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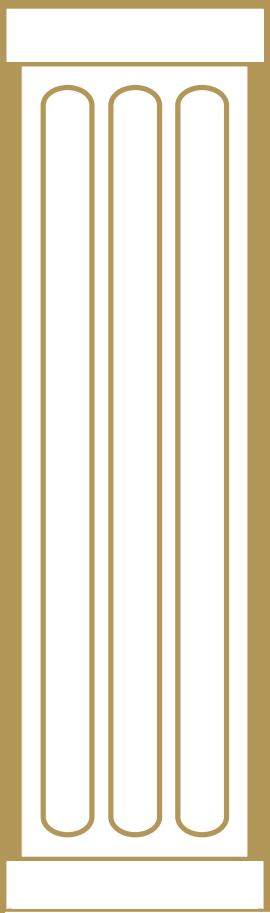

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American College of Civil Trial Mediators

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

This issue of the American Journal of Mediation is one of milestones.

In reverse order of importance, first is that this is the initial Journal to be published under my aegis as Editor In Chief, a responsibility not sought but clearly understood to be a great honor. We also welcome two new members to the Editorial Board, **Richard B. Lord** and **J. Allen Schreiber**.

Second is that we have once again partnered with the ADR Section of the New York State Bar Association in the *NYSBA/ACCTM National Championship ADR Law Student Writing Competition* which offers perhaps the richest prize of any law school writing contest in the United States. Forty articles were submitted this year from thirteen law schools contending for the $10,000 first place prize. The College and the New York State Bar Association are proud to announce that as you read this issue of the Journal, law students throughout this country and Canada are diligently preparing their entries for next year's competition.

In the pages that follow you will have the pleasure of reading *"Should Lawyers Owe a Duty of Candor in Mediation"* by our grand prize and New York winner, **Grace Watson Keesing, Esq**. (New York University). In addition, several members of the Editorial Board have chosen their favorite articles for inclusion in the Journal, each accompanied by a brief introduction explaining why. We are confident that after enjoying these articles you will agree that the future of academic scholarship in the area of ADR is exceedingly bright.

Many thanks to the members of our Editorial Board and Fellows of the College, **Charles Crumpton** (HI), **Jill Sperber** (WA), **Jay Sandak** (CT), **Peter Grilli** (FL) and **Stew Cogan** (WA), who served as judges for this year's competition.

Special thanks as well to **John Wilkinson, Jackie Nolan-Haley** and **David Singer** from the New York State Bar

Association who worked together with **Lawrence Watson, Jr., Lela Love** and me as members of the joint planning committee and as volunteer judges. All should be proud of the product of our endeavors.

Our lead article for this edition is "non-academic" in nature but exceptionally thought provoking for members of our mediation profession. **Vicki Assegued, M.A**., Executive Director of The Center for Restorative Justice & Mediation muses upon the meaning of being a neutral in *"I'm Not Neutral about Neutrality: I'm Partial to Multi-Partiality"*. Submissions discussing your approach to this central tenet of the mediation process are welcome for consideration for publication in a future issue of the Journal.

The final milestone is directly related to the first. After more than a decade of distinguished leadership as Editor In Chief, **Lawrence M. Watson, Jr.** is stepping aside. Simply put, without Larry there would be no American Journal of Mediation. His leadership and dedication to the College, this Journal and the mediation profession is unequaled among his peers. We owe him a debt of gratitude that cannot be measured.

A thank you is also due to Kathy Talbot who will continue her involvement with the College but will no longer be the "nuts and bolts" person who made sure this Journal was published every year. If Larry spent one thousand hours on our behalf, Kathy put in tenfold to our benefit.

In lieu of any poor attempt on my part to inspire the readers of this Journal, I would rather reprint Larry's words from Volume One published in 2007. Our goal is unchanged, and the Editorial Board pledges our commitment to these ideals.

"*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 that further this philosophy.

John W. Salmon
Editor In Chief

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AMERICAN JOURNAL OF MEDIATION

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I'M NOT NEUTRAL ABOUT NEUTRALITY: I'M PARTIAL TO MULTI-PARTIALITY

Vicki Assegued

Embarking upon the journey of becoming a mediator, 25 years ago, led me into learning a new language, one that would be spoken both internally – (in how I would think about the mediation participants and their circumstances) - and externally – (in how I would interact with them). Since I realized that the way I mediate is determined by what I am thinking, I was motivated to become very cognizant of my thoughts, so that I wouldn't be driven by any unconscious biases.

Instead, I wanted to develop my sense of shared humanity, so that I would observe, and interact with, everyone equitably. By learning how to encourage and accommodate each participant's individuality, without inserting my own judgment, or expectations, I hoped to skillfully connect with everyone in the mediation and fairly support them all through the process of resolving their conflict.

As I began developing this approach of being allied with everyone, I wanted a way to explain it to the participants, during the opening statements of the mediation, so they would know what to expect. I was originally instructed to describe myself as "neutral" in an attempt to assure the participants that I wouldn't be taking sides.

While I wanted to dutifully follow this instruction, being new to the field and eager to do everything right, I soon became uncomfortable with the word and the concept of being neutral. I understood the importance of not being one-sided, and yet, I wanted a better word for more accurately describing my method of siding with everyone rather than no one. "Neutral" felt unnatural because it seemed rather lifeless and inactive, as if the mediator is not really present for, or sincere about, the process.

To me, neutral sounds like a car idling, stopped at a red light. My mediation is a go, moving forward with a green light. I snap into gear, actively engaged, riding directly alongside the participants, and not hanging back passively in the gearless-ness of neutral.

When I looked up synonyms for neutral in the thesaurus, I found: "Disinterested, uncommitted, uninvolved, inactive, indifferent, detached, unconcerned and nonchalant." These words are actually antonyms for my active and involved approach to mediation and the overall essence of the process.

And, when I looked up "neutral" in the dictionary, these definitions seemed equally antithetical to the spirit of mediation.

Definition #1 of Neutral:
"Not helping or supporting either side in a conflict"
I wondered, if I'm not helping or supporting either side, then what am I doing as a mediator? I actually want to support every side, and to have participants count on me to do so.

Definition #2 of Neutral:
"Having no strongly marked or positive characteristics or features"
On the contrary, I want to have plenty of positive characteristics, such as being trustworthy, kind, knowledgeable about the process, open-minded, fair, and many other strongly marked features that assure the participants that they are in skillful and caring hands.

Definition #3 of Neutral:
"A disengaged position of gears in which the engine is disconnected from the driven parts"
I like this imagery. If we imagine that the "driven parts" are the participants, and the mediator is in a "disengaged position of gears," then there is no "engine" running the process because the mediator is "disconnected." This is exactly how the word "neutral" feels to me – disconnected and disengaged.

My research about the word neutral diminished my neutrality about it, and I came to realize I would not be using it to explain my role as a mediator. So, I still needed a word to describe this aspect of what I am and how I work.

Impartial? No, that felt even further off the mark than neutral. Impartial seems to imply that I don't really care and I'm not invested in the people, process or outcome.

So, I kept searching for a different word to use, one that would actually capture the essence of my equal engagement, fairness and consideration for all parties. And when it happened, that I found the word, and the wonderful concept of, "multi-partiality," I knew I had, at long last, found my vernacular soul mate.

The concept of multi-partiality accurately expresses my equal alliance with, respect for and care about everyone in the mediation, and characterizes my dedication to the mutually collaborative nature of the process. It also frees me from describing myself as neutral, and instead, being someone who is fully engaged, with every gear I've got - my mind, heart, spirit, energy, knowledge and skills….and my humanity, which connects me to the humanness in all people.

As a multi-partial mediator, I create a space where people can participate equitably in the entire process. They can share their experiences, be heard and understood, and work together to discover and agree upon solutions that will create a solid framework for moving forward. To support this process, I use a variety of mediation skills, such as asking open questions that encourage true expression to emit and emote from everyone present. I allow equal time for each participant to answer and to speak their truth, creating an exciting space for new information and insights to emerge, and a safe place for differences to co-exist together.

I listen with equal attention and authentic interest to all parties, encouraging them to share their perspective of the situation, what led them to see it in that way, and where they want to go with it. By creating this spaciousness for everyone to talk and listen, stress can go down, mutual understanding can grow, and initial perspectives and desires, that once seemed immovable, can even change. With the tension being released, the participants can expand their bandwidth to shift from any antagonism and miscommunication they may have had, to understanding, acceptance, empathy and collaboration. By being a part of this effective and positive process, the participants can expand their tolerance and compassion for each other, thereby tapping into their own experience of multi-partiality.

I find a vast difference between the concepts of impartial and multi-partial. Whereas impartial feels like I may not even notice the personalities of the participants, multi-partial is about honoring and bringing out each individual personality. And, while being impartial means that I won't favor anyone, multi-partial means that I favor everyone equally. Impartial sounds like I don't have my heart in it, while multi-partial means that I'm super invested in providing the best possible process that I can. And this process can lead to win-win outcomes for all, which is also a concept fully aligned with multi-partiality….I keep working equally with everyone until everyone is an equal winner.

If I drift away from multi-partiality, and tell people what to do, or begin to take sides, I am putting myself in the role of the judge, and then the process becomes more about me, as an authority figure, rather than about the participants, as the experts in their own lives. If I take it upon myself to decide who is right and who is wrong, it would display a lack of trust in the participants to work it out together. On the other hand, by being multi-partial, I am assuring them of my confidence in their ability to have a successful mediation and outcome. Multi-partial means that I trust and validate each of their realities and truths, even if they differ from mine or from each other's.

If I favor one party over the other, I can exacerbate the conflict, and they will be left without the anchor of fairness holding the process together. This would then deny the participants of the experience of a collaborative and transformative mediation process, and perhaps leave them with a distorted notion about what mediation really is. The essence of mediation is only maintained when the process is driven by, and belongs to, the people, who are fully welcomed, exactly as they are, by a truly multi-partial mediator who supports everyone equally.

