so sitting down together is helpful to try to make a breakthrough.¹¹⁴ “Tell me about Mama” refers to the family member’s opportunity to introduce the patient to the group and explain what their wishes would have been.¹¹⁵ If the patient is competent and present at mediation, this is their chance to talk about their own lifestyle and motivation.¹¹⁶ “Admire” is the mediator’s continued recognition of the parties’ participation and efforts.¹¹⁷ The mediator should show appreciation for each of the parties throughout the process.¹¹⁸ “Discuss” refers to the open discussion of medical facts and likely options available to the parties.¹¹⁹ Finally, “Ask” is the process of asking questions and encouraging the parties to continue to ask questions of each other throughout the process to facilitate discussion.¹²⁰

¹¹⁰ *Dubler & Liebman, supra note 6, at 71.*

¹¹¹ *Id. at 72.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id. at 73.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

Frequent summarization is one of the most important techniques used in bioethics mediation.¹²¹ When the mediator summarizes what has been said, parties are ensured that the mediator is listening and understands what they are saying.¹²² Summaries also present an opportunity for the mediator to clarify any issues that they are unsure of, and to emphasize facts that they think are essential.¹²³ In bioethics mediations, this is essential because of the presence of medical facts, which may be hard to follow.¹²⁴ Summary can then be used to ensure that everyone present is fully understanding what is being said.¹²⁵

Another significant technique is the use of reframing.¹²⁶ Through reframing, the mediator restates potentially harmful or hostile statements by parties in a more constructive manner.¹²⁷ Reframing is an important tool to maintain the mediator's facilitative role, as they must monitor statements to ensure that communication does not break down.¹²⁸ They may remove insults and threats from statements while keeping the main ideas intact, or find ways to frame individual concerns so that they relate to each party.¹²⁹

II. APPLICATIONS IN END-OF-LIFE CARE

There are several contexts in which conflict may arise surrounding a patient in an end-of-life situation. In such disputes, bioethics mediation should be used to help parties discuss their

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 74.

¹²⁵ *Id.*

¹²⁶ *Id.* at 76.

¹²⁷ *Id.* at 77.

¹²⁸ *Id.*

¹²⁹ *Id.*

viewpoints, go over the available options, and find an agreeable solution.

A. Decisions to Withdraw or Refuse Care by Competent Patients

Patients receiving terminal diagnoses face a myriad of complicated decisions, from what type of care they would prefer to whether they would like to continue treatment at all. These decisions may be influenced by the views of physicians and family members or constrained by outside factors such as financial burdens. While competent patients are technically able to make their own care decisions, in reality their own preferences may not be at the forefront.¹³⁰ The mediation process can ensure that the patient's voice is amplified to enhance their autonomy.¹³¹

There are several factors that may reduce a competent patient's control over their own care. For example, patients are often affected by the feelings and expectations of their loved ones.¹³² A patient wishing to forgo treatment may continue to appease family members who think that every option should be tried.¹³³ Patients may also base decisions on their family circumstances, such as who can care for them or assist them in treatment.¹³⁴ Another factor impacting patient decisions is the web of policies and procedures controlling their treatment.¹³⁵ Assisted suicide, for example, is legal on a state-by-state basis – patients therefore have different options depending on their location, regardless of what they may desire.¹³⁶ Institutional

¹³⁰ Hailey Akah, *Expanding the Scope of Bioethics Mediation: New Opportunities to Protect the Autonomy of Terminally Ill Patients*, 31 *OHIO ST. J. ON DISP. RESOL.* 73, 74 (2016).

¹³¹ *Id.* at 91-92.

¹³² *Id.* at 79.

¹³³ *Id.*

¹³⁴ *Id.* at 80.

¹³⁵ *Id.* at 81.

¹³⁶ *Death with Dignity Acts*, *DEATH WITH DIGNITY*, <https://www.deathwithdignity.org/learn/death-with-dignity-acts/> (last visited Mar. 18, 2021). Physician-assisted suicide is currently permitted in California, Colorado, Hawaii, Maine, Montana, New Jersey, Oregon, Vermont, Washington, and the District of Columbia.

policies may also affect patients' decisions.¹³⁷ Finally, patients may be influenced by the financial impacts of different treatment options.¹³⁸ Patients with insurance may have limited options for treatment based on their coverage, as the treatment that they prefer may not be covered.¹³⁹ Similarly, uninsured patients may choose a treatment option that is not truly their first choice based on cost.¹⁴⁰

Bioethics mediation should be used with competent patients to ensure that these factors are not diminishing their autonomy. The mediator can bring the patient together with members of the care team and any relevant members of their family to discuss options.¹⁴¹ Each party would have an opportunity to discuss their position, with the mediator ensuring that the patient takes an active role in presenting their views and determining how to proceed.¹⁴² Mediation also presents an opportunity to educate the patient and their loved ones about options that they may not have been aware of, ensuring that they are making a fully informed decision.¹⁴³ The mediator should encourage the patient to make the decision based on their own values and lifestyle, not based on external pressures, and should focus on empowering the patient.¹⁴⁴ The patient should know that they have been heard and that their decisions are respected and will be followed.¹⁴⁵

B. Decisions by Surrogate Decisionmakers on Behalf of Incompetent Patients

Many end-of-life disputes involve patients who are not competent to make a decision involving their care. If the patient does not have an advanced directive indicating their treatment

¹³⁷ Akah, *supra* note 136, at 82.

¹³⁸ *Id.*

¹³⁹ *Id.* at 83.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 93.

¹⁴² *Id.* at 93-94.

¹⁴³ *Id.* at 97.

¹⁴⁴ *Id.* at 95.

¹⁴⁵ Dubler & Liebman, *supra* note 6, at 134.

preferences, a surrogate decisionmaker, often a family member, makes care decisions on their behalf.¹⁴⁶ Disputes are not uncommon in this situation. Disagreements occur among family members as to what the patient's wishes would have been.¹⁴⁷ The decisionmakers may also clash with members of the care team over the best course of treatment.¹⁴⁸ Thus, when the patient cannot have a seat at the table, conflicts are likely to arise that can be resolved through bioethics mediation.

In the past, disputed end-of-life decisions involving incompetent patients have gone to the courts.¹⁴⁹ Litigation, however, is a long and impersonal process that is not well-suited to such a sensitive topic.¹⁵⁰ Previous litigation on issues such as removing feeding tubes from patients in vegetative states has become highly contentious in the media.¹⁵¹ Bioethics mediation should be used instead of litigation in cases involving incompetent patients in end-of-life situations. Mediation allows parties to come to an agreement much sooner than litigation does, with more privacy and respect given to all parties involved.¹⁵² Rather than spending months or possibly years in an emotional and possibly public court battle, a decision can be made in mediation within a few weeks at most.¹⁵³

¹⁴⁶ David M. Shelton, *Keeping End-of-Life Decisions Away From Courts After Thirty Years of Failure: Bioethical Mediation as an Alternative for Resolving End-of-Life Disputes*, 31 *HAMLIN L. REV.* 103, 117-118 (2008).

¹⁴⁷ *Id.* at 121.

¹⁴⁸ *Id.* at 121-122.

¹⁴⁹ *Id.* at 105.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 108-109 (citing *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d. 1378 (M.D. Fla. 2005))(Terri Schiavo was on a feeding tube for seven years throughout litigation which attracted national attention, including intervention by the President. Schiavo's husband wished to have the feeding tube removed, while her parents stated that removal contradicted her religious beliefs. The Court eventually allowed removal of the feeding tube, finding that the husband had provided enough evidence of Schiavo's wishes to support removal); see also *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990)(Cruzan was in a vegetative state and required a feeding tube after a car accident, which her parents sought to remove. She had previously stated that she would not wish to live if she could not take care of herself, however the Court held that this was not enough to satisfy the state's clear and convincing evidence requirement).

¹⁵² *Id.* at 135.

¹⁵³ *Id.*

Litigation also creates more costs for parties that will likely be facing some form of medical bills, while mediation is significantly cheaper.¹⁵⁴ Finally, mediation allows parties to consider emotional or other interests that will be disregarded in a court proceeding, which would only consider the legal merits of the case.¹⁵⁵

In a mediation involving an incompetent patient, it is important that the parties keep sight of what the patient would want and what is in the patient's best interest.¹⁵⁶ The mediator should encourage the family members to discuss the patient's "lifestyle, values, and preferences" so that the parties can get a clearer understanding of how the patient may have felt about various treatment options.¹⁵⁷

When family members disagree about the best treatment option for an incompetent patient, bioethics mediation may help them to discuss their positions. A mediator can help each party to articulate their wishes and communicate their reasoning. The parties would benefit from sitting down face-to-face and talking about their loved one in a neutral setting.

C. *Decisions for Adolescent Patients*

Adolescents present a unique challenge when making healthcare decisions, especially those in their late teens. While the default rule in the United States is to defer to parents when making decisions for children under eighteen, some states have started to follow the "mature minor" doctrine.¹⁵⁸ Under this doctrine, a minor can consent to treatment without parental consent if the minor has the requisite intelligence and maturity to fully understand the benefits

¹⁵⁴ *Id.* at 136.

¹⁵⁵ *Id.*

¹⁵⁶ Moorkamp, *supra* note 2, at 232.

¹⁵⁷ *Id.* (quoting Nancy N. Dubler & Carol B. Liebman, *Bioethics Mediation: A Guide to Shaping Shared Solutions* (Vanderbilt Univ. Press, rev. & expanded ed. 2011))

¹⁵⁸ Molly J. Walker Wilson, *Legal and Psychological Considerations in Adolescents' End-of-Life Choices*, 110 *NW. U. L. REV. ONLINE* 33 (2015).

and risks of the proposed treatment.¹⁵⁹ Even in states where the minor does not have a legal right to consent without their parent's approval, the care team may include the patient in the decision-making process.¹⁶⁰ Conflict may arise, however, when the minor and the parent have differing views as to the best course of action. Bioethics mediation can be used in these situations so that the parent can have their opinion heard while the adolescent is given a voice in their own treatment.¹⁶¹ There may also be cases in which the parent makes a decision that the care team does not believe is in the best interest of the child, creating a dispute.¹⁶² There are arguments that can be made supporting either the parent or the child making a care decision, but mediation allows both to explain their positions and come to a resolution without blindly choosing one over the other.

Although parents are legally able to make decisions for their minor children, these decisions are often impacted by multiple biases, especially when the child's prognosis is grim.¹⁶³ One of these is the overoptimism bias, which may cause parents to continue choosing for the child to undergo multiple treatment options because they sincerely believe that they will work.¹⁶⁴ This bias works together with the phenomenon of probability neglect, in which people tend to disregard probability while making decisions because the statistics are not tangible.¹⁶⁵ Parents will therefore ignore the likelihood of success that certain treatments may have, and focus instead on their desire to save their child.¹⁶⁶ They may also be

¹⁵⁹ *Id.* at 41 (quoting *Cardwell v. Bechtol*, 724 S.W.2d. 739, 745 (Tenn. 1987))("The mature minor exception is part of the common law of Tennessee. Its application is a question of fact for the jury to determine whether the minor has the capacity to consent to and appreciate the nature, the risks, and the consequences of the medical treatment involved."); see also *In re E.G.*, 549 N.E.2d. 322, 327-328 (Ill. 1989) (holding that the mature minor doctrine is sufficient to allow the minor to refuse medical treatment, but that minor's decision does not outweigh all other considerations).

¹⁶⁰ *Id.* at 35.

¹⁶¹ *Id.* at 49.

¹⁶² *Dubler*, *supra* note 19, at 196-197.

¹⁶³ *Walker Wilson*, *supra* note 164, at 44.

¹⁶⁴ *Id.* at 44-45.

¹⁶⁵ *Id.* at 45.

¹⁶⁶ *Id.*

affected by the availability bias, wherein people base the commonality or importance of something on how familiar they are with it and how readily it can be recalled.¹⁶⁷ For example, when a plane crash occurs it is typically covered on multiple news outlets and people become familiar with the details of the crash.¹⁶⁸ Individuals then overestimate how often plane crashes occur, because they hear more about plane crashes than safe flights.¹⁶⁹ In a care context, parents may hear about “miracle” cases or cures and assume that they can be used for their child, even if that situation was rare.¹⁷⁰ Parents are also likely to be affected by confirmation bias, wherein they focus only on information and data that supports their position, and ignore that which contradicts them.¹⁷¹ Finally, most parents would go to any length to save their child, motivated by a basic instinct to protect their young. When a parent becomes affected by these biases, a mediator may work with them to recognize this and help them to recognize where their expectations may be unrealistic or in conflict with the provider or child.¹⁷²

Minors are also susceptible to flaws in their decision-making. Studies suggest that adolescents are less risk averse than adults, which may impact the care decisions that an adolescent would be willing to make.¹⁷³ Adolescents are also likely to focus on short-term consequences of their actions rather than the long-term, and are more likely to be influenced by their peers.¹⁷⁴ Furthermore, minors’ decisions are likely impacted by their brain development. Research suggests that the brain does not fully develop until the mid-twenties, with those parts of the brain that are integral in decision-making maturing last.¹⁷⁵ These are factors and influences that a mediator may recognize, like a parent’s biases, to try to come to a resolution.

¹⁶⁷ *Id.* at 46.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 47.

¹⁷² *Id.* at 51-52.

¹⁷³ *Id.* at 39.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

While both parents and minors may have biases and other factors impairing their decision-making, each party has a significant stake in the outcome of the case and should be heard through mediation. The parent is just that – a parent. They have a basic interest in their child’s wellbeing, and a right to raise and care for them as they see fit.¹⁷⁶ Parents are also uniquely familiar with their child and have insights that a provider does not, such as the child’s hobbies, values, or interests.¹⁷⁷ The minor, however, has a significant interest as the patient being treated. Allowing minors to have a voice in their own treatment amplifies their personal autonomy.¹⁷⁸ When people feel that they are in control of a situation, they are less likely to fear it, and vice versa.¹⁷⁹ When providers choose to eliminate minor patients’ voices entirely and defer to their parents’ treatment preferences, the patients will likely feel more overwhelmed and fearful of their situation.¹⁸⁰ Because both the parent and the minor have significant interests in being involved in making decisions, and there may be drawbacks to choosing just one of them due to implicit biases, both parties should be heard through mediation.

Bioethics mediation can be used in adolescent end-of-life care by having the parent or parents meet with the adolescent patient and the members of the patient’s care team. After having the care team explain the patient’s medical history, the patient would have a chance to share their wishes and explain how and why they have decided that that is the best action to take. The parent would then have a similar opportunity to share their views, and then the mediator could take the opportunity to evaluate any factors affecting the decisions of either side. Through this open discussion, the parties

¹⁷⁶ *Id.* at 35-36 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)) (“The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).

¹⁷⁷ *Id.* at 37; see also *Parham v J.R.*, 442 U.S. 584 (1979) (holding that parents are presumed to act in the best interest of their child and therefore have broad decision-making power over them).

¹⁷⁸ *Id.* at 42.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 43.

should hopefully be able to come to a resolution that allows them both to have a voice in the adolescent's treatment.

III. LIMITATIONS

Mediation is not a one-size-fits-all approach, and therefore is not suitable for all decisions or conflicts. Although bioethics mediation has been successful in many healthcare disputes, including those involving end-of-life decisions, there are certain situations that do not lend themselves to finding mutually agreeable solutions.

A. Futility Disputes

One situation which typically does not benefit from mediation is a dispute between a provider and the patient's family over the futility of the patient.¹⁸¹ Futility disputes "[arise] when a health care provider seeks to stop treatment that the patient or surrogate wants continued."¹⁸² While other instances of bioethics mediation may have a middle ground option available or give the patient themselves a voice, here the family and the care team are sharply at odds in a situation with no real middle.¹⁸³ In these situations, the common outcome is that each party sticks to their position until the providers give in to the family's position to appease them.¹⁸⁴ Although this is a resolution, it is not one that both sides are actually comfortable with, and is therefore not a successful mediation outcome.¹⁸⁵

B. Disputes Involving Strong Cultural Influences

Bioethics mediation is also impeded when the case involves parties whose positions are based on strong cultural or religious

¹⁸¹ Thaddeus M. Pope & Ellen A. Waldman, *Mediation at the End of Life: Getting Beyond the Limits of the Talking Cure*, 23 *OHIO ST. J. ON DISP. RESOL.* 143, 151 (2007).

¹⁸² *Id.*

¹⁸³ *Id.* at 155.

¹⁸⁴ *Id.* at 159.

¹⁸⁵ *Id.* at 161.

convictions.¹⁸⁶ Resolutions are difficult to accomplish when an agreement would require someone to sacrifice their closely held beliefs. For example, Jehovah's Witnesses cannot receive blood transfusions according to their faith.¹⁸⁷ If the providers' position is that a blood transfusion is necessary, a patient or their family member is unlikely to agree unless an alternate treatment appears.¹⁸⁸ Mediation therefore would not be very effective in resolving this dispute, as it involves fundamental differences in opinion and interests that will not be changed through discussion.

C. Disputes Involving Complex Family Dynamics

Finally, mediation may not be the best option when the case involves complex family dynamics, such as cases where the patients has estranged family members.¹⁸⁹ Communication styles that are dysfunctional or toxic are likely to degrade even further when the family members are placed in a stressful or highly emotional situation.¹⁹⁰ When families have had years or decades of complicated relations influencing their behaviors, a few hours of mediation is not likely to change their actions.¹⁹¹ Estranged family members may also become overwhelmed by guilt and adhere to their position.¹⁹² Because the parties must be willing to participate for mediation to work, emotionally-influenced positions such as these are difficult to work through.¹⁹³ In mediation, it is possible for family members to explain their positions and come to an agreement, but the situation may also cause them to shut down entirely.¹⁹⁴

¹⁸⁶ *Id.* at 167.

¹⁸⁷ Caitlin McClay, *Mediation in Medical Treatment: A More Effective Way to Manage Disputes*, 68 *CATH. U. L. REV.* 525, 530 (2019) (citing *In re E.G.*, 549 *N.E.2d.* 322, 323 (Ill. 1989))

¹⁸⁸ *Id.*

¹⁸⁹ Pope & Waldman, *supra* note 187, at 168.

¹⁹⁰ Dubler & Liebman, *supra* note 6, at 141.

¹⁹¹ Waldman, *supra* note 101, at 466.

¹⁹² *Id.*

¹⁹³ Dubler & Liebman, *supra* note 6, at 13.

¹⁹⁴ *Id.*

CONCLUSION

Decisions for patients in end-of-life situations are incredibly difficult to make, and can lead to conflict among patients, providers, and family members. Bioethics mediation allows all interested parties to have their opinions heard and justified, and should be used when conflicts arise in end-of-life care. Although bioethics mediation is an excellent tool for resolving disputes and assisting decision-makers, there are limits to when the process will work. If the parties are willing to discuss their positions and to consider their options, bioethics mediation can help healthcare providers, patients, and families of patients to reach a resolution even at a difficult time.

Introduction

As 2020 ended, mediation practitioners came to the inescapable realization that our profession had entered a new era – that of mediation via Zoom.

Well conducted surveys by recognized ADR and trial attorney organizations repeatedly revealed the obvious – in-person mediation was potentially a thing of the past. Virtual mediation was here to stay. Settlement rates via Zoom or other platforms remained consistent with those of pre-pandemic in-person mediations. Attorneys, insurance professionals and mediators all found themselves more productive. No travel and no traffic closed the deal.

Therefore, it was not surprising that we received student articles addressing virtual mediation. The following two stood out to me, both from the Benjamin N. Cardozo School of Law. Each approached this new normal from a different perspective.

Pooja Talukdar confronted the elephant in the room: confidentiality in the virtual age in the aptly titled *Three is a Crowd: Is the boom in Zoom Mediation piercing the Confidentiality Bubble?*

Cai Phillips-Jones discusses how these new digital spaces present greater opportunities to create party-centered processes in *The Year of the Expanding Mediation Room: COVID-19 and the Dawn of Party-Centered Digital Spaces*.

These articles raise issues that will continue to impact our profession both positively, (I so much enjoy connecting with participants in Zoom mediations by inquiring about interesting items in their backgrounds) and negatively, (I have personally had to deal with a Zoom mediation being recorded by one of the parties).

These young minds never cease to amaze me with their inquisitiveness and insight. Enjoy.

John W. Salmon

Editor in Chief

Distinguished Fellow, American College of Civil Trial Mediators

**Three is a Crowd: Is the Boom in Zoom Mediation
Piercing the Confidentiality Bubble?**

Pooja Talukdar

Confidentiality is the essence of being trusted¹

—Billy Graham—

The [Society of Professionals in Dispute Resolution] standards address confidentiality as if we are all talking about the same thing when I think there are overt and subtle variations which needs to be explored].²

—Albie Davis—

I. Introduction

Imagine yourself sitting at your desk in the favorite corner of your room getting ready to engage in an online video conferencing mediation. The mediator informs you and the opposing party that everything said and all communication within the mediation process is confidential and proprietary. This explanation shakes some of the weariness away and comforts you to share information in order to reach a settlement. The mediation is conducted synchronously. However, lo and behold, little to your knowledge and consent, a third-party not related to the mediation records the session, downloads, and distributes it to the public. You are outraged,

¹ *American Evangelist who is among the most influential Christian Leaders of the 20th century.*

² *Research Associate, Center for the Study of Values and Social Policy, University of Colorado, Boulder. B.A. (Hons) Sussex University, U.K., 1980; Ed.M. Harvard University, 1985; Ph.D. University of Colorado, Boulder, 1991. Mediator, CDR Associates, Boulder.*

distressed, angry and you have no remedy or recourse for the wrong that has been committed.

The coronavirus ("COVID-19") pandemic has disrupted our lives in a myriad of ways by killing thousands, sickening millions, imposing continued travel restrictions, and changing the way we function to keep us and our community safe. Its impact has also been felt in our legal community; most specifically in our legal systems. Courts, the cornerstone of our judicial branch, have been particularly hindered as many courthouses still remain closed forcing judges to postpone in-person trials and hearings.³ Nonetheless, disputes continue to rise, including disruptions and delays exacerbated by COVID-19. In this unprecedented times, appropriate dispute resolution ("ADR") processes like mediation and arbitration with their inherent flexibility has provided litigants and backlogged courts much needed respite.

Mediation, in particular, which traditionally has been a face-to face process conducted in conference rooms and courthouses, has quickly tailored its existing norms by adapting to different forms of technology and online dispute resolution processes ("ODR"). This has in turn facilitated parties to resolve disputes remotely, in a chaotic time where cancelled hearings, postponed trials and social distancing is the new normal. However, the use of ODR as a dispute resolution practice is not something novel. Online mediation in particular has enjoyed a distinct place in the field of ODR.⁴

ODR, as a concept originated from the synergy between ADR and Information and Communication Technology ("ICT")⁵. It was introduced as a method of resolving disputes that were arising

³ Douglas Witten, *Video Mediation During Coronavirus Pandemic: How Online Dispute Resolution Works*, NOLO (last visited Apr. 28, 2021) <https://www.nolo.com/legal-encyclopedia/video-mediation-during-the-coronavirus-pandemic-how-online-dispute-resolution-works.html>.

⁴ Noam Ebner & Daniel Rainey, *ODR and Mediation (2021)* in RAINEY, D., KATSH, E. AND ABDEL WAHAB, A. *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE* (2nd ed. Forthcoming 2021).

⁵ P. Cortes, *A European Legal Perspective on Consumer Online Dispute Resolution*, 15(4) *COMPUT. TELECOMM. L. REV.* 90, 90-100.

online, for which traditional means of dispute resolution were either insufficient or unavailable.⁶ It incepted because of the realization that virtual commercial transactions created conflicts of a different kind as compared to face-to-face interaction. This realization eventually led to the development of ODR systems designed to handle huge volumes of cases that fell into easily classifiable repeating groups.⁷ Indeed, most of the literature discussing ODR originates from the suggestions made in the mid-90s, that increasing number of people engaging in e-commerce, and the growing number of online disputes would eventually lead to a corresponding growth in the number of online disputes, and the technology facilitating the original dispute will be used to support resolution processes.⁸

ODR and ADR fundamentally encompasses the same phenomena of adding tools to the dispute resolver's toolbox.⁹ One of its core foci i.e. replicating ADR processes by convening and conducting them wholly online (focusing largely on using technology as an intermediary for communication between the parties involved in the process)¹⁰ is being used increasingly during this pandemic with the advance of online video conferencing platforms to conduct online mediations.¹¹ Indeed, what the

⁶ Jon Linden, *Online Dispute Resolution: Resolving Conflicts In Cyberspace*, *MEDIATE.COM* (last visited Apr. 29, 2021) <https://www.mediate.com/articles/linden7.cfm>.

⁷ Ebner & Rainey, *supra* note 4, at 1.

⁸ Ethan Katsh & Leah Wing, *Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future*, 38 *U. TOL. L. REV.* 19, 20 (2006); See also Alyson Carrel & Noam Ebner, *Mind the Gap: Bringing Technology to the Mediation table*, *J. OF DISP. RESOL.*, 1-45 (2019) (increasing use of technology in society would eventually lead to the use of the technology that facilitated the original interaction to be used to support dispute resolution processes.)

⁹ Colin Rule, *Is ODR ADR? A Response to Carrie Menkel-Meadow*, *INTL. J. OF ONLINE DISP. RESOL.* <http://www.colinrule.com/writing/ijodr.pdf>.

¹⁰ Ayelet Sela, *Can Computers Be Fair? How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration*, 33 *OHIO ST. J. ON DISP. RESOL.* 91, 100 (2016); See also Carrel & Ebner, *supra* note 8.

¹¹ Carrel & Ebner, *supra* note 8 at 6 (online mediation initially used text based, primarily asynchronous platforms and process, and has relatively recently veered towards rapid adoption of video conferencing platforms).

pandemic and physical distancing have achieved is a mass learning event in how to use online video conferencing platforms to hold effective mediation sessions.¹² Among various online video conferencing platforms, Zoom has emerged as the go-to platform for mediation via video conferencing as it offers “breakout room,” a function inexplicably absent in other platforms. But the ominous question here is whether Zoom is safe?

Confidentiality and secure conversations have always been a hallmark of the mediation process. It is the heart of a mediation session and is critical to a successful resolution of the dispute. Stories of Zoom’s security and privacy issues have been lurking throughout its rise. From built-in-attention-tracking features to susceptibility of virtual hacking, which is also commonly referred to as Zoom bombing,¹³ Zoom’s security practices have been drawing more attention, along with at least three lawsuits.¹⁴ Again, can Zoom or any other virtual platforms control “*the unseen and unheard*” which can be a potential confidentiality issue? This may include a participant attending a mediation from an unsecure location such as a public Wi-Fi¹⁵ where other people are within hearing distance, an unauthorized third party in close proximity advising a party and thereby breaching confidentiality without the knowledge of other participants or a party surreptitiously recording the online mediation. Recently, a Michigan court hearing involving assault was postponed because the alleged abuser was found to be

¹² Amanda Bucklow, *Challenges and Benefits of In-Person and Remote Mediation*, LEXOLOGY (last updated Oct. 27, 2020) <https://www.lexology.com/library/detail.aspx?g=53c2ad92-0e20-466e-b188-15a0558e41e8>.

¹³ Lauren V. Humphries, Steven L. Cline et. al., *The Boom in Zoom and Related Class Action Filings*, BUCHANAN INGERSOLL ROONEY (last updated Nov. 4, 2020) <https://www.bipc.com/the-boom-in-zoom-and-related-class-action-filings>.

¹⁴ Ryan Browne, *Zoom Faces Investor Lawsuit Over Privacy and Security flaws*, CNBC (last updated Apr. 8, 2020) <https://www.cnbc.com/2020/04/08/zoom-faces-investor-lawsuit-over-privacy-and-security-flaws.html>.

¹⁵ Sara Clark Bowers, *What to Assume Before you Zoom Mediation*, SALLY CLARK BOWERS MEDIATION (last updated July 22, 2020) <https://sallybowersmediation.com/2020/07/what-to-assume-before-you-zoom-mediation/>.

in the same home as the victim during an online court hearing conducted on the Zoom platform.¹⁶ Although this case is not related to mediation, but there has been occurrence of similar incidence during an online mediation as well.