Many people are accustomed to not being valued in this way, to not having a voice in their own circumstances, and instead, allowing, or getting pressured into having, authority figures making decisions for them. A mediator can experience the great joy of breaking that mold in which people are disempowered, and instead, view everyone as having equal value to each other and to oneself. Multi-partiality is all about letting people know that their

voice matters, that their concerns are listened to and taken into account, and that their ideas for making change are worthwhile contributions that will be applied towards finding mutual solutions.

My choice to be multi-partial doesn't mean that I don't have feelings or that I won't possibly be pulled in different directions during the mediation process. I have cried and laughed while mediating. I am human and my emotions have a wide range. The goal is to not get sidetracked by my own ideas, emotions or biases, but to stay fully tuned in to the participants' experiences. The way I do this is to remain very aware of my internal self. As soon as I notice that I'm becoming partial, I consciously acknowledge the presence of the thought.

Rather than getting down on myself for having biases, I actually enjoy the process of noticing them, because it allows me to learn more about myself, and to engage in the practice of putting those biases aside in order to mediate well. By making a conscious choice to not be influenced by my biases, it allows me to open myself more fully to the reality of each person, excited to discover who they are, what matters to them, and how I can support them fully, regardless of any initial judgment I may have had.

I welcome my internal awareness of my biases, because I want to know what's driving my external words and actions, in order to stay clear and effective throughout the process. Once I am aware of the bias, I remind myself that this mediation isn't about me, and that my biases are biased and not useful in this process. My goal then is to quickly let go of these biases and move smoothly back into acknowledging and valuing each person's experience equally.

Another way that I put aside my biases is by reminding myself that, under different circumstances, I could be in anyone's shoes, going through what they are going through. I also remember that I was born into a certain place, time and family that shaped much of who I am and determined what lens I look through to see the world. Other people have very different backgrounds and lenses to look through. As soon as I remember this, I can let go of my judgment and return to being multi-partial. In this way, I hope to exemplify and encourage mutual acceptance, despite our differences.

One of the amazing gifts of being a multi-partial mediator, is this chance to go beyond my own self, to have the opportunity to get a glimpse of seeing life thru someone else's eyes. The variety of personalities that I encounter allows me to receive all types of people into my world and honor them for exactly who they are. My viewpoints get enriched beyond what I was already seeing. I cherish this broadening of my horizons, because each encounter expands my experience and my mind, and therefore, my ability to be multi-partial. By understanding and accepting people, as they are, I recognize that everyone has something to offer when given the context and safe space to do so.

Since the multi-partial mediator creates this welcoming environment in which people can openly express themselves, there can be moments during mediation when this expression becomes quite emotional and even confusing. This is sometimes a necessary part of the process, to get to, and then through, these difficult places, in order for transformation to occur. And, this can also be a precarious time, requiring skillful facilitation. As a multi-partial mediator, I allow for these turbulent moments while also remaining very attentive to the state of the participants. If the conversation is no longer constructive, I am ready to step in at any time to re-state, clarify or re-direct the interaction, in order to keep the process feeling respectful and supportive for everyone.

As a mediator, I have agreed to create this productive setting for the people who have chosen to participate in this process, whether the mediation is challenging or flowing smoothly. I sincerely apply myself to the process because I greatly admire people who are willing to show up for mediation and to engage in resolving their conflict, even without knowing how it will go. They are being vulnerable, and may initially feel like they are taking a risky leap into the unknown. They are trusting that I will create the right environment with them for everything to go well. So, each and all of them deserve to be valued with the highest regard by me, and to have their hopes, concerns, and goals equally considered throughout the entire session.

This philosophy, with the steps and communication skills applied to make it come alive, doesn't only belong to the mediator. The

participants can observe, and experience, what the mediator is doing, and then incorporate this same multi-partial approach into the way they interact with each other, both during and after the mediation. For example, by watching the mediator acknowledge and thank each person for sharing their views, the participants can witness the effectiveness of listening to each other with appreciation. By observing the mediator's focus on the positive aspects of each person, the participants can learn about seeing the best in others. By seeing how smoothly a conversation can go, when the mediator gives each person plenty of time to speak, the participants can structure their future conversations to provide space for everyone to equally express themselves.

These are just some of the many techniques that the multi-partial mediator welcomes the participants to witness, experience and absorb during their mediation session, and carry forward into their future interactions, if they choose to. Whatever methods the mediator has learned and uses, are available for others to learn and use. Because of the common humanity amongst the mediator and the participants, everyone has access to developing and applying these same philosophies and techniques. And, indeed, the mediator continually learns from the participants, as well. This concept of sharing information and skills amongst equals, honors the agency and authority of each person, which exemplifies multi-partiality.

Multi-partial is not just a word to use instead of neutral. It's actually an entirely different concept for approaching mediation. Having new vocabulary like this is a vital part of the ongoing expansion of the field of Conflict Resolution as it continues to grow. New ways to describe what we do, can lead to new ways of doing what we do. When I lost my neutrality about the word neutral, and became very partial to the word and concept of multi-partiality, my experience of being a mediator was greatly enriched. For me, this all-inclusive approach of being allied with every participant, brings out the wonderful possibilities inherent in resolving conflict, and also exemplifies the overall collaborative, transformative and vibrant spirit of mediation.

This year's $10,000.00 Grand Prize Winner of the NYSBA/ACCTM National Law Student ADR Writing Competition was submitted by Ms. Grace Keesing, a recent graduate of New York University Law School. Ms. Keesing's article examines a specific concept within a broader subject that is close to a civil trial mediator's heart; should mediation parties, particularly trial lawyers representing clients in mediation, have a duty of good faith and fair dealing in participating in court annexed mediation processes? At the heart of that question, and serving as the subject of Ms. Keesing's insightful analysis, is the question of whether lawyers engaged in civil trial mediations simply accept a duty of honesty to the process. "***Should Lawyers Owe a Duty of Candor in Mediation"*** is a thought provoking and important presentation that we are proud to feature in this issue of the *Journal*.

Arguably, while the rules might be different for mediations voluntarily convened by the parties, a court ordered mediation by the trial judge presiding over the case is much closer to an extension of the judicial process itself. In carrying out a court ordered mediation, a lawyer is still an officer of the Court. We all recognize in the judicial arena, applicable ethical rules for a trial lawyer's input to the process demand a significantly high level of candor. Quite beyond simply being honest with the tribunal, our rules go so far as requiring trial lawyers to advise the court of case law or factual data contrary to the lawyer's arguments if they are not advanced by the opposition. Admittedly, a mediator is not a "tribunal", and a mediated settlement negotiation is not a jury trial; but the damage to the integrity of a civil trial mediation is just the same when misrepresentations, omissions, or false and misleading data are introduced to the parties' decision making. As this article points out, public confidence and trust in the mediation process are critical to its continued role as a major part of our judicial culture.

Ms. Keesing's treatment of this subject generated one of the highest overall rankings by the NYSBA/ACCTM panel of judges in the short history of this competition. This is a truly remarkable piece that fittingly serves to highlight my passing on the position of Editor in Chief of the American Journal of Mediation to my learned friend, John Salmon with Salmon & Dulberg Dispute Resolution in South Florida. John has been with the Journal since its inception over ten years ago. He has contributed significantly as a standing member of the Editorial Board and we know he will continue to serve with distinction over the next chapter in the life

of this publication. I will continue as a member of the Board and look forward to many more productive years under John's leadership.

In passing, I must extend my deepest thanks to each member of the Editorial Board for their many substantive contributions to each issue of the Journal, to ACCTM Executive Director Steve Sawicki and the Board of Directors of the College for their vision and dedication to the concept of our Journal, and most especially, to Kathy Talbot whose administrative support and direction has been our heartbeat over the years.

Lawrence M. Watson, Jr.
Editorial Board, Past Chair
Emeritus Fellow ACCTM

SHOULD LAWYERS OWE A DUTY OF CANDOR IN MEDIATION?

Grace Watson Keesing

I. INTRODUCTION

Over the past decades, mediation has become a central feature of civil dispute resolution. It is now widely accepted that mediation offers a number of advantages over adjudicative processes such as litigation and arbitration. In addition to being comparatively quick and cheap, mediation affords the parties the opportunity to maintain confidentiality and exert a far greater degree of control over both process and outcomes. The presence of an experienced and neutral mediator can also serve to mitigate power imbalances between the parties, and encourage the recognition and pursuit of mutually desirable solutions.

In the wake of the increasing popularity of mediation, commentators, practitioners and professional bodies have developed detailed rules and guidelines regarding the obligations owed by lawyers acting as mediators. Over time, this process has resulted in a largely coherent set of ethical standards for lawyer-mediators. Mediators are, for example, generally expected to maintain objectivity, avoid conflicts of interest, ensure procedural fairness and refrain from offering legal advice or pressuring parties to reach settlement.[1]

In contrast, comparatively little attention has been directed to the ethical issues faced by the lawyers who represent parties in mediation. One issue in particular – the extent to which lawyers engaged in mediation should be honest and forthcoming with the

[1] See, eg, the American Bar Association's *Model Standards of Conduct for Mediators*. See, further, James Lawrence, "Lying, Misrepresenting, Puffing and Bluffing: Legal, Ethical and Professional Standards for Negotiators and Mediation Advocates" (2014) 29 *Ohio State Journal on Dispute Resolution* 35, 52-57.

opposing side and the mediator – remains the subject of considerable confusion and controversy.[2] The issue of candor in mediation and settlement negotiations has been variously described as one of *"the most important ethical issues facing lawyers"*,[3] as *"largely unchartered waters"*[4] or *"open to interpretation"*,[5] and as *"the ethical no-man's land"* of legal practice.[6] Moreover, the considerable body of cases concerning claims of dishonesty and sharp practice in mediation confirm that this issue is not merely theoretical. Yet as one commentator has observed, the resolution of such cases is *"more likely to reflect judicial viscera and intuitive notions of fairness than any coherent system of legal or ethical principles."*[7]

This paper explores the parameters of truthfulness in mediation from a legal and ethical perspective, with the aim of determining whether, and to what extent, a duty of candor should apply to lawyers engaged in mediation. The term *"candor"* in this context is used to connote a degree of full and forthright disclosure which extends beyond the mere obligation to tell the *"literal truth"*, and encompasses an ethical duty to ensure that the other parties to a mediation are suitably appraised of the facts and interests at play. The existence of other substantive legal duties of disclosure and fair dealing, such as those that may arise under the law of contract and tort, are beyond the scope of this enquiry.