The overarching issue remains that these confidentiality concerns do exist. There is an innate need to address if these concerns exist due to weak privacy and security protocols adopted by Zoom or because our existing confidentiality norms are erroneous. In light of this, the ultimate goal of this paper is to make suggestions for a change in nuance with respect to the existing mandates, by incorporating new rules tailored to video conferencing mediation; as well as suggest a different app/ platform to be used uniformly for conducting mediations online or perhaps continue using Zoom by customizing the platform specifically to mediation. **Part II** of this paper will explore the reasons and rationale as to why confidentiality is paramount in a mediation process; examine some of the existing sources of law for protecting confidentiality in mediation and analyze the extent of protection afforded by such existing mandates. **Part III** of this paper will focus on the current confidentiality norms adopted by institutions and courts for online video conferencing mediation. **Part IV** of the paper will discuss what is working and not working with respect to confidentiality. It will explore the reasons for confidentiality breaches by discussing whether it is due to defects in the Zoom encryption and security measures or because of existing gaps in the confidentiality mandates. **Part V** will include empirical data from a comprehensive survey of practicing mediators on confidentiality, issues faced with Zoom, settlement rate with respect to online mediation to decipher whether Zoom mediation is the future of mediation. **Part VI** will

¹⁶ Colin Kalmbacher, 'We May Need to Adjourn': Zoom Assault Hearing Goes Off the Rails After Court Discovers Alleged Abuser in the Same Apartment as Alleged Victim, *LAW & CRIME* (last updated Mar. 06, 2021) <https://lawandcrime.com/crime/we-may-need-to-adjourn-zoom-assault-hearing-goes-off-the-rails-after-court-discovers-alleged-abuser-in-the-same-apartment-as-alleged-victim-watch/>.

conclude by discussing proposals and highlighting some arguments in favor of updating the existing mandates with respect to confidentiality.

II. Background

A. Meaning of "Confidentiality" in Mediation

The dictionary meaning ascribed to confidentiality is imparting "private or secret matters to another" or "the realization of intimacy or trust between persons so confiding"¹⁷ Mediation is a process where a third-party neutral works his/her own brand of magic to break deadlocks between disputants by constantly adapting to changing dynamics in order to promote amicable resolution of the issue at hand.¹⁸ It focusses on breaking impasses and must be insulated from outside intervention to success.¹⁹ It requires an atmosphere free of "restraint and intimidation."²⁰ As such a promise of confidentiality is axiomatic in mediation.

Confidentiality fosters an atmosphere of trust which is essential to mediation.²¹ The disputants must be free to advance possible solutions without fear that these solutions will later be used against them or bind them if proved unsatisfactory.²² To elaborate, disclosure of private information can make a negotiator vulnerable, since traditional bargaining gambits require minimal disclosure,

¹⁷ 'confidential' *DICTIONARY.COM*, 2021 (last visited Apr. 30, 2021)

<https://www.dictionary.com/browse/confidential>.

¹⁸ *Local. 808, Bldg. Maint., Serv. and R.R Workers v. Nat'l Mediation Bd.* 888 F.2d 1428, 1435 (D.C. Cir. 1989).

¹⁹ *Id.*

²⁰ Note, *Protecting Confidentiality in Mediation*, 98 *HARV. L. REV.* 441, 443 (1984).

²¹ Joshua P. Rosenberg, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws*, 10 *OHIO ST. J. ON DISP. RESOL.* 157 (1994) (confidentiality is an important aspect in the mediation process as it gives the parties an assurance that the information disclosed in the mediation proceeding cannot be used against any of the parties at a later proceeding. This assurance of confidentiality promotes a sense of trust that is necessary to the success of the mediation process.)

²² *Local 808*, 888 F.2d 1428, at 1435.

bluffing and posturing.²³ There may also be personal reasons for parties to avoid publicity such as reluctance to make public the details of events leading to a divorce, or the presence of a motive such as revenge that is usually subject to moral censure.²⁴

B. Role of Confidentiality in Mediation

A discussion on the appropriate role of confidentiality must derive from a "*normative conception of mediation itself*".²⁵ In a mediation process (which is essentially a contractarian process), the mediator assists the parties to exercise their rights to negotiate settlements to facilitate dispute resolution and structure future relationships.²⁶ In the process of deliberation and collaboration, the parties are able to reach agreement voluntarily by retaining the power to shape the ultimate agreement.²⁷ The mediator acts as a facilitator during the process²⁸ by neither compelling the parties to

²³ Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 10 OHIO ST. J. DISP. RESOL. 25 (1992).

²⁴ James J. Restivo Jr. & Debra A. Mangus, *Confidentiality in Alternative Dispute Resolution (ADR): Alternate Dispute Resolution: Confidential Problem-Solving or Every Man's Evidence?* 2 ALTERNATIVES TO THE HIGH COST OF LITIGATION 2, 5 (1984) (suggesting that ADR is an appropriate forum for disputes where the parties wish to avoid public scrutiny, and that the confidentiality of mediation is a significant factor in attracting clients).

²⁵ *Protecting Confidentiality in Mediation*, supra note 20.

²⁶ *Id.* at 443 (The right of parties to settle claims privately has long been recognized. See, e.g., *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *United States v. City of Miami*, 614 F.2d 1322, 1330 (5th Cir. 1980)).

For representative definitions of mediation, see Jay Folberg, *A Mediation Overview: History and Dimensions of Practice*, 1 *MEDIATION Q.* 3, 7 (1983); and Josh Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 *VT. L. REV.* 85, 88 (1981) (models of mediation less contractarian in nature have been proposed to deal with disputes in which major public interests are at stake, such as conflicts over environmental issues); See Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 *VT. L. REV.* I, I-8, 40-46 (1982) (If the mediator assumes a more active role, such as enforcing community norms or representing absent interests, further limits to any privilege may be needed to enforce the mediator's increased responsibilities).

²⁷ Stulberg, supra note 26 at 91.

²⁸ *Id.* at 92 (neutrality should not be equated with passivity. The mediator, besides attempting to further agreement, may on occasion inject his own ethical concerns into mediation); See also WILLIAM E. SIMKIN, *MEDIATION AND THE*

furnish information nor rendering judgement based on preordained rules to the dispute. Mediator's role in the whole process is to assist the parties to reach a resolution by identifying issues, exploring possible avenues to agreement as well as repercussions of not coming to a settlement, and encouraging the parties to accommodate the needs of the other.²⁹ Sharing information about the parties' actual interest is vital to facilitate the parties to see the entire spectrum of possibilities for exchange and to reach optimal solution. Also, as parties in a mediation process are able to discuss and deliberate on the issues according to their own terms without restricting themselves to issues and facts relevant to a legal cause of action, they cooperate to expand the pie.³⁰ The efficacy of mediation thus depends on the mediators'³¹ ability to ensure the confidentiality of the communications made to them.

Parties have two important interests in preserving confidentiality: to facilitate disclosure by all the parties in order to find best resolution, and to avoid the sense of betrayal and unfairness that would follow the disclosure of information that a party thought was given in confidence.³² They may be reluctant to disclose personal needs, strategies, and information if they feel that it might be used against them. Mediation demands an element of trust to facilitate information sharing for the resolution of issues as a lot of information sharing takes place in joint sessions.³³ Agreement may be impossible if the mediator is unable to overcome the parties' wariness about confiding in each other during these sessions.³⁴

DYNAMICS OF COLLECTIVE BARGAINING 38-40 (Bureau of National Affairs, 1971).

²⁹ Rosenberg *supra* note 21, at 444.

³⁰ Wilbur C. Leatherberry, *Confidentiality in Mediation*, 71 *CLEV. B.J.* 20 (1999).

³¹ *Protecting Confidentiality in Mediation*, *supra* note 20 at 445.

³² Jonathan M. Hyman, *The Model Mediator Confidentiality Rule: A Commentary*, 12 *SETON HALL LEGIS. J.* 17, 29 (1988).

³³ Kraybill, *A Procedure for Mediating Inter-Personal Disputes*, L. BUZZARD & R. KRAYBILL, *MEDIATION: A READER* (REV. ED. 1982) (outlining typical mediation procedures).

³⁴ Kent L. Brown: *Confidentiality in Mediation: Status and Implications*, 2 *J. OF DISP. RESOL.* (1991) at 310 (“[t]wo people who knows from past experiences

Confidentiality in mediation is thus akin to trust in friendship.³⁵ It deprives the parties of the ability to use the information they gained during the mediation to the detriment of the other party paving the way for meaningful interaction between them. Finally, protection of the mediator's status as a neutral also requires recognition of a distinct privilege not to testify on his part. This privilege is asserted by the mediator at the very inception of the process via the mediator's opening statement to protect his interest in neutrality or to protect party expectations. Both the appearance and the reality of the mediator's neutrality are essential to generate the climate of trust necessary for effectiveness of the mediation process.³⁶

C. Sources of Protection

Aside from those jurisdictions where a specific privilege has been enacted, the following sources can aid in protecting confidentiality in mediation: (a) Uniform Mediation Act

that they should not trust each other are thrust together against their will and expected to give their most immediate enemy the tools needed to cause great emotional pain and financial damage.")

³⁵ *Id.*

³⁶ *Stulberg, supra note 26 at 87, 95-96.*

("UMA")³⁷; (b) state confidentiality statute³⁸; (c) mediation confidentiality agreements; (d) the federal rules of evidence³⁹; (e)

³⁷ Matt Brown, *Legislation: Where the Uniform Mediation Act Stands in the States*, CPR (last updated June 16, 2005): <https://www.cpradr.org/news-publications/articles/2005-06-16-legislation-where-the-uniform-mediation-act-stands-in-the-states-web>;

<https://www.uniformlaws.org/committees/community-home?CommunityKey=45565a5f-0c57-4bba-bbab>. (The UMA, constructed by drafting committees from the National Conference of Commissioners on Uniform State Laws and the American Bar Association's Section of Dispute Resolution, as well as legal academics, is an attempt to bring uniformity to mediation across the country. A primary purpose of the Act is to provide "a privilege that assures confidentiality in legal proceedings." Providing this privilege promotes full disclosure of facts to the mediator by all parties and helps bring a higher level of success and party satisfaction to all mediations. Twelve states have already enacted the UMA, led by Nebraska in May 2003. It is being currently considered in Vermont, New York, Minnesota, Massachusetts, and Connecticut. New Mexico has not introduced the UMA but has introduced a less comprehensive but similar bill.)

³⁸ Ronald R. Rossi, Kasowitz Benson Torres LLP, *Mediation Q&A* (New York), THOMSON REUTERS <https://www.kasowitz.com/media/3083/mediation-qa-us-new-york.pdf> (in New York, there is no state or federal statute that creates a mediation privilege or guarantees confidentiality with the sole exception of McKinney's Judiciary law Judiciary law § 849-b, which prohibits disclosure of a mediator's writings and files, but only applies to community dispute resolution centers, not courts. However, federal courts in New York have adopted rules extending the confidentiality obligation to the mediator to varying degrees. For example, the U.S. District Court for the Southern District of New York requires that "[t]he mediator shall not disclose any information about the mediation to anyone except for Mediation Office staff" and further, that "[t]he mediator shall not be called as a witness or deponent in any proceeding related to the dispute in which the mediator served, or be compelled to produce documents that the mediator received or prepared for mediation." see also SDNY Procedures for the Mediation Program, 1(a), (d).)

³⁹ FED. R. EVID. 408.

(Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Although the rule does not expressly cover mediation, it provides protection for statements made in an attempt to settle.)

common law rules of evidentiary privilege; (f) state specific local rules of evidence; and (g) the ethical codes such as the barring disclosure by the mediator.⁴⁰

At the very outset, common law and rules regarding compromise and settlement protects mediation to some extent. But, as there are numerous exceptions, they almost swallow the rules as applied to mediation.⁴¹ For instance under common law, statement of fact made during settlement negotiation are admissible into evidence in subsequent litigation unless worded and framed judiciously.⁴²

Many jurisdictions have adopted Rule 408 of the Federal Rules of Evidence, which strengthens the common law rule by barring the admissibility (but not the discoverability) of settlement statements,⁴³ including those that occur in mediation sessions.⁴⁴ Further, the common law rules of evidence that govern proceedings in the state courts also limit the admissibility of settlement discussions in the same manner, but not to the full extent of Rule 408.⁴⁵

Federal Courts also have adopted local rules that contain confidentiality provisions applicable to mediation. By way of example, for the Southern District of New York, the Mediation Program is governed by Local Civil Rule 83.9⁴⁶ which limits the disclosure of information only with the mediation office staff and

⁴⁰ David A. Hoffman, *Confidentiality in Mediation* MASS. ALT. DISP. RESOL. (Michie/Butterworth 1994), <https://blc.law/wp-content/uploads/2016/12/2005-07-confidentiality-in-mediation-branchmainlanguagedefault.pdf>.

⁴¹ Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37 (1986).

⁴² *Protecting Confidentiality in Mediation*, *supra* note 18; Lawrence R. Freedman, *Confidentiality: A Closer Look*, in *Mediation And The Law: Will Reason Prevail?* ABA SPECIAL COMM. ON DISP. RESOL. 68 (1983); *see generally* Restivo & Mangus *supra* note 24.

⁴³ Freedman & Prigoff, *supra* note 42 at 40.

⁴⁴ FED. R. EVID. 408.

⁴⁵ Hoffman, *supra* note 40 at 9.

⁴⁶ Fed. R. Civ. P. 83.9, S.D.N.Y., <https://www.nysd.uscourts.gov/sites/default/files/pdf/Local-Civil-Rule-83.FINAL.pdf>.

while engaged in settlement negotiations with a District or Magistrate Judge (only upon consent of the parties).

Parties to a mediation often endeavor to keep the proceedings confidential by signing a mediation confidentiality agreement (“Confidentiality Agreement”), wherein they agree at the outset of mediation that nothing said will be subsequently disclosed. The Confidentiality Agreement protects communications and writings materially related to the mediation. Courts generally treat breach of the provisions of the Confidentiality Agreement as a breach of contract.⁴⁷

Courts have held that the Confidentiality Agreement generally provides a remedy for a breach of the non-disclosure provision by excluding statements made during mediation from proceedings unrelated to mediation.⁴⁸ The appropriateness of this remedy is consistent with Rule 408 of the Federal Rules of Evidence,⁴⁹ which excludes the content of the parties’ negotiations from other legal proceedings.⁵⁰ In *re Anonymous*⁵¹, the United States Court of Appeals for the Fourth Circuit has held that in determining whether sanctions are warranted in a case concerning the confidentiality of mediation, an appellate court reviews the totality of the circumstances and analyzes and weighs the following and other relevant factors such as: whether the mediator explained the extent of the confidentiality rules and the clarity of the such explanation; whether the parties executed a confidentiality agreement; the extent of willfulness or bad faith involved in the breach of confidentiality rule; and the severity or adverse impact of

⁴⁷ *Bethlehem Area Sch. Dist. v. Zhou*, 2012 U.S. Dist. Lexis 37313 (In general to determine whether a contract was formed, a court must look to: (1) whether both parties manifested an intention to be bound by the agreement; (2) whether the terms of the agreement are sufficiently definite to be enforced; and (3) whether there was consideration. If the parties have signed an agreement intending to be bound by the terms set forth in it, then there is an enforceable contract between the parties.)