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[2] See, eg, Bruce Meyerson, "Telling the Truth in Mediation: Mediator Owed Duty of Candor" (1997) 4 *Dispute Resolution Magazine* 17; John Cooley, "Defining the Ethical Limits of Acceptable Deception in Mediation" (2004) 4(2) *Pepperdine Dispute Resolution Law Journal* 263; Don Peters, "When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal" (2007) *Journal of Dispute Resolution* 119.

[3] Robert Burns, "Some Ethical Issues Surrounding Mediation" (2001) 70(3) *Fordham Law Review* 691, 692.

[4] Barry Temkin, "Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?" (2004) 18 *Georgetown Journal of Legal Ethics* 179, 181.

[5] John Tarlow and Charles Sink, "In Defense of Lying: The Ethics of Deception in Mediation" (2015) *American Bar Association*, presented at the Fall Meeting of the Forum on Construction Law, October 8-9 2015, 3

[6] Temkin, above n 4, 182, paraphrasing Michael Rubin, "The Ethics of Negotiations: Are There Any?" (1995) 56 *Louisiana Law Review* 447.

[7] Temkin, above n 4, 180.

Following this introduction, Part II examines the current ethical rules and guidelines concerning obligations of honesty and disclosure in mediation. Beginning with a review of the relevant *Model Rules of Professional Conduct*, I demonstrate that these obligations are extremely limited, and fall well short of the duties placed on lawyers engaged in other forms of dispute resolution. In light of this, in Part III I assess the ramifications of the current approach. I argue that the rules and guidelines governing lawyers in mediation are fundamentally flawed. First, they permit lawyers to engage in morally reprehensible conduct – conduct which has the potential to seriously erode the standing of the legal profession and entirely defeat the purpose of mediation. Second, they are in significant respects unclear, and fail to provide practitioners with sufficient guidance concerning the limits of acceptable behavior, particularly in the context of conflicting duties to the client and third parties. Finally, in Part IV, I consider how the current rules and guidelines should be amended. I argue that, in order to maintain an appropriate balance between the lawyer's duties to his or her client and to the administration of justice, lawyers must, at a minimum, display the same degree of candor in mediation that is required of them before courts and other adjudicative tribunals. I conclude that this result can best be achieved by a modest amendment to the existing professional conduct rules, pursuant to which the lawyer's duty of candor to tribunals would be expanded to include mediation.

II. Obligations of Honesty and Disclosure in Mediation

The natural starting point for any examination of lawyers' ethics in the United States is the American Bar Association's *Model Rules of Professional Conduct*. While the superior courts of each state retain ultimate authority for the adoption of ethical standards in their respective jurisdictions, the *Model Rules* now form the basis for the applicable professional conduct rules in all states other than California.[8] As such, the *Model Rules* have come to encapsulate the core tenants of ethical legal practice in the

[8] See, further, American Bar Association, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html.

United States, including with respect to obligations of honesty and candor.

In light of their primacy as standards of professional conduct, it is perhaps surprising then that the *Model Rules* do not directly address mediation. Rather, the obligations of lawyers engaged in mediation fall under the general umbrella of Rule 4.1 concerning *"Statements to Others"*, and in particular Rule 4.1(a), which prohibits lawyers from knowingly making false statements of material fact or law to third parties. The comments to Rule 4.1 confirm that this obligation is not solely confined to positive misstatements. A lawyer may also make a misrepresentation by incorporating or affirming the statement of another, or by the use of a misleading partial truth or omission that is the equivalent of an affirmative false statement.[9] In addition, Rule 8.4 imposes a general prohibition on lawyers engaging in dishonest, deceitful and fraudulent conduct.

While these rules would, at a minimum, appear to forbid lawyers from lying during mediation, there are two substantial caveats to that proposition that require further attention.

First, the obligation of truthfulness in Rule 4.1(a) is confined to statements of *material* fact and law. This is in contrast to the more onerous standard that applies in the context of other forms of dispute resolution, where lawyers are prohibited from making *any* false statements of fact or law to the adjudicative body.[10] The term *"material"* is not defined in the Model Rules, and its meaning

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[9] See also Annotations to Rule 4.1 in the American Bar Association, *Annotated Model Rules of Professional Conduct* (8th ed, 2015) ("Annotated Rules").

[10] Rule 3.3(a)(1) prohibits lawyers from knowingly making false statements of fact or law to tribunals. Rule 1.0(m) defines *"tribunal"* as *"a court, an arbitrator in a binding arbitration proceeding, or other body acting in an adjudicative capacity."* At least one commentator has suggested that the definition of tribunal may include a mediation conducted by a court appointed mediator, although this would appear to be in contradiction to the requirement for a tribunal to act in an "adjudicative capacity": see Lawrence, above n 1, 55. Some jurisdictions that have adopted Model Rule 4.1 have omitted the requirement of materiality: see Robert Kaplan and Linda Lawson, "Ethical Considerations in Settlement Discussions and During Mediation" (2016) 58(3) *DRI For the Defense* 12, 19.

remains open for interpretation.[11] What is clear, however, is that the standard of honesty expected of lawyers engaged in mediation is of a less stringent kind than that applied to other forms of dispute resolution. Consistently with his ethical duties as a member of the legal profession, a lawyer engaged in mediation may knowingly lie to both the mediator and opposing parties, so long as the lie does not include a false statement of fact or law that is *"material"*.[12]

Second, it is apparent that different considerations apply where a statement (or misstatement) is made during settlement negotiations. The comments to Rule 4.1 include the observation that:

> *Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.*

Pursuant to the *Model Rules*, a certain degree of dishonesty is therefor considered to be a natural and ethically sound aspect of settlement negotiations, including negotiations conducted through the medium of mediation.[13] Moreover, this is so even where the dishonesty relates to a core aspect of the case such as the price or value of the thing in dispute, provided only that such dishonesty is consistent with *"generally accepted conventions in negotiation"*.[14]

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[11] The Annotated Rules state that *"A statement is material for purposes of Rule 4.1(a) if it could or would influence the hearer."*

[12] See also American Bar Association, *Ethical Guidelines for Settlement Negotiations* (August, 2002), section 4.1.1 ("Settlement Guidelines").

[13] See, further, American Bar Association Formal Opinion 06-439, *Lawyers Obligations of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation* (2006)

[14] The word *"ordinarily"* was added to Rule 4.1(b) in 2002 to acknowledge that an estimate of price or value or a statement of intention regarding settlement could, under some circumstances, constitute a false statement of fact: Annotated Rules, annotations to Rule 4.1. See also American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, (2013) 552.

As a number of commentators have observed, the use of lies and misleading statements during mediation is apparently endemic, and is largely accepted by practitioners as a natural and permissible aspect of the negotiation process.[15] As such, the categories of permissible misdirection encompassed within *"generally accepted conventions in negotiation"* are likely to be considerably more extensive than the specific examples identified above.

In addition to dealing with false statements, Rule 4.1 also addresses obligations of affirmative disclosure. Pursuant to Rule 4.1(b), lawyers are required to disclose a material fact to a third person *"when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."* Rule 1.6 concerns the lawyer's duty to maintain the confidentiality of information relating to the representation of a client. Somewhat circuitously, the obligation of confidentiality imposed by Rule 1.6 is also subject to an exception under Rule 1.6(b)(2) (among others) pursuant to which:

> *A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary… to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services… .*

As one commentator has explained, the upshot of these various rules and exceptions is that lawyers in mediation and negotiation have *"an affirmative duty… to come forward with corrective non-confidential facts to prevent or avoid aiding a criminal or fraudulent act by a client."*[16] Where the facts are confidential, however, then the lawyer is under no such duty, although he or she *may* still elect to disclose confidential information in certain circumstances, including those set out in

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[15] See, generally, Peters, above n 2. See also John Cooley, "Mediation Magic: Its Use and Abuse" (1997) 29 *Loyola University Chicago Law Journal* 1, analyzing the types of deception practiced in mediation.

[16] Temkin, above n 4, 186. Rule 1.0(d) defines fraud as conduct that is fraudulent *"under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive"*. See, generally, Bruce Green, "Deceitful Silence" (2007) 33 *Litigation* 24.