⁴⁸ *Higbie v. United States*, 778 F.3d 990 at 995 (3rd Cir. 2015).

⁴⁹ FED. R. EVID. 408.

⁵⁰ *Higbie*, *supra* note 48 at 995.

⁵¹ 283 F.3d 627 (4th Cir. 2002).

the disclosure on the parties or the case.⁵² An example of bad faith is when a party is aware and has actual notice of the confidentiality agreement and yet discloses and/or disseminates the information used in the mediation process willfully.⁵³

A final source of protection for confidentiality is derived from the mediator's ethical codes, which require confidentiality. The existence of ethical guidelines is often considered a hallmark of becoming a profession and most self-regulating professions typically require their members to adhere to a common set of ethical rules and have enacted disciplinary procedures for those who fail to comply with such standard.⁵⁴ For instance, Standard V of the Model Standards of Conduct for Mediators⁵⁵ sets forth the ethical confidentiality standards for mediators ("Model Standards"). There also various ethical codes created by both public and private mediator organizations.⁵⁶ While variation in all of these codes exist, a number of similarities can be found throughout most of the schemes.⁵⁷ One such similarity is the mandate that any communication made exclusively during the mediation process shall be confidential and that the disputants shall not disclose such information with any third-party unless such disclosure is required by law.

⁵² *Id.* at 636

⁵³ *Frank v. L.L. Bean, Inc.*, 377 F. Supp. 2d 233, 18 (D.Me.2005)

⁵⁴ KIMBERLEE K. KOVACH, *MEDIATION IN A NUTSHELL* 256 (3rd ed. 2014).

⁵⁵ *MODEL STANDARDS OF CONDUCT FOR MEDIATORS Canon 5*, (AM. BAR. ASS'N 2005).

https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf.

⁵⁶ See, e.g., *JAMS, Mediators Ethics Guidelines* (last visited May 28, 2021), <https://www.jamsadr.com/mediators-ethics/>; See also *S.D.N.Y., Procedures of The Mediation Program* (last visited Apr. 26, 2021)

https://nysd.uscourts.gov/sites/default/files/2019-12/Mediation%20Program%20Procedures.final_.2018.pdf; *AAA Mediation Procedures* (last visited Apr. 26, 2021)

<https://www.adr.org/sites/default/files/Mediation%20Procedures%20of%20the%20American%20Arbitration%20Association%20Oct%2001%2C%202009.pdf>.

⁵⁷ *Kovach, supra note 54 at 264.*

D. The Extent of Protection

As noted above, confidentiality is vital in the mediation process as it encourages consensual dispute resolution.⁵⁸ Yet, confusion persists about the reality of promising confidentiality. There is no uniformity in confidentiality protections between state and federal laws as both offer varying and often different levels of confidentiality protection.⁵⁹ Similarly, there are variations in private mediation agreements with respect to their terms.⁶⁰ What exactly is subject to confidentiality? What can be used outside of the mediation? For example, in the Eastern District of New York (E.D.N.Y.)⁶¹ and the Southern District of New York (S.D.N.Y.),⁶² there are broad guidelines and litigants in these courts can be assured that the confidentiality of the mediation proceedings will be protected. But many mediations are not court annexed mediations. In summary, there is no iron clad guarantee.

In addition, many statutes do not refer to the court's authority to override confidentiality.⁶³ Further, Rule 408 is limited not only

⁵⁸ Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 *HASTINGS L.J.* 955, 958 (1988) (describing the rationale behind drafting Federal Rule of Evidence 408: "This rationale recognized that it was in the public interest, and in the interest of individual litigants, to encourage consensual resolution of disputes.").

⁵⁹ Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?* 85 *MARQ. L. REV.* 100 (2001) ("[B]ecause states currently use so many different legal frameworks to protect mediation confidentiality, because these statutory frameworks can be ambiguous to categorize, and because federal courts use different analytical approaches to choose of law...vertical choice of law for confidentiality is an amazingly complex, multi-factorial analysis.").

⁶⁰ Richard S. Weil, *Is Mediation Confidential in New York?* *LEXOLOGY* <https://www.lexology.com/library/detail.aspx?g=bbf97ee8-0898-4146-9f6c-78c3694916e3>

⁶¹ *E.D.N.Y. Confidentiality Agreement (2016)*, <https://img.nyed.uscourts.gov/files/forms/Confidentiality%20Agreement.pdf>

⁶² *S.D.N.Y. Mediation Confidentiality Agreement*, <https://nysd.uscourts.gov/sites/default/files/pdf/Mediation/Mediation%20Forms/Mediation%20Confidentiality%20Form.5.19.20.pdf>

⁶³ Maureen A. Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8

by exceptions in the Rule itself (i.e. the substance of settlement discussions may be admissible for the purposes other than establishing liability), but also by the fact that the Rule does not bar disclosure through pretrial discovery.⁶⁴ Rule 408 provides no protection against public disclosure of information revealed in mediation. Perhaps most importantly, mediation parties who are not parties to the litigation cannot raise an objection to the introduction of otherwise confidential communications under the Rule.⁶⁵ Again, while Courts have afforded mediation confidentiality agreements the status of a contract, governed by contract law, such agreements are neither enforceable against a non-party nor prevents a non-party to the agreement from seeking or disclosing information.⁶⁶ Lastly, although there are legal and ethical rules and standards, they provide considerable—but not absolute protection.

III. Current Trends

As mediation has moved online during the pandemic, there has been an increased use of video conferencing to conduct mediation especially via the Zoom platform. Most courts and institutions have amended their existing mandates by including confidentiality provisions specifically addressing remote video conferencing mediation. For instance, E.D.N.Y. has included a separate Remote Mediation Agreement which among other things, prohibits recording any portion (audio, video, chat and other aspect of the conference) of an E.D.N.Y. mediation and also imposes court ordered sanctions in the event of breach.⁶⁷ Similar provisions have

HARV. NEGOT. L. REV. 29, 33 (2003) ("Few ... statutes, however, acknowledge the authority of a court to override the confidentiality privilege to enforce participation orders, address claims of participant misconduct, or to prevent abuse of process or professional ethics violations.").

⁶⁴ *Hoffman*, *supra* note 40 at 7.

⁶⁵ *Freedman & Prigoff*, *supra* note 42 at 40.

⁶⁶ *Id.*

⁶⁷ See *E.D.N.Y. Remote Mediation Agreement* at 2,3:

<https://img.nyed.uscourts.gov/files/forms/EDNY%20Confid%20Stip%20and%20Remote%20Med%20Agrmt%206.12.20.pdf>.

also been included in S.D.N.Y.'s Mediation Program Procedures.⁶⁸ Further, some institutions like the American Arbitration Association ("AAA") have developed detailed and succinct procedures for mediation via video conferencing such as "disclosing at the start of the session all people in the room with the attendee. Should an individual join the attendee after the session has begun, that individual should be identified to counsel and the mediator at the earliest opportunity."⁶⁹ Lastly, most private mediators have adopted comparable protocols (based on the court based or institutional rules) in their own mediation confidentiality agreement with respect to remote mediation by including prohibitions on recording, sharing attendee lists prior to the mediation and mandating use of a secure WiFi/Ethernet connection for all communications related to the mediation.⁷⁰

IV. Diminished Privacy and Higher Risks of Confidentiality Breach with Zoom

Although there are many platforms for video conferencing such as Skype for Business, Microsoft Teams, Google Meet...and so on, Zoom has become the most preferred platform to host a video conferencing mediation for mediators and American Courts.⁷¹ While there have been heightened initiatives in terms of tightening confidentiality mandates to adapt to remote mediation, there is also this sense of unease regarding privacy and security concerns with Zoom as its popularity soars. There have been stories of parties attending a remote video conferencing mediation from an unsecure

⁶⁸ See *S.D.N.Y. Mediation Program Procedures Sec 2 (c) and (d)*: <https://www.nysd.uscourts.gov/sites/default/files/pdf/Mediation/Mediation%20Rules%20and%20Procedures/Mediation%20Program%20Procedures.final.2020.pdf>.

⁶⁹ *AAA Video Conferencing Procedure*: https://go.adr.org/rs/294-SFS-516/images/AAA287_Model_Order_Procedures_Mediation_Videoconference.pdf

⁷⁰ *Zoom Interview with Linda Gerstel, Arbitrator & Mediator, GerstelAdr P.L.L.C. (April 10, 2021)*.

⁷¹ *Charles Young & Bob Wright: Online Dispute Resolution: You Can Do This!* *MEDIATE.COM* (last updated July 2020) <https://www.mediate.com/articles/wright-can-ODR.cfm>.

Wifi/Ethernet connection, or from a public location such as office within hearing distance of others where confidentiality is compromised, or in some cases in their homes with non-parties present in the same room.⁷² Also, the app's security and privacy practices have garnered a lot of bad press with upticks in "Zoom bombing,"⁷³ false end-to-end encryption claims⁷⁴, endless security issues—concern on its default settings and the mechanisms that make the app so easy to use.⁷⁵ At the beginning of the pandemic there were lawsuits filed alleging that Zoom is illegally disclosing personal information to third parties.⁷⁶ However, in response, Zoom remediated its security and privacy flaws by way of adding features intending to stop Zoom bombing such as waiting rooms and default passwords on all meetings.⁷⁷ With respect to its heavily criticized

⁷² Sara Clark Bowers *supra* note 15.

⁷³ Kim Lyons, *Zoom Vulnerability would have Allowed Hackers to Eavesdrop on Calls* (last updated Jan. 28, 2020), <https://www.theverge.com/2020/1/28/21082331/zoom-vulnerability-hacker-eavesdrop-security-google-hangouts-skype-checkpoint>, *THE VERGE* (last updated Jan. 28, 2020) (Zoom call has a randomly generated ID number between 9 and 11 digits long that's used by participants to gain access to a meeting. Researchers have found that these meeting IDs are easy to guess allowing anyone to get into meetings. Part of this ease of use has led to the "Zoombombing" phenomenon, where pranksters join Zoom calls and broadcast porn or shock videos. At fault here are Zoom's default settings which don't encourage a password to be set for meetings and allow any participants to share their screen.)

⁷⁴ Micah Lee & Yael Grauer, *Zoom Meetings Aren't End-to-End Encrypted, Despite Misleading Marketing*, *THE INTERCEPT* (last updated Mar. 31, 2020), <https://theintercept.com/2020/03/31/zoom-meeting-encryption/> (Most damning issue with Zoom is that on its website that a meeting is secure with end-to-end encryption, which it admitted was actually misleading).

⁷⁵ Lyons, *supra* note 73.

⁷⁶ Emma Whitford, *Zoom Hit With Proposed Class Action Over Privacy Concerns*, *LAW 360* (last updated Mar. 31, 2020) <https://www.law360.com/articles/1258716/zoom-hit-with-proposed-class-action-over-privacy-concerns> (Robert Cullen of Sacramento sued the company in California federal district court, saying Zoom has violated California's Unfair Competition Law, Consumers Legal Remedies Act and Consumer Privacy Act by collecting and disclosing personal information to third parties like Facebook "upon installing or upon each opening of the Zoom app," according to the complaint.)

⁷⁷ Kate O'Flaherty, *Zoom Security: 100 New Features Later, Can You Trust Zoom?* *FORBES* (last updated Jul 2, 2020):

lack of end-to-end encryption, Zoom addressed this by acquiring an identity management firm Keybase.⁷⁸ It claims to have added better encryption to its service. In other words, Zoom has put mechanisms in place to ensure that security and privacy remains paramount in each phase of its product and feature development.⁷⁹

A. What is Zoom Preferred for Mediation?

Zoom's features are easier to use as compared to other platforms. Its free software is simple to use both for the mediator and the parties. The form and substance of the process mirrors a traditional in-person session.⁸⁰ The neutral and the provider organization schedules and hosts the mediation process with the parties and counsel attending as guests. Agreements can be signed remotely using DocuSign and similar services.⁸¹ However, separate account credentials are required for the use of such services.

It is easier to connect to a Zoom meeting, usually with a link which includes a password for access. Its high-quality video features seamlessly shift to reflect the speaker. Zoom's enhanced features such as waiting room prevents unauthorized participant from joining the meeting until accepted by the mediator. As the platform is built and designed with business meetings in mind, tools like breakout rooms⁸² are built in features. Participants generally start in joint sessions and it is easier to break parties in caucus by moving them to a different breakout room. Also, one its unique feature which involves screen share functions, enables users to share screen

<https://www.forbes.com/sites/kateoflahertyuk/2020/07/02/zoom-security-100-new-features-later-can-you-trust-zoom-yet/?sh=210106d3336e>

⁷⁸ Eric S. Yuan, *Zoom Acquires Key base and Announces Goal of Developing the Most Broadly Used Enterprise End-to-End Encryption Offering*, ZOOM (last updated Mar 7, 2020): <https://investors.zoom.us/news-releases/news-release-details/zoom-acquires-keybase-and-announces-goal-developing-most-broadly>.

⁷⁹ Whitford, *supra* note at 76.

⁸⁰ Young & Wright *supra* note at 71.

⁸¹ *Id.*

⁸² Jane Colston & Steven James, *To Zoom Or Not To Zoom, That Is The Question: Mediations In The Time Of COVID-19* BROWNRUDNIK (Apr. 9, 2020), <http://brownrudnick.com/alert/to-zoom-or-not-to-zoom-that-is-the-question-mediations-in-the-time-of-covid-19/>.

simultaneously. Once all participants have joined the meeting, it allows the mediator to lock the meeting thus restricting non-participants from joining.

B. What Is Not Working?

Before analyzing what is not working with Zoom, a discussion on how video conferencing platforms like Zoom operate is most pertinent. With a phone, tablet or computer, users can access video conferencing platforms. These platforms generate a unique link for every video conference; upon clicking the link, a user is brought to the e-conference room. Similarly, other users who are a part of the meeting room can also connect to the same e-conference. Data (which includes voice and video stream, or anything that is shared on the screen) is sent from the person's computer to the Zoom server and the server then sends the data to all the participants.⁸³

Privacy and digital advocacy groups have raised concerns about the weak privacy and security measures adopted by Zoom. Zoom's privacy statement states that it does not monitor, sell or share *customer content*⁸⁴ for any purposes other than providing its services. However, Zoom collects and stores some personal data during mediations, including customer content in cloud recordings. Again, privacy policies are subject to change at any time based on a company's business strategy/policy. We have already seen this happen with WhatsApp when they updated their privacy policy.⁸⁵ Similar issues can develop with Zoom. Zoom's privacy policy also

⁸³ ZOOM, *White paper-Zoom Connection Process* (last visited Apr. 26, 2021), <https://zoom.us/docs/doc/Zoom%20Connection%20Process%20Whitepaper.pdf>

⁸⁴ Zoom Privacy Statement, ZOOM (last updated Aug. 12, 2020) https://zoom.us/privacy#_Toc44414842. (Customer content is the in-session information that the users give directly to Zoom through use of their services such as meeting recordings, files, chat logs and transcripts and any other information uploaded while using the services).

⁸⁵ Jagmeet Singh: *WhatsApp: Everything You Need to Know About the Controversial Privacy Policy Update*, NDTV (last updated Feb. 22, 2021) <https://gadgets.ndtv.com/apps/news/whatsapp-privacy-policy-update-changes-what-happens-if-you-dont-agree-details-facebook-data-2376020>. (Has already brought enough criticism for WhatsApp as it is changing the way it shares user data through its platform).

states that they may provide personal data with actual or prospective acquirers.⁸⁶ This may lead to sharing of personal data including name, email address, meeting schedules among other sensitive data from the point of view of confidentiality within the mediation process. In an in-person mediation, these risks are generally non-existent.

Another issue with Zoom is Zoom Bombing. Zoom Bombing is when a Zoom meeting is hijacked or infiltrated by pranksters or hackers, often with disturbing content of a graphic or racist nature.⁸⁷ This was primarily due to shared passwords and distribution of access information. In the recent past there have been a few instances of Zoom Bombing during online mediation in process. However, Zoom quickly rectified the issue by providing four essential tools which is a mandatory requirement for all neutrals.

First, the hosts for each mediation are required to assign a unique meeting ID and password to the participants to gain access to the mediation. Second, the waiting room restricts uninvited participants from entering into the meeting. Once the participants login in via the confidential meeting ID and password, they enter a virtual waiting room and remain there until admitted by the hosts. The host has the authority to either admit the participant or eject without having any contact with other attendees until a legitimate purpose for their presence is established.⁸⁸ Third, once all the required participants are admitted, the mediator will close the meeting barring any further admissions. Lastly, the mediator has the capability to create private conference rooms along with the main conference room and choose which guests to admit in each room. This way even if an uninvited party enters the meeting, he/she will be in the main conference room and unable to communicate with other attendees before being ejected.⁸⁹

⁸⁶ *Zoom Privacy Statement supra note 84.*

⁸⁷ *Kim Lyons, supra note 73.*

⁸⁸ *Young & Wright, supra note 71.*

⁸⁹ *Id.*

There are also inherent risk of non-parties advising or eavesdropping the disputants when a mediation session is in progress or a third party recording the mediation proceedings in absence of consent from the other party. For instance, a participant may use a share screen application and remotely share screen with a third-party even before the start of the meeting, allowing the third party to access the mediation. Alternatively, there may also be occasions wherein a disputant connects his laptop to another device like a smart television facilitating a non-related third party to access the mediation process. Lastly, if one of the parties is using a mobile device, like a smart phone, there are numerous screen mirroring applications like Bubble UPNP⁹⁰, Chromecast which can be used to mirror the device and can be accessed by third parties.

C. Why Is It Not Working?

The rationale for attributing confidentiality as the quintessential feature of mediation is that it encourages consensual dispute resolution. These issues such as third-party presence during an ongoing online video conferencing mediation session or issues of surreptitiously recording a mediation proceeding posits a serious question on the effectiveness of the online video conferencing mediation as it undermines confidentiality. However, the unanswered query remains that can Zoom or for that matter any other online video conferencing platform control the unseen and the unheard. Indeed, there are flaws with Zoom's privacy and security measures, yet it is equally possible for an individual attending an in-person mediation session to record or broadcast proceedings surreptitiously by using an electronic device. These risks have always been present. With the ongoing pandemic and with most proceedings moving online via Zoom along with Zoom's privacy issues, people are talking more about it. Hence, this may be the appropriate time to amend the existing confidentiality norms taking into consideration the lack of uniformity in confidentiality protections between the state and federal laws as well keeping up

⁹⁰ *FAQ, BUBBLEUPNP SERVER (last visited Apr. 30, 2021)*
<https://www.bubblesoftapps.com/bubbleupnpserver2/docs/FAQ.html>

with this new normal—a paradigm shift of conducting mediations via Zoom.

V. Empirical Study & Survey Results

If Zoom mediation needs to thrive, it must have the support and confidence of mediators, conducting remote online mediations. Recently, using a focused online survey through SurveyMonkey⁹¹, an endeavor was made to check the sentiments of leading practitioners about their preference in terms of online versus in-person mediation; issues faced with Zoom (if any) in terms of confidentiality breach and if they will continue to use Zoom post pandemic for mediation⁹².

(i) Survey Participants

To research these issues, two-groups were contacted with an online survey: (i) Members of the NY-DR List Serve;⁹³ (ii) Mediators empaneled with AAA-ICDR.⁹⁴ These survey results attempt to encapsulate the sentiments of 142 leading mediators,

⁹¹ About us, SURVEYMONKEY (last visited Apr. 30, 2021) <https://www.surveymonkey.com/mp/aboutus/>. (SVMK Inc., doing business as SurveyMonkey, is an online survey development cloud-based software as a service company. The company provides surveys, and a suite of paid back-end programs.)

⁹² Survey questions <https://www.surveymonkey.com/results/SM-MBFQQ2F89/>. (Some of the questions that were posed include:

- a. If you are a mediator which form of mediation, do you prefer?
- b. What platform do you use to conduct video conferencing mediation?
- c. Reason for developing a preference for Zoom.
- d. If there is a need for a platform which is uniformly used across institutions and courts for mediation?
- e. Confidentiality issues that have faced using Zoom.
- f. Impact of Zoom mediation on settlement rate?
- g. If they will continue to use an online platform like Zoom as the preferred method of mediation when the pandemic is over.

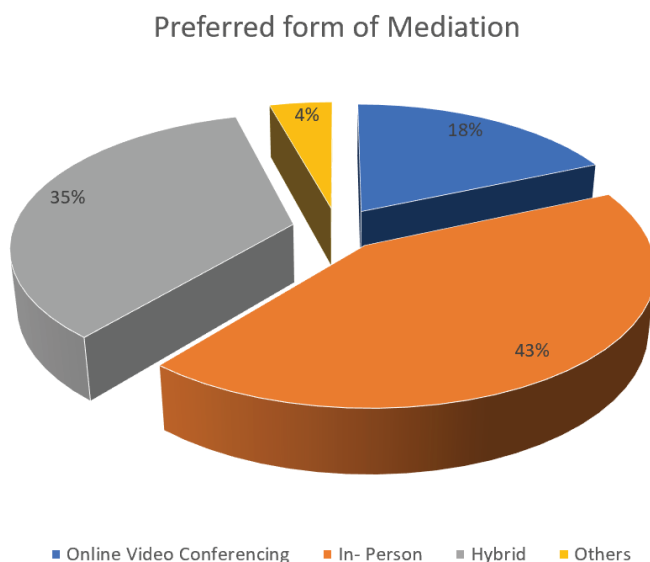
⁹³ NYC-DR listserv is hosted by the City University of New York Dispute Resolution Center at John Jay College of Criminal Justice for the purpose of facilitating information exchange and discussion among all those interested in dispute and conflict resolution, mediation, arbitration, peacemaking, facilitation, dialogue, collaborative problem solving, restorative justice, violence prevention, social justice and related fields.

⁹⁴ Member of AAA-ICDR Labor, Employment & Election Division who assisted in posting the survey to the mediators empaneled with AAA-ICDR.

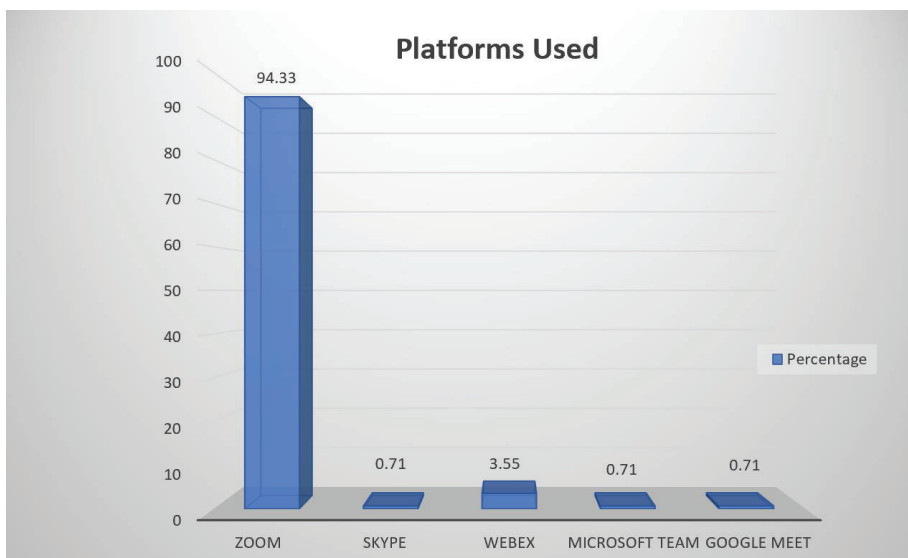
arbitrators/mediators and administrators with institutes which provides mediation service to the public. With respect to practice areas, most of the survey participants were mediators (59.15%) with the remaining belonging to other practice areas like arbitrators, inhouse counsels or people serving as both as a mediator and arbitrator.

(i) *Survey Results*

About 42.55% of the survey participants referred in-person mediation, while 18.44% were in favor of online video conferencing mediation. 34.75% of the group were in consensus for adopting a hybrid model consisting of both in-person and online video conferencing mediation depending on the nature and complexity of the case.

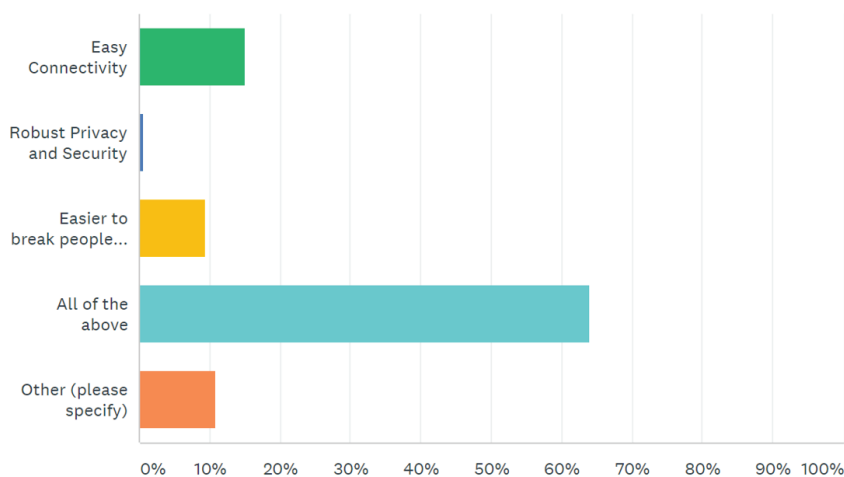


There is a broad consensus among the group on the use of Zoom over other video conferencing platforms: 94.33% of the participants prefers Zoom over other platforms.

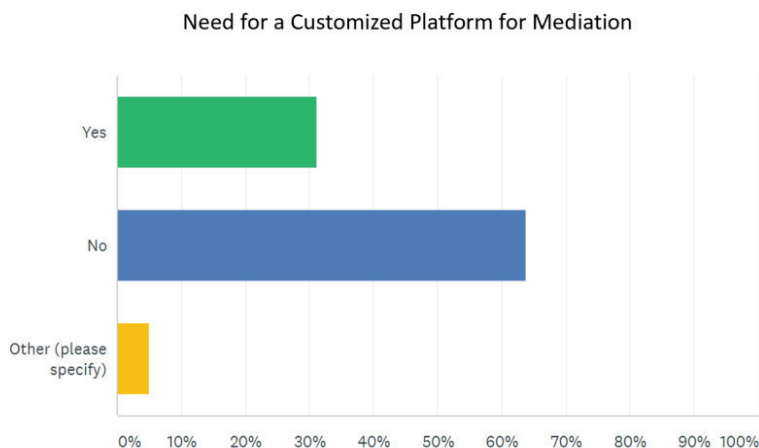


Further, according to 64.49% of the responders, Zoom’s enhanced features and easy connectivity are among the reasons for developing a preference over other video conferencing platforms.

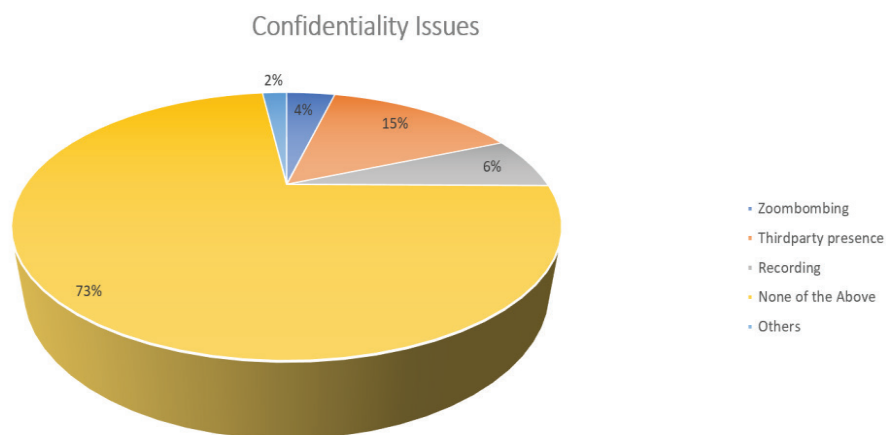
Reasons for Developing a Preference



About 63.57% of the survey respondents are comfortable with Zoom as is, without a need for a customized platform specially tailored for mediation. While, 31.43% of the participants recommended a customized platform specially enhanced for mediation.