Rule 1.6(b)(2).[17] Furthermore, as the comments to Rule 4.1 confirm, in the absence of a criminal or fraudulent act by the client, a lawyer *"generally has no affirmative duty to inform an opposing party of relevant facts."*

The American Bar Association's *Ethical Guidelines for Settlement Negotiations* provide further guidance on the ethics of disclosure. Unlike the *Model Rules,* the *Ethical Guidelines* do not serve as a basis for liability, sanctions or disciplinary action, but rather are *"designed to facilitate and promote ethical conduct in settlement negotiations."*[18] Consistently with the *Model Rules*, the Committee Notes to Section 4.3.5 of the *Ethical Guidelines* state that there is *"no general ethics obligation, in the settlement context or elsewhere, to correct the erroneous assumptions of the opposing party or opposing counsel"*. However, *"the duty to avoid misrepresentations and misleading conduct implies a professional responsibility to correct mistakes induced by the lawyer or the lawyer's client and not to exploit such mistakes."*[19]

The lawyer's duty to behave honestly during mediation is thus doubly circumscribed. On the one hand, lawyers are expressly permitted to make false statements wherever those statements concern facts or law that are not *"material"*, including statements relating to apparently crucial information that is nevertheless deemed to be immaterial because it is information about which lawyers may lie according to *"generally accepted conventions in negotiation"*. On the other, they are not obliged to make any positive disclosures of law or fact – except in the unlikely event that a disclosure of fact (but not law) is *both* necessary to prevent a fraudulent or criminal act by the client *and* would not constitute the revealing of confidential client information. Furthermore, while lawyers may be obliged to correct an erroneous assumption that has been induced by their client's own misleading conduct, they

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[17] See further Lawrence, above n 4, 49-50 explaining that, in certain circumstances, a lawyer must resign where continuing to act would be tantamount to assisting the client's fraud. But see John Humbach, "Shifting Paradigms of Lawyer Honesty" (2009) 76 *Tennessee Law Review* 993, 1009, expressing the view that *"Since Rule 4.1(b) requires its disclosures when Rule 1.6 permits them, a new and wide-ranging 'duty to warn' has emerged."* See also the annotations to paragraph (b) of Rule 4.1 of the Annotated Rules.

[18] Preamble to the Settlement Guidelines.

[19] Citing *Crowe v. Smith*, 151 F.3d 217 (5th Cir, 1998). See also section 4.3.5

are otherwise under no duty to correct the mistakes of third parties, however arising.

The limited character of these constraints raises important questions concerning both the nature and purpose of mediation, and the rationale for ethical standards in legal practice. Are the goals of mediation different from other forms of dispute resolution and, if so, does that justify the adoption of less rigorous professional obligations? Do the current standards strike the right balance between the lawyer's duties as a representative of clients and an officer of the legal system? Do lawyers have sufficient guidance to successfully navigate the ethical dilemmas of mediation, and maintain the integrity of the legal profession and the administration of justice? This paper now turns to address these questions, with a view to assessing the extent to which the exceptions and limitations described above are warranted in the context of mediation.

III. RAMIFICATIONS OF THE CURRENT APPROACH

There are two principal problems with the current rules governing lawyer's misleading statements and omissions during mediation. First, as I have described above, they are extremely limited, so that lawyers are often permitted to engage in behavior during mediation which is both morally dubious and potentially productive of serious injustice. Second, the shifting and imprecise line between mere omissions and misrepresentations means that lawyers have no clear guidance as to whether, when and to what extent they must disclose information.

A. Moral ambiguity and injustice

One of the clearest demonstrations of the moral ambiguity surrounding obligations of honesty in mediation is the now infamous case of *Spaulding v. Zimmerman*,[20] in which lawyers for the defendant deliberately withheld from the plaintiff the fact that he was suffering from an aorta aneurism. The lawyers were fully aware of the potentially catastrophic ramifications of withholding such information. Their own medical expert had written to them stating:[21]

[20] 116 N.W.2d 704 (1962).
[21] *Id,* 707.

> *The one feature of the case which bothers me more than any other part of the case is the fact that this boy of 20 years of age has an aneurysm… Of course an aneurysm or dilatation of the aorta in a boy of this age is a serious matter as far as his life. This aneurysm may dilate further and it might rupture with further dilatation and this would cause his death.*

Nevertheless, the lawyers elected not to disclose the plaintiff's true medical condition in order to obtain a more advantageous settlement. Ultimately, that settlement was vacated on the basis that the defendant's counsel had failed in his duty of candor to the court (court approval being required because the plaintiff was a minor). However, the Minnesota Supreme Court was unequivocal in concluding that no such duty of candor existed during the course of the negotiations.[22]

From an ethical perspective, the facts of *Spaulding* are undoubtedly problematic. On the one hand, the defendant's lawyers clearly had a professional duty to maintain the confidentiality of their client's information, particularly in circumstances where disclosure would have been counter to the zealous promotion of their client's interests. Yet, on the other, concealing the true state of the plaintiff's condition may well have resulted in his death, and at the very least meant that he was denied the opportunity to seek compensation for the full extent of his injuries. The situation was further compounded by the fact that the plaintiff's lawyer inexplicably failed to request a copy of the defendant's medical report, so that any sanction of the defendant's lawyer would have amounted to punishment for failure to correct the mistakes of opposing counsel.

Given this, it is not surprising that *Spaulding* has divided commentators. While at least one critic has argued that the *Spaulding* court should have recognized an ethical duty of good faith and fair dealing in negotiation,[23] others point out that such an

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[22] *Id*, 709.
[23] Nathan Crystal, "The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations" (1999) 87 *Kentucky Law Journal* 1055, 1086, 1097.

obligation would be inconsistent with the adversarial nature of settlement negotiations and the lawyer's duties of confidentiality and zealous advocacy.[24]

What is largely absent from these critiques, however, is any attempt to grapple with the underlying rationale for the various ethical duties place on lawyers. As the preamble to the *Model Rules* explains:

> *A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.*

The lawyer's duties to the client are thereby premised on the more fundamental principle that lawyers, as officers of the legal system, must act in furtherance of the administration of justice. Ordinarily, justice will be best served through zealous advocacy and the maintenance of client confidences, but this does not always hold true. The lawyers in *Spaulding*, for example, were presumably under no illusion that justice was *"being done"* when they deliberately withheld crucial and potentially lifesaving information in order to force down the settlement price. Similarly, it would be difficult to argue that maintaining confidentiality serves the public interest if the consequences include an innocent party being knowingly exposed to the risk of death and denied the opportunity to seek due compensation.

In other areas of dispute resolution, the profession has dealt with these issues by recognizing that the lawyer's duties of confidentiality and zealous advocacy are subject to the overriding demands of justice. A lawyer, for example, is forbidden from

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See generally Peter Thompson, "Good Faith Mediation in the Federal Courts" (2010) 26 *Ohio State Journal on Dispute Resolution* 363.

[24] See, eg, Temkin, above n 4,199-200.

raising issues or prosecuting arguments that are frivolous or made in bad faith, notwithstanding that it may be in the client's interests to do so.[25] In a similar vein, lawyers are prohibited from making false statements of fact or law to adjudicative bodies, are bound to disclose any binding adverse legal authority, and may also be required to disclose criminal or fraudulent conduct by their client.[26] Furthermore, the *Model Rules* expressly impose on lawyers engaged in adversarial proceedings a duty of fairness to the opposing party and counsel, pursuant to which lawyers are barred from (among other things) destroying or concealing evidence or making use of certain diversionary and misleading tactics during trial.[27] As the commentary to Rule 3.3 explains (emphasis added):

> *[Lawyers owe] special duties… as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force.* ***Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal****. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be mislead by false statements of law or fact or evidence that the lawyer knows to be false.*

In light of the now central role that mediation plays in the justice system, it is difficult to find any basis in principle for distinguishing between the duties owed by lawyers engaged in mediation and those involved in adjudicative forms of dispute resolution. While it is true that mediation allows for a greater degree of flexibility and informality, the mediation process can nevertheless result in binding agreements that fundamentally alter the legal rights of the participants. Moreover, the need for lawyers to adhere to overriding principles of justice and fairness is, if anything, more acute in circumstances where the parties may lack access to other mechanisms by which to obtain crucial information.

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[25] Rule 3.1 of the *Model Rules*.
[26] Rule 3.3 of the *Model Rules*.
[27] Rule 3.4 of the *Model Rules.*

In the absence of meaningful duties of honesty and candor, there is a very real risk that mediation will be used by savvy practitioners to circumvent due process, and secure unjust advantages for their clients.[28]

Despite this, the use of dishonest and misleading tactics during mediation appears to be regarded by many practitioners as inevitable and even desirable.[29] If not checked, these practices will continue to erode the public standing of the legal profession, and permit mediation to become an instrument of injustice.

B. The uncertain distinction between omissions and misrepresentations

In addition to permitting undesirable conduct, the current rules regarding honesty in mediation have also been productive of significant confusion and uncertainty. At the heart of this confusion is the difficult and sometimes illusory distinction between mere omissions (where the lawyer currently has no duty of disclosure) and omissions amounting to positive misstatements (for which the lawyer owes a duty to correct the misunderstanding). The absence of clear and consistent guidance on this issue can place lawyers engaged in mediation in an impossible position. Either they choose to correct a misunderstanding and risk breaching their professional duties to the client, or they elect not to do so and risk running foul of their obligations to third parties and potentially jeopardizing the enforceability of any resulting agreement.

The problems with applying the omission/ misstatement distinction in practice are well illustrated by the body of cases and ethics opinions concerning failure to disclose the death of a client during settlement negotiations. In the seminal case of *Virzi v. Grand Trunk Warehouse & Cold Storage Co*,[30] the District Court for the Eastern District of Michigan set aside a settlement agreement because the plaintiff's attorney had failed to inform the

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[28] Section 4.3.1 of the *Settlement Guidelines* specifically states that *"[a]n attorney may not employ the settlement process in bad faith."* However, *"bad faith"* does not include the sort of conduct contemplated here: see further Committee Notes to Section 4.3.1 providing examples of bad faith conduct.

[29] See, eg, Lawrence, above n 1; Peters, above n 2; Temkin, above n 4; Tarlow and Sink, above n 5.

[30] 571 F. Supp. 507 (E.D. Mich. 1983).

court and opposing counsel of the prior death of his client. The Court considered that the plaintiff's lawyer had an *"absolute ethical duty"* to disclose the death to opposing counsel, and that this duty applied irrespective of the fact that the lawyer had not actually made any false statements.[31] While the Court noted that, unlike *Spaulding*, the plaintiff's death *"did not have any effect on the fairness of the ... mediation award"*, it nevertheless had a *"significant bearing"* on the negotiations because the defendants' willingness to settle was in large part due to their belief that the plaintiff would make an excellent witness on his own behalf if the case were to proceed to trial.

Although the Court in *Virzi* purported to base its decision partially on Model Rules 3.3 and 4.1, the Court's language goes well beyond what is contemplated by those rules. In particular, the Court explicitly recognized an *"absolute"* and *"affirmative"* duty of candor and frankness to opposing counsel.[32] Moreover, the Court held that this duty existed on the same footing as the duty of candor to the court, and that it prevailed over any conflicting demands of zealous advocacy.[33] *Virzi* therefore represents a significant departure from the approach in *Spaulding*, in which the Courts drew a distinction between the duty of candor to the court and the far less rigorous obligations imposed on lawyers engaged in mediation and settlement negotiations.

Since *Virzi,* there have been numerous other attempts to explain whether, and when, a lawyer will be duty bound to disclose the death of a client to an opposing party. In a 1995 opinion, the American Bar Association Committee on Ethics and Professional Responsibility expressed the view that a lawyer representing the plaintiff in a personal injury claim *does* have a duty to promptly inform opposing counsel and the court of the client's death.[34] The Committee's conclusion rested in part on the fact that the death of the client will generally terminate the lawyer's authority to act – including with respect to negotiating or accepting settlement. Additionally, the Committee was of the view that, in the absence

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[31] *Id.* 508, 511.
[32] *Id.* 512.
[33] *Id.*
[34] American Bar Association, Formal Ethics Opinion 94-397, Duty to Disclose Death of Client (1995).

of disclosure, any further communication would implicitly represent that the client was alive, and would therefore contravene Model Rule 4.1(a) (the death of a client being a "material fact").[35] By contrast, the state bar association committees in both Virginia and Pennsylvania have concluded that, in the absence of a direct inquiry or prior false statement, a lawyer does not have a duty to disclose the death of his client.[36] In a further variation, the Illinois State Bar Association considered that the death of a personal injury claimant must be promptly disclosed, but not the death of the sole remaining officer of a corporate client.[37]

Judicial approaches to the issue have also varied widely. Whereas no other decision has gone as far as *Virzi* in recognizing an affirmative duty of candor to third parties, other courts have held that failure to disclose the death of a client violated the requirements of Rule 4.1 because the failure amounted to a positive misstatement, or constituted a deliberately misleading half truth.[38] So, for example, in *Kentucky Bar Association v. Geisler*,[39] the Kentucky Supreme Court held that a lawyer had breached the equivalent of Rule 4.1 where she contacted the defendant's representatives shortly after her client's death and invited them to engage in settlement negotiations. Although the Court purported to follow *Virzi*, the decision in *Geisler* was in fact premised on the rationale that the lawyer's actions amounted to an affirmative misrepresentation. By writing to her opposing counsel, the plaintiff's lawyer had impliedly represented that she had continuing authority to act on the plaintiff's behalf, and had thereby violated the equivalent of Rule 4.1(a).[40]

Although many observers would no doubt agree that something as fundamental as the death of a client should be disclosed, these conflicting decisions and opinions demonstrate the

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[35] See further Kaplan and Lawson, above n 10, 7-8.
[36] Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibly, Informal Opinion 93-51 (1993); Virginia Bar Association Standing Committee on Legal Ethics, Opinion 952 (1987).
[37] Illinoi State Bar Association, Advisory Opinion on Professional Conduct, Opinion 96-03 (1996).
[38] See, eg, *People v. Rosen*, 198 P.3d 116 (Colo. 2008); *In re Lyons*, 780 N.W.2d 629 (Minn. 2010); *In re Forrest*, 158 N.J. 428, 730 A.2d 340, 345–46 (1999).
[39] 938 S.W.2d 578 (Ky. 1997).
[40] *Id*, 580.

difficultly of identifying a convincing rationale for that obligation in the text of Model Rule 4.1.[41] Despite the valiant efforts of the *Virzi* Court, there is quite simply nothing in the language of Rule 4.1 that amounts to a positive duty of candor to third parties. Instead, lawyers engaged in mediation must try to determine whether any misconception on the part of their opponent or the mediator derives from their own misstatement. It is only to that extent that the lawyer is obliged to be forthcoming. Beyond that, he is prohibited from making any disclosure that would jeopardize confidentiality or otherwise harm his client's interests. This delicate calculation is further complicated by the fact that the relevant misstatement may not be express nor even deliberate. A declaration that is literally true, or a total omission, may nonetheless amount to a false statement if it implies, including inadvertently, that the facts are otherwise than the lawyer knows them to be.

In practice, of course, it is difficult to conceive of how a lawyer could continue to act for a dead client during settlement negotiations without implicitly or explicitly representing that his client was still alive. If, however, the facts were slightly different, so that the client had instead slipped into a coma (after giving sufficient instructions) then a careful lawyer could proceed to negotiate settlement without making any misrepresentations. Notwithstanding that the client's ability to testify might well be the determining factor in the opposing party's settlement calculation, Rule 4.1 would not require its disclosure.[42]

The difficulties with the omission/ misstatement distinction are thus twofold. For individual practitioners, the impossibility of identifying with any certainty the point at which an omission becomes an implied misrepresentation means that even the most diligent lawyers can inadvertently fall foul of their ethical

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[41] This issue is not confined to cases involving the death of a client. For example, Courts are also split regarding whether failure to disclose the existence of insurance coverage would constitute a false statement of material fact under Rule 4.1: See generally Kaplan and Lawson, above n 10, 7.

[42] This conclusion is consistent with other opinions of the ABA Ethics Committee. See, eg, American Bar Association, Formal Opinion 94-387, *Disclosure to Opposing Party and Court That Stature of Limitations Has Run* (1994).

obligations, with potentially serious consequences for both their professional career and the client's settlement.

For the profession as a whole, the distinction also raises a more fundamental set of concerns surrounding the role of mediation in the justice system. As I have stated above, mediation is now a central feature of dispute resolution. Many, if not the majority of civil cases settle without ever reaching the stage of formal adjudication. The imposition of ethical duties on lawyers engaged in mediation therefore has important ramifications for the overall fairness of the justice system. In the absence of clear and unambiguous criteria for disclosure, parties in mediation are denied two core safeguards of that system – the right to know the case against them, and the assurance that other parties are operating pursuant to the same rules and obligations.

This is by no means the first time a commentator has identified problems in this area. Writing more than 20 years ago, John Cooley concluded that the *Model Rules* offered no guidance regarding the acceptable limits of deception in mediation.[43] In a similar vein, James Alfini has recognized *"a compelling need to articulate the ethical constraints on lawyers when they represent clients in ADR settings."*[44] Despite this, the relevant text of the *Model Rules* has remained largely static for decades. While the need for change is now impossible to deny, calls for reform inevitably raise further questions regarding both the extent of the obligations that should be imposed, and the form in which to impose them. To this end, this paper now turns to consider possible avenues for reform of the *Model Rules*.

IV. AVENUES FOR REFORM

Ostensibly, the *Model Rules* serve to define the relationship between lawyers and the legal system.[45] Yet, as I have described above, in relation to a central aspect of that system – mediation – the rules are almost entirely silent. This state of affairs has the

[43] Cooley, above n 15, 101-103, 106-107.
[44] James Alfini, "Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1" (1999) *19 Northern Illinois University Law Review* 255, p 266.
[45] Preamble to the *Model Rules*.

potential to be productive of serious injustice. As currently drafted, Rule 4.1 permits lawyers in mediation to engage in morally reprehensible conduct, requires them to draw difficult and sometimes impossible distinctions between omissions and implied misrepresentations, and denies parties engaged in mediation some of the most basic assurances of procedural fairness. The situation is all the more striking because it stems from an unjustified distinction between mediation and other forms of dispute resolution, pursuant to which mediation is omitted from the categories of *"tribunal"* to which lawyers owe a duty of candor.[46]

In light of these manifold problems, it is imperative that the rules regarding lawyer conduct in mediation are amended so as to provide robust and unambiguous professional standards. At a minimum, the rules should ensure that parties who elect to settle their disputes via mediation rather than adjudication are not substantively or procedurally disadvantaged, and that the integrity of the civil justice system is not undermined. To this end, lawyers engaged in mediation should be held to the same obligations of honesty and candor that exist in adjudicative proceedings. Such a development would ensure that lawyers are duty-bound to disclose information (whether of fact or law) that is crucial to the just resolution of proceedings. Moreover, it would relieve practitioners engaged in mediation of the need to contend with the distinctions between "material" and "immaterial" facts, or "misstatements" and "omissions", and appropriately recognize the central role that mediation plays in the justice system.

Against this, some commentators have argued that a duty of candor in mediation would be either incompatible with the adversarial nature of settlement negotiations, or overly subjective and impossible to police.[47] At least one observer has gone so far as to suggest that lying is an inherent part of the negotiation process, such that lawyers engaged in negotiations (including through mediation) should be wholly exempt from duties of honesty or disclosure.[48] Another has expressed the view that a duty of candor

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[46] See above n 10.

[47] See, eg, James White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation" (1980) *American Bar Foundation Research Journal* 926, 929.

[48] See, eg, Thomas Guernsey, "Truthfulness in Negotiation" (1982) 17 *University of Richmond Law Review* 99, 125, suggesting the use of a *"caveat lawyer"* rule. See also Temkin, above n 4.

might well confer an unfair advantage on those least deserving of it – unscrupulous lawyers who would continue to lie and obfuscate irrespective of heightened professional standards.[49]

These arguments are unconvincing. While it is true that mediation may be (although is not necessarily) adversarial, so too are court proceedings. Yet, as I have explained above, the *Model Rules* expressly recognize a duty of candor to courts and other adjudicative tribunals. In so doing, the rules reinforce the overarching duty of lawyers to the administration of justice. That duty does not cease to exist merely because a lawyer is engaged in adversarial proceedings. A lawyer's role is not to "win at all costs" but to diligently defend his client's interests within the parameters of his obligations to the justice system and the public at large.