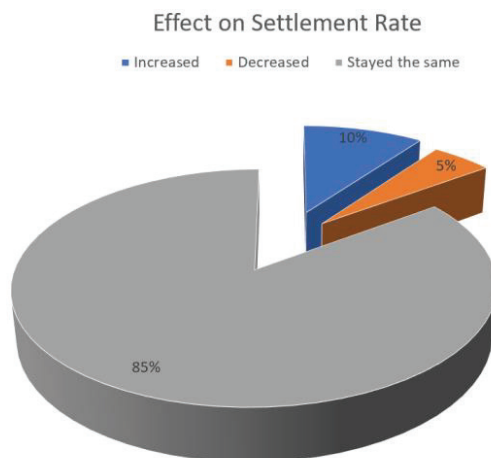


There is also a broad consensus on issues of confidentiality. A resounding 78.87% of survey participants are not aware or have not faced any confidentiality issues while using Zoom. About 16.20% of the respondents have encountered issues of third-party presence during a Zoom mediation. 7.04% of the responders have confronted issues of surreptitious recording while a mediation is in process and the remaining 4.23% have faced issues of Zoom Bombing.

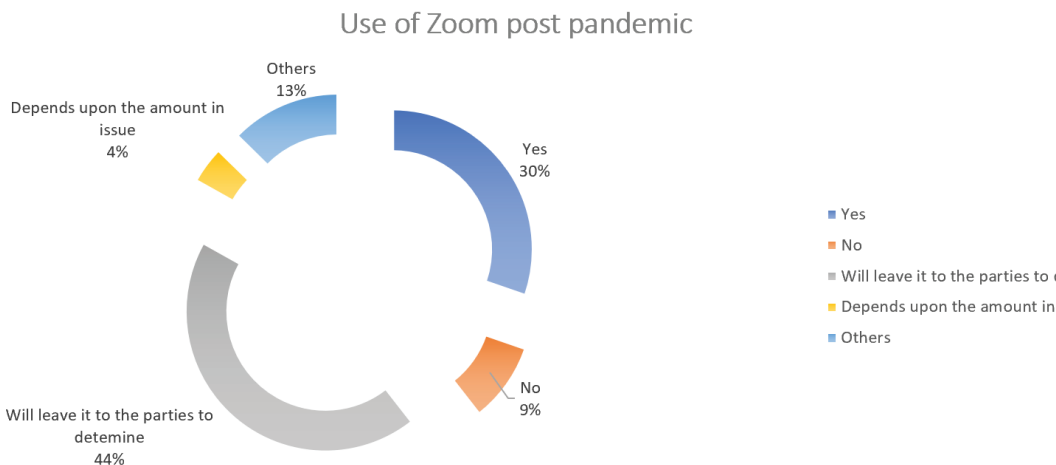


There is a greater consensus when it comes to settlement rate—85.00%—indicated that rate of settlement with respect to in person mediation versus mediation conducted via zoom have

remained the same. But 10.00% of the survey respondents are of the opinion that the settlement rate has increased with online Zoom mediation.



There was also a strong majority on whether they will continue to use Zoom as the preferred method of mediation when the pandemic is behind us. A strong majority of the participants, 43.66%, would leave it to the parties to determine their preferred mode of mediation (in-person versus Zoom mediation). But 29.79% of the participants preferred maintaining status quo i.e. continuation of Zoom mediation post pandemic and 4.26% were of the opinion that the decision to use Zoom or in-person mediation should depend on the nature and complexity of the issue.



VI. Proposals

To generate some workable proposals, an endeavor was made to combine the survey results with interviews with leading mediators⁹⁵ and service providers. After reviewing and synthesizing best practices followed by providers like AAA⁹⁶ and courts like E.D.N.Y.⁹⁷ and S.D.N.Y.⁹⁸ with respect to remote mediations, the following is proposed. Some of the proposals are procedural in nature while other aspects have more to do with practicalities to mitigate confidentiality breach.

The widespread perception of confidentiality underscores the need to amend the existing confidentiality norms in order to match reality with belief. A confidentiality provision in the Model Standards can be crafted with appropriate standards of conduct for online remote mediation and expressed remedies for breach. By way of example, following can be added to Standard V of the Model Standards: “The mediator must ensure that the parties to the mediation sign a remote confidentiality mediation agreement in which they agree not to record, transcribe or distribute any part of the mediation process. The parties must agree to announce to the

⁹⁵ Interview with Linda Gerstel, *supra* note 70.

⁹⁶ AAA Video Conferencing Procedures, *supra* note 69.

⁹⁷ E.D.N.Y. Remote Mediation Agreement, *supra* note 67.

⁹⁸ S.D.N.Y. Mediation Program Procedure, *supra* note 68.

mediator and the other parties, in the event a third party who has not signed the confidentiality agreement, joins the room or Zoom connection. In the event of any breach of the foregoing, the breaching party will be liable for liquidated damages to the non-breaching party.” Also, as more and more states have started adopting the UMA, a section specifically designed to remote mediation and confidentiality norms that needs to be adhered to, can be included.

The Confidentiality Agreement entered into between the parties and the mediator should prohibit with specificity the presence of any unrelated third-party in the mediation. Further, no recording of mediation proceedings should be permitted without full disclosure, awareness and informed consent of all participants. The Confidentiality Agreement should also include a separate provision on damages with higher liquidated damages for any breach thereof. Further, mediators should take steps to decipher the client’s beliefs about confidentiality and disclose the applicability of laws in their jurisdiction.

Most US Courts⁹⁹ are using a separate Zoom account—Zoom for Government. It has been designed to conform with special needs¹⁰⁰ and requirements of the U.S. government and provides a same, seamless, secure and reliable Zoom experience. Although it is available to only federal and state government, similar agreements can be put in place with Zoom to leverage the existing privacy flaws. For instance, a specific restriction can be referenced in the agreement that any authorized recording should only be recorded to

⁹⁹ Lauren Believe, *Things You Should Know About Zoom for Government*, ZOOM (Jan. 12, 2021) <https://blog.zoom.us/4-things-you-should-know-about-zoom-for-government/#:~:text=While%20Zoom%20for%20Government%20users,the%20other%20certifications%20and%20authorizations.>

¹⁰⁰ *Id.* (Zoom for Government was designed to conform with the requirements for FedRAMP authorization, the federal program for evaluating the security of solutions. This government-wide program provides a standardized approach to security assessment, authorization, and continuous monitoring for cloud products and services. It enables agencies to evolve from legacy infrastructures to mission-critical, secure, and cost-effective cloud technology.)

and stored on the mediator's computer and not on Zoom cloud, to preserve privacy.

Lastly, along with a change in nuance, a few practical measures followed at the start of the session can help circumvent mediation issues. For instance, requesting participants to wear headphones to avoid a third party listening in, requiring them to scan the room with their cameras to confirm the absence of third parties and using dual camera to detect any third-party presence during the course of the meeting.

VII. Conclusion

Zoom Mediation is here to stay. This tumultuous period of chaotic disruptions has taught us the effective use of technology to conduct business and resolve disputes if nothing else. Most survey practitioners have opined that ultimately it is the party's choice whether to continue using Zoom for mediation or revert to in-person mediation once the pandemic is behind us. While I agree with this, I also feel a hybrid model will be most suited to circumstances where parties have difficulty travelling to the venue due to logistical issues such as disability or where parties are hostile and wants to avoid a face-to-face confrontation. Also, cases where the monetary value is below a certain threshold can be automatically referred to Zoom Mediation.

Lastly, amending the existing norms and practices with respect to confidentiality is important for mediation to function as a representative of the law and the court. A review of the survey and review of the literature concerning confidentiality reveals an almost universal agreement that Zoom platform is the most preferred platform for video conferencing mediation and thus, there is a need to amend the existing confidentiality norms. Without new standards, the mediation process will become a house of cards subject to complete disarray by a variety of potential disruptions.

The Year of the Expanding Mediation Room: COVID-19 and the Dawn of Party-Centered Digital Spaces

Cai Phillips-Jones

Introduction

Mediators are in the business of enhancing agency for parties in conflict.¹ Peter Miller, a mediator of the transformative school of mediation defines agency as follows: “Agency is the self-aware and reflective assertion by an individual of the intentional choice to make decisions affecting their life circumstances.”² Mediator and writer Kenneth Cloke puts it more simply: “[The] role of mediators is... to create choices.”³

The ability of mediators to help create choices for disputants is constrained by, among other things, the conditions under which mediations can occur. The conventional in-person model of mediation imposes such limitations as: the need to be willing to devote most of a day to the mediation; the need to be together in a building to mediate; and the need for parties to be able to afford to travel or take time away from their jobs. Even when parties are willing and able to attend a mediation in-person, the mediator may have to work to put the parties at ease in an unfamiliar or intimidating setting; they may be uncomfortable being close to the opposing party; parties may have grown to resent the opposing party in anticipation of litigation; or they may feel coerced to enter

¹ *There is debate around whether party agency is the foundational values of mediation, or merely one of the core values. See Robert A. Baruch Bush and Peter F. Miller, Hiding in Plain Sight: Mediation, Client-Centered Practice, and the Value of Human Agency, 35 Ohio St. J. on Disp. Resol. (2020) (Forthcoming) (Arguing that agency is the core value of mediation).*

² *Id.* at 20.

³ KENNETH CLOKE, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION* xii 2006.

mediation by a judge.⁴ The limitations imposed by basic physical and procedural realities goes on. In contrast to the limitations widely accepted pre-COVID, new digital spaces present opportunities for mediators and court systems to collaboratively create party-centered processes.⁵

From within the dark cloud of COVID-19 emerges a possible a silver lining for mediators - and many others as well. Across the country, many people hope that they will be able to continue to work remotely and spend more time with their families and less time in traffic, and perhaps enjoy greater autonomy in their workspaces.⁶ The extent to which these hopes will be realized is still unclear. Some functions are simply not translatable to a remote economy. Mediation, however, can be *enhanced* by remote processes.

This paper will attempt to persuade the reader that remote mediation has not merely risen to the challenge of the pandemic, it has in fact brought mediation closer to fulfilling its potential to create integrative solutions and enhance human agency. Remote processes are remarkably well suited to support mediation's core value, party agency, and the potential advantages of remote

⁴ *Presumptive mediations as a policy has often emerged in tandem with remote mediation during the pandemic – and thus the pressure to mediate likely has increased during the pandemic and alongside the rise of remote mediation. Remote processes and undue pressure to mediate are not necessarily linked. In fact, earlier and more involved intake by mediation experts may provide parties a more informed choice about whether to mediate than the traditional court mediation referral.*

⁵ *Mediation should fundamentally be about creating party-centered spaces. Mediation involves the creation and maintenance of spaces where parties have additional choices, and a mediation is successful only when these additional choices change the rules or patterns that previously defined the conflict.*

⁶ *Lydia Saad & Adam Hickman, Majority of U.S. Workers Continue to Punch in Virtually, Gallup News (Feb. 12, 2021), <https://news.gallup.com/poll/329501/majority-workers-continue-punch-virtually.aspx>.*

mediation should be acknowledged as we transition away from a quarantined, remote-only world.⁷

The advantages that remote mediation offers are also suitable to advance the relationship between mediation processes and legal processes. Mediators value party agency, integrative outcomes,⁸ and the process of mediation itself, while courts have historically valued the ability for mediation to reduce caseload.⁹ When mediation is easier to access, there is more opportunity for more people to discover the agency-enhancing power of mediation, and more cases will be settled that would otherwise end up in the courts. In the ongoing dialog between courts and mediators about how best to serve disputants, remote mediation can be part of an integrative solution.

The opportunities presented by remote mediation will be explored in this paper with the help of three guiding questions: (1) Why did remote video mediation work better than expected? (2) What was the transition to remote mediation like for mediation professionals? (3) What will happen with remote mediation when it is no longer necessary?

Section I will interrogate the question of why remote video mediation works, through the lens of psychological and negotiation theory. The aim of this section is twofold: (1) to provide a brief overview of the small body of research on video negotiation that

⁷ Among the sample of CDRC administrators interviewed for this paper, Remote video mediation seems to have become the preferred type of remote mediation process during the pandemic. In this paper, the term “remote mediation” generally refers to remote video mediation, unless audio only or telephone mediation is specified.

⁸ A concept fundamental to mediation, integrative solutions are those solutions that are non-zero sum. In other words, solutions where no party must be the loser. See CARRIE MENKEL-MEADOW et al., *MEDIATION: PRACTICE, POLICY, AND ETHICS* 8 (2nd ed. 2013) (discussing non-zero sum solutions).

⁹ Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR”*, 19 FLA. ST. U. L. REV. 1, 3 (1991).

exists and (2) to offer some explanation of why remote (especially video) mediation has been successful.

To answer guiding question (2), Section II will report the experiences and lessons learned by administrators of mediation programs as they rapidly adapted to remote mediation. Fourteen individuals who mediate with and administer mediation programs, and two professors of mediation, hereinafter referred to as “interviewees,” were interviewed. These interviewees work in federal courts, state courts, law schools, and community dispute resolution centers (CDRCs) across seven states. In Section II, the reported changes that remote mediation wrought are categorized into (1) robust characteristics of remote mediation that are likely to continue after the pandemic, and (2) non-robust characteristics likely to be a result of the particular circumstances of the pandemic. Section III will briefly address the third question: “What will happen when remote mediation is no longer necessary?” The tentative visions that the interviewees have of post-pandemic remote mediation will be discussed.

I. Theoretical Approaches to Remote Mediation

Stress: Good and Bad Outcomes

Remote mediation changes the way that parties engage in conflict. Though the differences are not yet well documented, remote mediation seems to be more comfortable for many parties.¹⁰ The Yerkes-Dodson Law suggests that performance at complex tasks increases under pressure up to a point; if pressure then continues to increase past this threshold, performance decreases.¹¹

¹⁰ E.g. Interview with Palvir Shoker, Mediator, Congress of Neutrals (May 30, 2021).