Similarly, the fact that a duty of candor might be difficult to enforce does not provide any rationale for distinguishing in this regard between mediation and other forms of dispute resolution. More fundamentally, such arguments also misconceive the nature of professional standards, which are directed in the first instance to providing a framework for the ethical practice of law, rather than a set of punitive regulations. Public confidence in the legal profession requires that lawyers are – and are seen to be – held to high standards of ethical behavior. The mere fact that some unscrupulous individuals might choose to deliberately flout those standards does not mean they should not exist. On the contrary, the need to weed such persons out of the profession provides further justification for the adoption and enforcement (where possible) of robust professional rules and guidelines.

Given the clear need to improve the ethical standards for lawyers in mediation, it is apposite to consider what such a reform might look like in practice. One obvious option is to amend the text of Rule 4.1. Alfini, for example, has proposed removing the *"material"* qualifier to the prohibition on false statements of fact and law, and adding a prohibition against lawyers knowingly *"assisting the client in reaching a settlement agreement that is based on reliance upon a false statement of fact made by the lawyer's client"*.[50] In addition, Alfini suggests amending the

[49] See Burns, above n 3, 696-7.
[50] Alfini, above n 44, 270-1.

commentary to Rule 4.1 to include a statement to the effect that lawyers engaged in mediation should inform their clients of these obligations.[51]

While removal of the "material" qualifier is a good start, the problem with this proposal is that it maintains the arbitrary distinction between mediation and other forms of dispute resolution. Under Alfini's suggested amendments, lawyers would be obliged to refrain from making untruthful statements or taking advantage of the false statements of their clients. However, there would still not be any requirement to disclose material information to the opposing party or correct misunderstandings. The proposal therefore does nothing to resolve the problems discussed above concerning moral ambiguity and the uncertainty of the omission/misstatement distinction. Furthermore, such a reform would continue to promulgate the notion that mediation is a "lesser" form of dispute resolution in which lawyers are free to disregard the overarching demands of justice.

A better option would include amending the definition of *"tribunal"* for the purposes of Rule 3.3, so as to expand the existing duty of candor owed to tribunals and during adjudicative proceedings to include mediation.[52] This seemingly modest reform would have significant implications. In addition to providing for more rigorous standards of truthfulness and disclosure in mediation, such an amendment would place mediation on an equal footing with other forms of dispute resolution, and ensure that parties engaged in mediation are afforded the same ethical protections as elsewhere in the justice system. The approach also has the advantage of utilizing a familiar form of words for which there is already substantial judicial and professional guidance, and that takes appropriate account of the subsisting duties of confidentiality and zealous advocacy.

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[51] *Id*.

[52] There is precedent for this approach in other common law jurisdictions. In Australia, for example, lawyers engaged in mediation owe the same duties of honesty and candor that they owe in litigation. See, generally, Bobette Wolski, "The Truth About Honesty and Candour in Mediation: What the Tribunal Left Unsaid in Mullins' Case" (2012) *Melbourne University Law Review* 706. See, also, Peters, above n 2, 121 noting that previous calls for such a reform have been ignored.

V. CONCLUSION

Mediation is now a central feature of our justice system. In order to ensure that mediation produces just results, lawyers must be held to the same ethical standards of honesty and candor that apply to adjudicative processes. To that end, this paper has proposed a modest amendment to the *Model Rules* that overcomes the problems of moral ambiguity and uncertainty which are inherent in Rule 4.1. Despite repeated calls for reform stretching over many decades, the legal profession has yet to address these issues. It is high time that it did so.

To paraphrase the *Virzi* court, mediation is not a game, or an exercise in free market economics. A lawyer who deals with another lawyer *"should not need to exercise the same degree of caution that he would if trading for reputedly antique copper jugs in an oriental bazaar."*[53] Ethics, and justice, demand more. So should the *Model Rules*.

[53] *Virzi v. Grand Trunk Warehouse & Cold Storage Co* 571 F. Supp. 507 (E.D. Mich. 1983), quoting with approval from Alvin Rubin, "A Causerie on Lawyers' Ethics in Negotiations" (1975) 35(3) *Louisiana Law Review* 577.

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Virginia Bar Association Standing Committee on Legal Ethics, Opinion 952 (1987)

Fellow Introduction:

This article by NICOLE DUKE of Cardoza School of Law, "*Expose Your Pig": The Procedural Failures of Sexual Harassment Mediation And Danger to Abuse Victims"* both challenged a personal presumption and explained a personal concern about mediation as a dispute resolution process. After nearly 30 years of mediating civil trial disputes, on a broad level I was pretty much convinced that virtually any issue can be reconciled through the mediation process. "Help me understand the nomenclature and the tradecraft involved in the conflict, and we can get your case resolved" was my professional mantra. At the same time, having mediated a fair number of Title VII sexual discrimination claims, I was troubled by a nagging concern that at least some of the settlements reached had not really resolved anything. Ms. Duke's insightful analysis of the dynamics in play with sexual harassment and discrimination disputes and her explanation of why those factors often don't lend themselves to facilitated negotiations is both revealing and thought provoking. I can remember telling one particularly distraught victim of horrific sexual discrimination in the workplace that, "It looks like we can get transfers, separations, back pay, sensitivity training, even letters of apology - what we can't get is the public exposure, shaming and personal vindication that may be needed to resolve the pain you feel." Maybe the classic civil trial model isn't the default dispute resolution process we assume it to be.

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"EXPOSE YOUR PIG": THE PROCEDURAL FAILURES OF SEXUAL HARASSMENT MEDIATION AND DANGER TO ABUSE VICTIMS

Nicole Duke

INTRODUCTION

Years of repressed rage and tension boiled over in October of 2017, as a seemingly never-ending stream of sexual harassment victims began to share their experiences of abuse.[1] Charged by the Harvey Weinstein scandal, a shocking exposure of a systematic and calculating abuser who sexually preyed on young actresses while operating a campaign of fear and coercion, the "Me Too" movement rapidly grew.[2] Women, both within the entertainment industry and outside, began to share their own traumatic sexual harassment experiences using the hash tag "Me Too".[3] The movement has surpassed the entertainment industry and gone international. The French branch on the "Me Too" movement is entitled "Balance Ton Porc" or "Expose Your Pig".[4] "Expose Your Pig" encourages women to open up about their own sexual harassment experiences in order to shame the men who committed these acts against them.[5] This paper will explore the danger of the confidential mediation of sexual harassment cases, and propose a more justice-based approach to allow victims to "expose their pigs".

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[1] Christen A. Johnson and KT Hawbaker, *#MeToo: A timeline of events*, CHICAGO TRIBUNE, Feb. 26, 2018, http://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html.

[2] Megan Twohey, Jodi Kantor, Susan Dominus, Jim Rutenberg, and Steve Eder, *Weinstein's Complicity Machine*, NEW YORK TIMES, Dec. 5, 2017, 2017 https://www.nytimes.com/interactive/2017/12/05/us/harvey-weinstein-complicity.html.

[3] Heidi Stevens, *#MeToo campaign proves scope of sexual harassment, flaw in Mayim Bialik's op-ed*, CHICAGO TRIBUNE, Oct. 16, 2017, http://www.chicagotribune.com/lifestyles/stevens/ct-life-stevens-monday-me-too-mayim-bialik-1016-story.html

[4] Laignee Barron, *French Women Have Their Own Anti-Sexual Harassment Campaign: 'Expose Your Pig'*, TIME, Oct. 18, 2017, http://time.com/4986965/weinstein-french-women-balancetonporc-expose-your-pig/.

[5] *Id.*

The number of accusations and shared stories in the "Me Too" movement is not surprising, considering 54% of American women have experienced "unwanted and inappropriate sexual advances" at least once in their lives.[6] More specifically, 30% of American women have been sexually harassed at work by male colleagues.[7] This statistic represents the 33 million American women who have been sexually harassed on the job, a staggering number.[8] Sexual harassment has unfortunately become a part of the workplace culture, and though not all women report their abusers, safeguards need to be put in place in the legal process to protect the women that do push forward and expose their harassment.

What processes are in place to protect these women from sexual harassment in the workplace? One contentious potentially problematic path is mediation. Mediation may seem like the ideal choice for these victims of abuse because of the emphasis on holistic solutions and party autonomy. Some feminist scholars have praised mediation for empowering victims and providing a forum of these victims' choosing in order to resolve the process in the manner they see fit, rather than being forced into lengthy litigation.[9] However, 25% of male on female sexual harassment cases in the workplace involve a male who holds power of the fate of the victim's career.[10] Sexual harassment mediations are in danger of perpetuating severe power imbalances. Feminist scholar Catharine MacKinnon theorizes that patriarchal societies have socially constructed gender, and that this construction of gender has placed men in a superior standing to women.[11] In mediation, these power imbalances are caused by the mediator failing to observe and consider "gendered communications and behaviors" which may lead to a more dominate male presence in the mediation, with the female participant conceding more

[6] Claire Zillman, *A New Poll on Sexual Harassment Suggests Why 'Me Too' Went So Insanely Viral*, FORTUNE, Oct. 17, 2017, http://fortune.com/2017/10/17/me-too-hashtag-sexual-harassment-at-work-stats/.
[7] *Id*.
[8] *Id*.
[9] Carrie A. Bond, *Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace*, 65 FORDHAM L. REV. 2489 (1997).
[10] *See supra* note 6.
[11] Deborah Rubin, *Re-Feminizing Mediation Globally*, 12 N.Y. CITY L. REV. 355 (2009).

frequently. [12] Further, "[u]nderstanding gender as a social construction with men in a superior position and women in an inferior position can create a power imbalance in mediation where men set the terms and women acquiesce".[13] Others have gone as far as comparing mandatory mediation being forced on women as synonymous to rape.[14]

Harvey Weinstein is a prime and timely example of the danger of power imbalances both in a societal context and the mediation room. Weinstein used his direct power and influence in the entertainment industry to control the fate of the careers of many actresses and industry workers. Sexual harassment mediation protocol in the workplace needs to be re-evaluated in a post-Weinstein world.

The *New York Times* reports, "Harvey Weinstein built his complicity machine out of the witting, the unwitting and those in between. He commanded enablers, silencers and spies, warning others who discovered his secrets to say nothing. He courted those who could provide the money or prestige to enhance his reputation as well as his power to intimidate".[15] Harvey Weinstein victimized women by using his power to silence (and often times settle) sexual harassment claims.[16] Herein lies the danger of alternative dispute resolution for sexual harassment claims. Like Harvey Weinstein's victims, victims of sexual harassment in the workplace may be pressured into settlement in order to save their careers and avoid retaliation. Women in the workplace may even avoid reporting instances of sexual harassment if they believe that the avenues available to them internally involve a highly unbalanced dispute resolution process. The Financial Times reports, "As one Weinstein victim after another made clear, women are afraid to report harassment due to a power imbalance between an individual victim and her harasser. The situation is he said-she said, and he is much more able to insist on his version. At best, she might end up

[12] *Id*.
[13] *Id*.
[14] Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. (1991). (Grillo goes on to explain that this comparison can also be made in regards to the traditional adversarial process, which is also rooted, in patriarchal values.)
[15] *Supra* note 2.
[16] *Id*.

with a settlement and a non-disclosure agreement, but at the cost of her job".[17] Further, an importance must be placed on the assertion of rights of women who are involved in sexual harassment claims, with some scholars arguing that women discover greater self-preservation in collectivism.[18]

The realization of the scope and intricacy of Weinstein's abuse scheme has led to similar accusations of abuse of power throughout the industry and the workplace, proving that these situations are all too common.[19] Mediators must combat power imbalances with stricter screening and intake procedures, or even make the determination that the case is inappropriate for mediation.

BACKGROUND

I. The Scope of Sexual Harassment in the Workplace

Sexual harassment is classified as a form of discrimination by the U.S. Equal Employment Opportunity Commission ("EEOC")

[17] Anne-Marie Slaughter, *Sexual Harassment is Rooted in Power Imbalances*, THE FINANCIAL TIMES, Oct. 26, 2017, https://www.ft.com/content/1d624ee0-b8af-11e7-bff8-f9946607a6ba. (The article goes on to explain that victims often find power in numbers, resulting in phenomenon such as increased reporting about a particular abuser after that abuser has already been accused. Oftentimes joining in on a public claim is easier and less intimidating than being the first to accuse, displaying the importance of public shaming and ridicule of abusers in order to let other cases come to light and prevent future cases).

[18] *See* note 14. (Grillo writes, "For example, Elizabeth Schneider has demonstrated that assertion of rights can aid in the development of individual and group consciousness among women. She notes that Carol Gilligan describes the developmental challenges of maturity as very different for men and for women. Men must learn connection and care for others; women must learn to care for themselves. The assertion of rights can aid women in this development, as " the essential notion of rights is that the interests of the self can be considered legitimate.' Thus, assertion of rights can help women distinguish self from other, and ultimately give them a sense of collective identity.")

[19] *See* Katie Rife, *An incomplete, depressingly long list of celebrities' sexual assault and harassment stories,* AV CLUB, Nov. 22, 2017, https://www.avclub.com/an-incomplete-depressingly-long-list-of-celebrities-se-1819628519. (Describing multiple abuse stories from entertainment industry professionals as well as explaining the scope of the "Me Too" movement and its growth due to social media)

under Title VII of the Civil Rights Act of 1964.[20] In 1986, the Supreme Court first recognized sexual harassment as a form of discrimination under Title VII in *Meritor Savings Bank v. Vinson*.[21] Sexual harassment comes in many forms and can include "unwanted sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature".[22] The two main forms of sexual harassment in the workplace are the "quid pro quo" and the hostile work environment.[23] Quid pro quo harassment occurs when the harasser holds power of the victim's employment status and demands sexual favors in return for security.[24] This is the clearest form of sexual harassment in the workplace because of the existence of a "tangible job benefit" between the supervisor and employee.[25] The hostile work environment form occurs "when offensive conduct, usually by co-workers, creates a hostile work environment that changes the victim's terms and conditions of employment."[26]

Between 1990 and 1999, there were 36,500 reported sexual assault cases in the American workplace, and women are the victims of 80% of all workplace assaults.[27] Sexual harassment cases are reported at a much higher rate, with 12,428 claims submitted to the EEOC in 2017 alone.[28] This statistic does not include any state or local Fair Employment Practice claims.

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[20] *Facts About Sexual Harassment*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/publications/fs-sex.cfm (last accessed May 23, 2018).
[21] 477 U.S. 57 (1986).
[22] *See supra* note 16.
[23] Mori Irvine, *Mediation: Is it Appropriate for Sexual Harassment Grievances?*, Ohio State Journal on Dispute Resolution, Vol 9:1 (1993).
[24] *Id*.
[25] *Id*.
[26] *Id*. (Explaining that this can be perceived as an environmental issue in which the victim's workplace is transformed by an air of intimidation. Hostile work environments often consist of numerous "minor" offensive issues that combine to form the offensive workplace. In these workplace situations harmful intent is not required to categorize it as true harassment.)
[27] *Sexual Violence & the Workplace*, National Sexual Violence Research Center, 2013, https://www.nsvrc.org/sites/default/files/publications_nsvrc_overview_sexual-violence-workplace.pdf.
[28] *Charges Alleging Sex-Based Harassment (Charges filed with EEOC)FY 2010 - FY 2017*, EEOC.GOV,

A study by the EEOC explained that reporting incidences of harassment to employers can lead to company trivialization of claims.[29] Often times victims find that the best course of action is to simply not act at all, and continue working as if the abuse had not occurred.[30] In many cases, therefore, targets of harassment do not complain or confront the harasser… The least common response of either men or women to harassment is to take some formal action – either to report the harassment internally or file a formal legal complaint."[31] The majority of sexual harassment victims in the workplace will not discuss the harassment with a superior or file a formal complaint.[32] One 2003 study found that 75% of employees who reported incidents of sexual harassment were retaliated against by their abuser or employer.[33] The lack of formal complaints is understandable when considering the likelihood of employer retaliation.[34]

Picture this scenario. Ann is a new employee at her company and has been experiencing harassment throughout her short time on the job. Her boss, Jim, visits her desk multiple times a day and makes disparaging sexual comments, repeatedly asks her to join him for lunch and insults her when she does not agree. He makes explicit comments about her appearance and hovers in her personal space. Ann has felt increasingly unsafe at work and fears that Jim's behavior will just escalate. Ann has talked to other workers in the office who tell her to relax because "That's just how Jim is". Ann is dependent on position financially and professionally and is

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https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm. (Last visited April 2nd, 2018).

[29] Chai R. Feldblum & Victoria A. Lipnic, Select Task Force on the Study of Harassment in the Workplace, https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

[30] *Id.* (The EEOC reports that "[c]ommon workplace-based responses by those who experience sex-based harassment are to avoid the harasser (33% to 75%); deny or downplay the gravity of the situation (54% to 73%); or attempt to ignore, forget or endure the behavior (44% to 70%).")

[31] *Id*.

[32] *Id*. (Approximately 70% of victims did not even discuss the harassment with a superior, let alone file a formal complaint, a step only 6 to 13% of victims take.)

[33] Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8:4 J. OCCUPATIONAL HEALTH PSYCHOL. 247, 255 (2003).

[34] *See* Feldblum *supra* note 25.

scared to approach Human Resources with a complaint because she does not want to be retaliated against.

When reading Ann's story as an outsider it may be easy to judge her inaction and quickly recommend she contact her HR representative. It is often difficult to sympathize in these situations, but we must realize that it is impossible to know how one would react unless they have been in the same position. These scenarios, which Ann has suffered, happen often, resulting in the majority of these cases going unreported. Fear of retaliation is a major factor in the lack of reporting of workplace sexual harassment. Yet, when victims take the next step and report their harasser they are not free from power imbalances and retaliation is not the only concern that may affect a mediation session.

Now, picture that Ann has decided to formally report Jim because she believes his abuse is escalating. After speaking with her Human Resources representative, they may offer the opportunity to internalize the situation within the company and resolve the issue quickly and privately. Ann may be embarrassed by coming forward with allegations, especially her other co-workers seem unfazed by Jim's behavior. She may even be grateful when the company offers her a mediation session with an unbiased mediator, and believe that she will have the opportunity to confront Jim and explain how his behavior makes her feel uncomfortable.

Ann enters the session nervous but thankful to express her discomfort to her boss and put this situation behind her. In mediation sessions, the mediator will give an opening statement and disclaim any bias, and explain that both parties will be given equal opportunity to express their views of the situation. The mediator will then ask Ann, the complainant, to explain her positions. Ann, in good faith, explains her discomfort, her concerns and the inappropriateness of Jim's behavior and sexually explicit comments. She may feel relief upon reliving her experience and expressing her emotions. Now, it is Jim's turn to speak.

Jim begins to gaslight Ann. Gaslighting is defined as a "colloquial term that describes a type of psychological abuse in which the abuser denies the victim's reality, causing him/her to

question him/herself, his/her memory, or his/her perceptions".[35] Jim recounts the same situations and conversations that Ann does, but with a twist on the scenario. Jim proclaims innocence to any ill intentions and claims that he has always joked this way with female employees. In fact, Ann had always seemed receptive to his quips and laughed along with him. Further, he takes all of his new employees out to lunch, male or female, in order to get to know them better. Jim may seem truly contrite by Ann's discomfort and explains that this was all just one big misunderstanding. Jim promises that he values Ann's contribution to the company and believes that she is an excellent worker. Jim wants to put this small misunderstanding behind them, and continue their professional relationship, with less personal interaction between the two. Jim monopolizes the conversation and counters every point Ann makes with a louder, longer seemingly innocent explanation.