¹¹ The original Yerkes Dodson Law has been altered over the past century and alternative models have been developed to more accurately describe the effects of stress on specific mental tasks. For example, in memory tasks, there is a sudden, steep decline in performance, rather than the gentle decline described in the original formulation. See: Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 *Law & Hum. Behav.* 687, 689 (2004).

This may sound familiar to mediators who endeavor to keep parties engaged in problem-solving, but not at each other's throats or overwhelmed by the stress of the conflict.

Differing experiences of remote mediation and legal processes among sophisticated, experienced parties, and everyone else, may be explained by the neuroscience of stress. Novelty, unpredictability, and uncontrollability all tend to increase stress response.¹² Lawyers who frequently go to hearings in their work may experience a pleasurable adrenaline rush that helps them stay focused - even though the experience is routine to them and far more predictable it would be to a non-lawyer.¹³ For parties, the experience of going to court, or even a mediation, is highly stressful: it is novel, unpredictable, and can feel uncontrollable even for parties who are being helped by an experienced mediator. The mediator's job is to help parties regain some control over their conflict. Remote mediation may enable anxious, introverted, scared, or overwhelmed participants to participate at a higher level.¹⁴

Conversely, case types that are less contentious may benefit from in-person mediation. One interviewee reported that commercial mediation parties are looking forward to going back to in-person mediation as soon as possible.¹⁵ Commercial mediators tend to be sophisticated parties who are skilled at maintaining continuing commercial relationships. Online mediation may feel like a downgrade - it may lack the human touch and even excitement that traveling to do an in-person mediation provides. This mirrors

¹² *Sonia Lupien et al, The effects of stress and stress hormones on human cognition: Implications for the field of brain and cognition, 65 Brain and Cognition 209, 210 (2007).*

¹³ *Margaret D. McGaughey, Remote Oral Arguments in the Age of Coronavirus: A Blip on the Screen or a Permanent Fixture?, 21 J. App. Prac. & Process 163, 178 (2021) (Noting lawyers experienced less of an adrenaline rush with remote hearings).*

¹⁴ *See Interview with Palvir Shoker supra note 10; Interview with Anonymous CDRC Administrator (April 21, 2021).*

¹⁵ *Interview with Tamara Lange, supra note 15.*

experiences of some lawyers during the pandemic.¹⁶ Video mediations felt less exciting, and the general takeaway was that remote hearings felt “more stilted and less spontaneous.”¹⁷

In conflicts where parties may not feel motivated to engage in the mediation process, the Yerkes-Dodson law and related research suggests that increased comfort may militate against party engagement. It has been observed by some mediators that parties in remote mediations may have “excessive freedom” that and they have trouble staying on task and engaged.¹⁸ Difficulty connecting with and keeping the parties engaged was one of the most commonly cited challenges of remote mediation observed by New York Peace Institute mediators during the summer of 2020.¹⁹ However, difficulty in maintaining party engagement was mentioned with much less frequency during the interviews for the present study, perhaps reflecting the growth in ability of mediators to guide parties and adapt their skills to remote mediation between the summer of 2020 and spring of 2021.

Media Richness Theory

One of the biggest surprises to come out of the transition to remote mediation is just how well video mediation works. However, the success of video mediation is probably less surprising to those who have read the work of professor and online dispute resolution scholar Noam Ebner. Ebner applies the theoretical framework of media richness theory to help explain the challenges of remote negotiations and why video technology is successful in remote negotiations.²⁰

¹⁶ Margaret D. McGaughey, *supra* note 13.

¹⁷ *Id.* at 174.

¹⁸ Remote Mediation Report 5 (2020) (unpublished) (on file with with author).

¹⁹ *Id.*

²⁰ Noam Ebner, *Negotiation via Videoconferencing*, in *THE NEGOTIATOR'S DESK REFERENCE*, 151, 154 (2017).

Media richness theory is composed of four components: (1) the senses activated by a medium, (2) the types of cues used (such as verbal and nonverbal), (3) the languages and types of languages that are used in the communication, and (4), the “interactivity” or quickness of the communication.²¹ By definition, communication becomes more difficult as media richness is reduced.²²

In his 2017 paper on video conferencing, Ebner notes that video is a very rich medium:

Videoconferencing seems to score high on nearly all of the measures these theories provide. It allows for visual and aural channels, and a rich variety of verbal and nonverbal cues. Some platforms allow parties to share screens, whiteboards or slides, expanding the number of channels, the types of information that can be shared through them, and the multiple types of languages accommodated by the medium. Clarification can be an instantaneous process, and all communication can be personalized. Parties are not only visible to one another, but their instinctive reactions to one another—a laugh, a nod of the head, a “Yes, exactly” or even a “Never!” all give the sense of parties being present, “there,” and “real.”²³

Media richness theory suggests that the adoption of video technology for mediation during the pandemic was facilitated by how well video approximates the experience of communicating with someone in person. However, Ebner also elucidates the challenges that may accompany video negotiation, including a lack of trust due to technology struggles, lack of the same body language cues as featured in in-person negotiation, and reintroduction of “otherness”

²¹ *Id.* at 154-55.

²² *Id.* at 154.

²³ *Id.* at 155.

i.e., differentiators like race and sex that are less present in text-based, (or perhaps audio-only) negotiation. Ebner urges practitioners to compensate for potential pitfalls of video negotiation: “Be proactive: Use verbal and nonverbal cues to lessen perceived distance between you and your counterpart.”²⁴

Affective Synchrony

Another piece of the puzzle of computer-mediated communication comes from Psychologist Paula Niedenthal’s theory of affective synchrony. Her research demonstrates that understanding of others’ emotional states is enhanced through mimicry of their expressions.²⁵ In other words, mimicking others’ expressions helps us understand what other people are feeling. Video mediation provides a far richer opportunity for this empathic mimicry compared to audio only mediation. Niedenthal’s research also shows that when other stimuli are lacking, such as the ability to communicate verbally, we increase this affective synchrony through increased mimicry to facilitate communication.²⁶ In video mediation where the face is seen clearly, but some body language will be cropped out, a lack of body language may be able to be compensated for by increased utilization of facial expressions or tone of voice. Mediators might visually react *more* to what parties are saying when they are in a restricted medium like zoom compared to in-person.

The reading of facial expressions is something that has been noted by mediators²⁷ and at least one judge²⁸ as a potential advantage of online video platforms over in-person mediations - the result of being able to see everyone’s face side by side. While video mediation is still less rich than in-person mediation, it seems to be

²⁴*Id.* at 156.

²⁵*Affective Synchrony, NIEDENTHAL EMOTIONS LABS, <https://www.niedenthalemotionslab.com/affective-synchrony> (last visited June 14, 2021).*

²⁶ *Id.*

²⁷ *Remote Mediation Report, supra note 18.*

²⁸ *Margaret D. McGaughey, supra note 13.*

rich enough so that mediators are often able to make up the difference by adapting their techniques.

II. The Response to COVID-19

On March 16, 2020, New York Courts closed for all non-essential functions. No new civil or criminal cases were opened between March 16 and July 14, and jury trials were further delayed until October 20.²⁹ By March 18th, over 25 federal district courts around the country had closed.³⁰ The lack of access to litigation likely put pressure on litigants, especially plaintiffs, to solve their disputes outside of the courtroom, and on court systems and CDRCs to provide safe fora for resolution.

Many court ADR programs and CDRCs responded to the need for continuing dispute resolution services by quickly shifting to online video chat platforms such as Zoom, Skype, and Microsoft Teams.³¹ For both mediators and administrators, the adaptation to remote work has largely been viewed as successful. This transition to remote work occurred despite long-standing resistance to remote mediation and legal processes from many attorneys and mediators.³²

The Court during the COVID-19 Pandemic

When the pandemic struck in March 2020, courts around the country took steps to mitigate the public health risk of in-person

²⁹ *Archive of Covid19 Content, New York State Unified Court System, <https://www.nycourts.gov/covid-archive.shtm> (last visited May 3, 2021).*

³⁰ *DEBRA CASSENS WEISS, A Slew of Federal and State Courts Suspend Trials or Close for Coronavirus Threat, ABA Journal (Mar. 20, 2020), <https://www.abajournal.com/news/article/a-slew-of-federal-and-state-courts-jump-on-the-bandwagon-suspending-trials-for-coronavirus-threat>.*

³¹ *The gap in time between when mediations were called off due to COVID-19 and when they were resumed ranged from less than a week to multiple months, depending on the organization. See: Interviews with Court Administrators. (Feb-April 2021).*

³² *Doug McQuiston & Sharon Sturges, A Digital Door to Justice or Pandora's Box?, 43 Colo. Law. 30, 32 (2020).*

hearings. By March 18, at least 25 federal courts halted jury trials.³³ By mid-April, the Supreme Court was doing all oral arguments via telephone.³⁴ Between March and June, state courts issued over 300 orders pertaining to COVID-19 restrictions.³⁵

Now that the worst of the pandemic seems to be over in the United States, court administrators, like mediation administrators, are faced with the question of if, when, and how they will return to in-person work. Broader court policy regarding remote work will likely have a trickle-down effect on the extent to which mediation is practiced remotely.³⁶ The question that the legal industry, like many others, is facing, is whether or not the pandemic shifted some types of work to being permanently remote. One recent in-depth treatment of the remote court experience concludes by saying “How long remote arguments will be the norm is anyone's guess.”³⁷

ADR Responses to COVID-19

Many ADR programs responded to COVID-19 by quickly instituting remote mediation policies and preparing mediators and parties for remote mediation.³⁸ Court systems (such as the federal court system) that already had remote technology platforms or presumptive mediations programs in place prior to the pandemic

³³ Weiss, *supra* note 30.

³⁴ Press Release: April 13, 2020 Supreme Court of the United States https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20 (last accessed May 3, 2021)

³⁵ 2020 Emergency Order Archives National Center for State Courts <https://nationalcenterforstatecourts.app.box.com/s/bqbl3fjlwp5bt87j6nnbocxlq9fgpzf?sortColumn=date&sortDirection=ASC>

³⁶ Interview with Laurel Stevenson, Mediation and Assessment Program Director for the W. Dist. Ct. of Mo. (Feb. 17, 2021).

³⁷ Margaret D. McGaughey, *supra* note 13.

³⁸ It is not clear the degree to which the many different court systems used video vs. audio only ADR processes - but there near universal agreement that video has emerged as the superior tool for both remote mediation and court litigation. See Interviews with ADR Administrators (Feb.-Apr. 2021); Remote Mediation Report *supra* note 18.

seem to have been able to make the transition more quickly.³⁹ Janet DiFiore, the chief judge of the New York State Unified Court System had in 2019 implemented a presumptive ADR program.⁴⁰ This helped reduce the scramble to unload cases from the court system when the pandemic made court procedures impossible: many cases that might have been disrupted in another court system were already in the ADR pipeline, so when mediations resumed remotely, New York's ADR programs seem to have had sufficient capacity to pick up the slack.⁴¹

Some Courts and CDRC's were less quick to move remote. Courts such as California's Contra Costa County Superior Court did not attempt to process small claims cases for remote mediation for some nine months after the pandemic struck, despite willingness of CDRC's to take the cases.⁴² This was apparently due to a lack of technical infrastructure for the courts to process the cases remotely.⁴³ Some mediation programs continued to offer mediation throughout the pandemic, while offering optional virtual mediation.⁴⁴

At least one CDRC, independently of court action, delayed moving to remote processes in order to ensure that their processes and high standards of service were maintained. The Mediation Center of Dutchess County, (MCDC) New York delayed moving their processes to remote until June, approximately 2.5 months after

³⁹ E.g. *Interview Anonymous supra note 14* (stating the court had adopted remote technology shortly prior to the pandemic).

⁴⁰ *Press Release: Court system to Implement Presumptive Early Alternative Dispute Resolution for Civil Cases, New York Unified Court System, (May 14, 2019)*.

⁴¹ *Interview with Lisa Denig, Special Counsel for ADR Initiatives, New York State Office of Court Administration. (Apr. 19, 2021)*.

⁴² *Interview with Palvir Shoker supra note 10*.

⁴³ *Id.*

⁴⁴ *See Anna C. deDufour & Karlee M. Naylor, Mediating Parenting Solutions in the Age of Technology, 2021 Am. U. Sch. Pub. Aff. Res (Forthcoming) 6; See also Interview with Laurel Stevenson (Feb. 17, 2021)*.

the pandemic struck, in order to train their volunteers and staff to mediate remotely.⁴⁵ In order to ensure a high quality of service, MCDC instituted a policy that all mediations would be attended by at least one staff member. Executive Director Leanne Lawson anticipated the remote mediation infrastructure would not be a temporary fix, so delaying in order to implement a high-quality, long term remote mediation plan made sense.⁴⁶

How Shifting to Remote Processes Affected Mediation: An Evolving Picture

In terms of overall settlement rates, it appears that in most contexts there has not been a significant difference between remote and in-person mediations.⁴⁷ One potential source of confounding factors when comparing settlement rates is the pandemic itself. Merely by comparing 2020 remote mediations to in-person mediations that happened prior to the pandemic, it is impossible to know whether any observed differences are either being created or masked by factors other than the switch to remote mediation. For example, there is presumably greater pressure for plaintiffs to settle during the mediation when there are long waits to get into a courtroom - and correspondingly less pressure for defendants to settle - as they can comfortably delay having to settle the case by opting out of mediation.

In a survey conducted in August and September of 2020 of mediators at a New York CDRC, nearly all mediators surveyed found the experience of moving to remote work to be positive or better than they expected.⁴⁸ The most cited concerns were difficulties forging personal connections in remote spaces, and increased difficulty for the parties engaging and staying engaged in the process.

⁴⁵Interview with Leanne Lawson, Executive Director, Mediation Center of Dutchess County (Mar. 26, 2021).

⁴⁶Id.

⁴⁷E.g. Interview with Anonymous, *Supra* note 14.

⁴⁸Remote Mediation Report, *supra* note 18.

In the more recent interviews with ADR administrators and mediators conducted by the author between February and April of 2021, reception of remote mediation seemed even more positive, though also included some negatives. One interviewee even went as far as to say that the advantages of remote mediation outweighed the disadvantages, and remote mediation (in his area of practice) is simply superior to in-person mediation.⁴⁹ Other mediators have said they will never go back to in-person mediation.⁵⁰ It is worth noting that similar sentiments were almost entirely absent from the interviews conducted by the author earlier, in the summer of 2020. A possible explanation of this change since summer 2020 is that mediators have become more comfortable and skilled in conducting remote mediation. One state supreme court ADR administrator described a process of becoming acclimated to remote mediation: “Initially the procedural and administrative parts were the focus. When that became second nature, and as we became more comfortable, we started to be able to focus on the quality of the process and the substance of the mediation.”⁵¹

The results of the interviews conducted are numerous anecdotes, including observations, predictions, and strategies concerning remote mediation. These anecdotes have been sorted into two categories. The first category concerns the attributes of remote mediation that are mostly independent of the pandemic crisis itself.⁵² These are called *robust* attributes. The second category

⁴⁹ Interview with Robert K. Collins, Professor of Practice, Cardozo School of Law (April 8, 2021).

⁵⁰ Interview with Laurel Stevenson *supra* note 36 (referring to other mediators).

⁵¹ Interview with Anonymous (April 9, 2021).

⁵² Robust attributes will not necessarily continue to be in effect after the pandemic, but rather they are able to be utilized if practitioners so decide. Whether they are utilized depends on the choices of mediators and administrators. For example, CDRCs will likely be able to use the remote work experience of the pandemic to offer more flexible work arrangements to staff going forward. However, whether a particular CDRC actually finds the remote work

concerns those attributes that are more likely to be strongly influenced by the pandemic and associated circumstances and therefore temporary, and are called *non-robust* attributes. The purpose of this classification scheme is to make clear which characteristics should be weighed more heavily when considering the role of remote mediation in a post-pandemic future. The robust and non-robust categories are further broken down into advantages, disadvantages, and tradeoffs.⁵³

Robust Advantages of Remote Mediation

There are significant advantages of remote mediation for administrators of mediation programs, particularly in terms of flexibility and administrability.⁵⁴ There is greater willingness to mediate on the part of both mediators and parties, especially for parties who live far away,⁵⁵ and a corresponding advantage in access to justice.⁵⁶ The greater flexibility of remote mediation also means that parties who are offered non-mediation services may take

arrangement to be advantageous or practicable for their organization is not within the scope of this paper.

⁵³ Generally, these comparisons are meant to contrast remote mediation during the pandemic to in-person mediation before the pandemic. However, there are also comparisons between in-person mediation and remote mediation that both occurred during the pandemic. Finally, there are comparisons between remote video mediation and remote telephone mediation. The problem of what to compare different methods of ADR to is one that has been conceptualized as the "baseline problem." See: Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 1 (1991).

⁵⁴ Ease in administration of mediations has carryover effects for access to justice, and quality of justice as well. When mediations are easy to attend, they will be attended by people who otherwise would not be willing or able to. Many mediators would likely argue that more mediation is better and thus any improvements in administrability will translate to increased access to justice. However, some parties undoubtedly felt pressured to mediate due to the lack of other means of settling disputes during the pandemic. Any corresponding increase in mediations should not uncritically be accepted as a net positive outcome.

⁵⁵ Interview with Palvir Shoker *supra* note 10.

⁵⁶ E.g. Interview with Anonymous *supra* note 14.

advantage of underutilized pre-litigation diversion programs.⁵⁷ For mediators and administrators, remote mediation offers a larger pool of more diverse, specialized, and skilled mediators to select from.⁵⁸ For example, if a CDRC is referred a case from the Surrogate's Court in Queens, NY, they can bring a mediator who is an expert in dealing with estate disputes, even if they live in Albany or even further away. There is also an opportunity for CDRCs and courts to provide more flexible work hours and arrangements to staff. In addition to flexibility in administration of mediations themselves, there the potential for significant cost savings in moving away from physical mediation offices and rooms,⁵⁹ savings that have only begun to be realized as organizations rethink their onsite/remote work balance.

Besides these administrative advantages, there are robust advantages that remote mediation provides to the parties directly, or indirectly by helping mediators be more effective. Perhaps most significantly, several interviewees reported that some parties seem less pressured or more relaxed in remote mediation,⁶⁰ or that it was easier to get parties to buy in to the process of remote mediation.⁶¹ Another important advantage of remote mediation to parties is the distance between the parties, which can provide a buffer in

⁵⁷ E.g. Interview with Palvir Shoker *supra* note 10.

⁵⁸ Interview with Lisa Denig *supra* note 41.

⁵⁹ Interview with Anonymous *supra* note 51.

⁶⁰ E.g. Interview with Palvir Shoker *supra* note 10.

⁶¹ Too much informality (e.g., a party using a vaporizer during a mediation), or a lack of engagement can arguably also be detrimental to the process. However, a process that reduces anxiety, even when it is occasionally accompanied by excessive informality or lack of engagement, should be considered an advantage to a mediation process – because these behaviors are ultimately a reflection of party choice. While this reasoning may not persuade those concerned primarily with settlement rates, the fundamental value of mediation, as articulated from the first sentence of this paper, is party agency. What might persuade courts of the proposition that relaxed parties are good for them, is data showing that offering lower stress remote processes increases overall engagement in ADR. These interviews anecdotally support this conclusion.

contentious conflicts or conflicts where safety is an issue.⁶² While multiple interviewees reported this as an advantage, one interviewee reported that it might be more difficult to support traumatized parties via remote processes.⁶³

Robust Tradeoffs in Remote Mediation

Mediators and CDRCs may take on more of a role in managing and developing cases; this may decrease the level of adversarial behavior in mediations, enhancing the efficacy of mediation, but it may also increase the administrative burden for CDRCs, as some interviewees reported.⁶⁴ While administrative burden may be an inevitable consequence of reaching more disputants, in some programs it felt like there was an increased workload per case, as court systems were asking for help from mediation programs in earlier stages of cases or asked mediation programs to handle additional steps of the intake process.⁶⁵ If CDRCs are able to be sufficiently funded to take on additional case management roles, parties could stand to benefit from earlier diversion to ADR. Alternatively, referring courts, such as small claims courts, could themselves train experts to brief the parties on mediation. This practice is already in place in many courts that handle larger cases.

Another tradeoff that emerged from the interviews is the diversity of technological ability among mediators and parties.⁶⁶

⁶² One anonymous administrator observed that social media usage seems to have eroded the ability for community members to speak to each other in productive terms about contentious issues - but video mediation seemed like a good way to bridge the divide between online antagonism and in-depth in-person discussion. See Interview with Anonymous *supra* note 14.

⁶³ Interview with Adrian J. Burke and Amy L. DiFranco (Feb. 23, 2020) (noting that providing the support a traumatized party needs can be challenging to do remotely); see also deDufor and Naylor, *supra* note 44 (reporting that remote mediation provided a buffer for abused parties).

⁶⁴ Interview with Lisa Denig *supra* note 41.

⁶⁵ Interview with Leanne Lawson, *supra* note 45.

⁶⁶ There are also known quality challenges with video mediation not mentioned by interviewees, including difficulty establishing rapport and frequent

While this may upend some hierarchies and power dynamics, such as younger vs. older parties, it may perpetuate other inequities due to a “digital divide” that occurs when marginalized demographics do not have sufficient access to or comfort with technology.

Robust Disadvantages of Remote Mediation

Remote mediation is not without disadvantages, at least for the time being. The downside of remote mediation mentioned most frequently by interviewees was the potential for there to be distractions in the background, which can make communication and engagement more difficult. Another disadvantage of remote mediation that is unlikely to change at least for a few years, is that even video is not as rich a communication medium as a shared room. While video mediation is a big improvement over telephone, it was reported by one interviewee that it was more difficult to read body language over video than in-person.⁶⁷ Others however reported that being able to see both faces at the same time, or even one’s own reactions to what parties were saying, was an advantage.⁶⁸ Finally,⁶⁹ issues with security and identity verification, while well controlled in general, will continue to be more challenging than in-person.

Non-Robust Advantages

Most of the attributes reported by interviewees seemed to be embedded in remote mediation technology itself and are therefore likely to be present going forward. However, a few were linked to the circumstances of the pandemic. For example, an advantage of remote mediation during the pandemic was that it was offered more quickly to parties compared with most court processes.⁷⁰ Remote

technological issues that mediators have reported in previous research. See Remote Mediation Report, supra note 18.

⁶⁷ *Interview with Anonymous supra note 14.*

⁶⁸ *Interview with Robert K. Collins Supra note 49.*

⁶⁹ *There are also known quality challenges with video mediation not mentioned by interviewees, including difficulty establishing rapport and frequent technological issues that mediators have reported in previous research. See Remote Mediation Report, supra note 18.*

⁷⁰ *Interview with Lisa Denig supra note 41.*

mediation was also therefore able to settle cases more quickly – which may not be the case in the future.

Non-Robust Disadvantages

The need for initial training and resources to support the move to remote mediation is something that is mostly ephemeral. The struggle to get remote mediation to a workable, relatively comfortable place seems to have occurred mostly in the first few months of the pandemic. It seems likely, however, that we are still on a learning curve for remote mediation.

There was also a shift to increased time in front of a computer for administrators. While this will remain in effect for as long as computers are the medium for remote mediation, the disadvantages and health risks associated with sedentary screen-dependent lifestyles, are not inherent in computer-centric workplaces.

III. The Future of Remote Mediation

Interviewees were asked what they expected in terms of remote mediation continuing after it was no longer medically necessary. Out of these conversations emerged a near-consensus view that remote mediations are here to stay. However, there is much uncertainty about what form they will take.

Areas of Agreement and Converging Strategies

Multiple interviewees noted that mediation was on a trajectory in the direction of remote mediation even before the pandemic.⁷¹ Some programs already offered video or telephone mediations before the pandemic as a supplement to in-person mediation.⁷² In light of these programs, and the inertia toward them

⁷¹ Interview with Tamara Lange, *supra* note 15.

⁷² An interviewee who had used telephone mediation previously stated “Video will be the way going forward as long as I am director.” Interview with Anonymous *supra* note 51.

of the mediation world, it is not surprising that several interviewees anticipate similar hybrid programs going forward.⁷³ A hybrid mediation program would feature some combination of in-person and remote services.

Timelines

All or nearly all interviewees expressed belief that in-person mediations would resume in the near future in some capacity. Some anticipate that this will happen as soon as courts open back up, while others believe that their court systems will prioritize other caseloads which they will be overwhelmed with, leaving mediation to continue remotely for some time.⁷⁴

Supplementation vs. Replacement

Literature on remote mediation has argued that remote mediation is not a replacement for in-person mediation.⁷⁵ Interviewees in the present study reaffirmed this view,⁷⁶ or stated that they would have to offer in-person mediation, as some cases are not mediatable remotely.⁷⁷ The desire to go back to in-person mediation seems to be related to case type. As noted earlier, commercial dispute parties seem eager to go back to in-person mediation.⁷⁸ Two interviewees mentioned that they expected insurance claim-related mediations to remain remote going forward due to the insurance companies often being located far from the courthouse or CDRC, sometimes out of state.⁷⁹

⁷³ The word “hybrid” can mean a few different things. It can refer to video or telephone mediation being offered as an alternative to in-person mediation; it can mean that one party travels to a mediation office, and the party does not; it was used by one administrator to refer to the desire on the part of some administrators to be able to continue to work from home.

⁷⁴ Interview with Lisa Denig *supra* note 41.

⁷⁵ deDufour and Naylor *supra* note 44 at 6

⁷⁶ Interview with Joseph A. Barrett, Mediation Program Staff Attorney, US District Court, Middle District of Pennsylvania (Feb. 24, 2021).

⁷⁷ Interview with Lisa Denig *supra* note 41.

⁷⁸ Interview with Tamara Lange, *supra* note 15.

⁷⁹ Interview with Tamara Lange, *supra* note 15; Interview with Joseph A. Barrett *supra* note 76.

Conceptually, there is no clear line between replacement and supplementation. If video mediation, for example, becomes the default mediation mode for a specific case type, it has partially supplanted in-person mediation. Mediators should not be afraid of this possibility if it works and is implemented carefully and cautiously. It seems likely that increasing the amount of remote mediation will decrease the amount of in-person mediation. However, one model could target only those mediations that would be very unlikely to happen in-person. While no interviewee endorsed this model specifically, several implied or stated that a primary advantage of remote mediation is increasing access to justice for people who would otherwise not mediate at all.⁸⁰

Procedural Choices and Strategies

Besides the likelihood of a hybrid mediation model becoming the norm, there was no solid agreement, or strongly expressed views, about what remote mediation programs would or should look like or how they would or should be structured. Questions about process need to be considered, such as: how will administrators decide which cases go to remote mediation? Will they stratify by case type? How much discretion will administrators, parties, and mediators get in determining whether a particular case will be remote or in-person?

Joe Barrett of the Middle District of Pennsylvania expressed a desire for objective criteria to be created that gave notice to administrators, mediators, and parties about what would qualify a case to be mediated remotely.⁸¹ Other administrators emphasized flexibility of process as a goal.⁸² Tamara Lange of the Northern

⁸⁰ Interview with Douglas Van Epps, Director of the Office of Dispute Resolution for the Michigan Supreme Court (Feb. 25, 2021).

⁸¹ Interview with Joseph A. Barrett *supra* note 76.

⁸² Interview with Samantha Adler, Conflict Resolution Specialist, Program Manager, Chief of Staff, New York Peace Institute (Mar. 9, 2021).

District Court of California offered the idea of treating the discussion of remote vs. in-person mediation as a mediatable issue itself: “The most important consideration would be the process by which the remote/in-person decision is made.”⁸³ How to facilitate the parties and mediator to have this discussion is an open question. One vision of increasing agency, it seems, is to have a flexible discussion about fora.

Limitations and Considerations for Future Research

Remote mediation during a pandemic has additional upsides and downsides that will not be present during other times - which makes comparison difficult to generalize to non-pandemic conditions. For example, in-person mediation may appear to perform relatively worse during a pandemic than it would at other times because of masks making communication difficult, and the stress associated with fear of contracting the virus. Remote mediation may seem worse during a pandemic because it is accommodating cases that would be more appropriate for in-person mediation. It is imperative that administrators and mediators keep in mind that flexibility of process is what has made mediation a success during the pandemic. New data will undoubtedly affirm some of the observations in this paper and throw others into question. When considering rules for remote mediation in the future, administrators can avoid new data invalidating their assumptions by leaning on flexibility as a key advantage of any remote mediation program.

⁸³ *Interview with Tamara Lange, supra note 15.*

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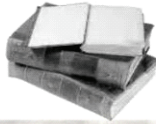
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