Ann feels overwhelmed. Ann may begin to question these conversations that had previously made her so uncomfortable. Had she taken Jim's comments too personally, and was she overreacting? Jim now seems so genuinely sorry that he must have never directly intended to harm her. Ann may believe that the session has been a success and end the mediation, thinking that their relationship has improved and they can move on.

Following the mediation Jim barely speaks to Ann. He does not assign her enough work and does not invite her to company events. Even though the mediation was supposed to be confidential, the rest of the office avoids Ann because they believe she is a troublemaker and she feels alienated from the office. Her lack of work product may even lead to a poor employee evaluation that could result in her termination.

What went wrong in this mediation? One theory is that sexual harassment mediation is inherently flawed because of gender construct and the existence of power imbalances in both the workplace and society.

[35] *Gaslighting*, GOODTHERAPY.ORG https://www.goodtherapy.org/blog/psychpedia/gaslighting (last visited April 12, 2018).

II. Sexual Harassment Mediation

In the early 1980s, the alternative dispute resolution field began to work with employment discrimination claims.[36] The ADR field's involvement grew when "[f]ollowing success in applying ADR to collective bargaining and organized labor disputes, ADR advocates promoted mediation and arbitration as alternatives to litigation for employers seeking less costly methods for resolving the growing number of employee claims of workplace discrimination and sexual harassment."[37] Instead, author Susan K. Hippensteele argued that the rise of sexual harassment mediation was due to a combination of employer anxiety and the advocating of civil rights groups.[38] First, a sudden increase of sexual harassment claims following a shift in public opinion in regards to sexual harassment led to the desire for employers to privatize the complaint process.[39] Previously, female employees that had entered the workforce in the 1950s and 1960s saw sexual harassment in the workplace as an unavoidable part of their experience.[40] Employers intended to avoid litigation and advocates sought to best represent their clients in a process they believed provided the most benefit.[41] The overall goal was re-privatizing sexual harassment by employers and advocates alike.[42] Two factors, "the legal profession's failure to understand the psychology of sexual harassment combined with renewed political backlash against sexual harassment victims provided the ADR industry a unique opportunity to move into the sexual harassment arena".[43]

A. Sexual Harassment Mediation: The EEOC Model

In 1992, the EEOC began a pilot ADR Program to internally mediate all discrimination to voluntary parties.[44] This pilot program included sexual harassment discrimination cases brought

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[36] Susan K. Hippensteele, *Mediation Ideology: Navigating Space From Myth to Reality in Sexual Harassment Dispute Resolution*, 15 AM. U. J. GENDER SOC. POL'Y & L. 43 (2006).
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] *See* Bond *supra* note 9.

to the EEOC.[45] The program was reported to have "…an ultimate success rate of more than fifty percent, with ninety-two percent of the parties rating the mediation process as "very fair" or "fair." The remedies varied from cash settlement and changes in employment status to apologies."[46] 77% of the victims were satisfied in mediation in comparison to a 45% satisfaction rate for arbitrated cases.[47] This data does not separate sexual harassment cases to a separate category, making it impossible to determine the satisfaction rate in these situations.

One possible reason for a higher satisfaction in settlement is that monetary relief is not the sole end goal of mediation. Claimants have a wide avenue of possible solutions available to them in comparison to mediation, and may feel that they hold a greater measure of power in the mediation setting than in the course of litigation. Alternative solutions that are not focused on monetary settlement can include: "education rather than punishment; transfers, retraining, counseling, back pay; disciplining of the offender, separation of offender and victim, office-wide training, updated complaint processes; letters of reference, or job modifications…", as well as a formal apology.[48] Formal apologies in sexual harassment mediation arguably empower victims by recognizing the harm that was done to them, and relieve the claimant of future self-doubt about her trauma.[49] Finally, employers are attracted to mediation for the substantially lower cost than a litigation would incur, and the often times confidential nature of settlements between employees.[50]

In an interview with an EEOC Mediator, the importance of the voluntary nature of the process was made clear.[51] The Mediator explained that while there is not a formal screening process before the mediation takes place, any sexual harassment case that is referred to the EEOC only takes place on a voluntary basis. The

[45] *Id.*
[46] *Id*
[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] *Id*.
[51] Phone Interview with Anonymous EEOC Mediator (May 23, 2018). Author communicated with the Mediator in regard to the appropriateness of sexual harassment mediation and his experience mediating this category of cases.

Mediator focuses on providing a comfortable environment for both parties and keeps them in separate caucuses so that a victim may not be forced to face her alleged abuser. The Mediator argued that giving victims the choice to mediate empowered victims to take control of their case and avoid length litigation. During the interview, the Mediator expressed the helpfulness for victims who are continuing to work in the company or organization to express their feelings about the harassment to her employer the mediation room, which the Mediator has designed to be a safe and inviting forum. Oftentimes, settlement is not solely focused on monetary relief, and the Mediator has helped draft new sexual harassment policies and stipulated sexual harassment training in the workplace in order for settlement to go forward. The Mediator believes that the point of mediation is resolution and settlement whether monetary or not, and victims have the opportunity to draft creative solutions that may not be available in a litigation context that may be time consuming and emotionally devastating. The opportunity is important for both sides to try to resolve the matter before a long litigation. The Mediator believes that the confidential nature of settlement does not protect just the abuser, but the victim who may not want her case publicized.

On the other hand, the confidentiality of settlements in mediation is a component of the process dangers for sexual harassment victims in mediations. Confidential settlements prevent public awareness and shaming of abusers, which may lead the victim to feel powerless, or allow the abuser to continue the cycle of harassment.

DISCUSSION

I. Power Imbalances and the Dangers for Female Victims in Mediation

While not referencing the appropriateness of sexual harassment mediation, author Trina Grillo criticized the idea that mediation presented a safer legal avenue for women who wanted to avoid the more "patriarchal" litigation process in her seminal article.[52] Grillo explains that because mediation involves trading

[52] *Supra* Grillo note 14.

interests in the desire to compromise and reach a resolution, there is less focus or importance on the values of the parties present.[53] Oftentimes focus on the morality of an issue can halt agreement and a mediator may push to focus instead of the practical in order to have both parties come to some form of an agreement.[54] The danger is found in the idea that "all agreements are not equal. It may be important, from both a societal and an individual standpoint, to have an agreement that reflects cultural notions of justice and not merely one to which there has been mutual assent. Many see the courts as a place where they can obtain vindication and a ruling by a higher authority."[55]

Another component of the power imbalance is the societal expectation that women are expected to appear cool and collected, displaying no hint of anger, in order to not be seen as hysterical or "unfeminine".[56] Grillo explains that Western culture views women who hide their anger as the "nice woman" and those who assert and express their anger as "the bitch".[57] Female victims in mediation may struggle to contain their anger in order to come across as the "nice woman" so that they are not viewed as expressing anger solely to be difficult and unconstructive, displaying aggression that others may judge them for and result in the victim not being taken seriously.[58]

Gender differences in conversational styles also can affect the mediation process. Research suggests that female conversational styles tend to be more "personal, relational, and focused on understanding" while male conversational style focuses more on information, power and status.[59] It must be said that "the

[53] *Id*.
[54] *Id*.
[55] *Id*.
[56] *Id*.
[57] *Id*. (Grillo writes, Neither of the alternatives traditionally available to women allows a woman to use her anger to clarify and strengthen herself and her relationships. Rather, both alternatives force her to deny, displace, internalize, or fear it.)
[58] *Id*.
[59] David A. Hoffman and Katherine Triantafillou, "Cultural and Diversity Issues in Mediation", *Mediation: A Practice Guide for Mediators, Lawyers, and Other Professionals,* Massachusetts Continuing Legal Education, Inc., 2013. (Citing another study the authors present "Professor Linda Babcock performed experiments with men and women as advocates for themselves and others in

norms of one gender are [not] 'better' than the other's (quite the opposite)— instead, their point was that these differences, if not identified, become sources of misunderstanding, judgment, and blame…these differences are not surprising, because boys and girls grow up in different "cultures" with differing expectations about how to behave and how they will be treated".[60] Finally, gender may affect negotiation styles. Academia has acknowledged a (possibly stereotyped) theory that women are more "risk averse" in negotiation and may behave differently in competitive settings.[61] Whether these negotiation differences are reality or stereotype, they may influence a negotiation or mediation.[62]

Author Andrea Schneider argues that these perceptions of negotiation differences are a narrative used to blame women for societal issues and constructs, such as the gender wage gap.[63] Studies present results that show women are at a disadvantage in the negotiating rule, but only because the studies are designed to "focus on what are traditionally seen as masculine characteristics of negotiation—aggressiveness and confidence (or overconfidence…[s]ince these characteristics are the variables that are being measured, the games themselves are rigged to show men

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salary negotiations, and found that women tend to be less forceful advocates for themselves, but are more forceful when advocating for others. For men, the pattern was the opposite—they were more assertive than women when advocating for themselves, and somewhat less so when advocating for others.")

[60] *Id*. (Explaining that these gender "culture" differences are enforced from infancy. Children's books predominantly feature male heroes and seldom show women in leadership roles. Boys are expected to play different types of games, focused on competition while young girls are given dolls and encouraged to play house. Girls are taught to "be nice and get along" while boys are taught to win.)

[61] Michelle R. Evans, *Women and Mediation: Toward a Formulation of an Interdisciplinary Empirical Model to Determine Equity in Dispute Resolution*, 17 Ohio St. J. on Disp. Resol. 145, (2001).

[62] *Id*. (Quoting, "While stereotyped behavior such as this may have empirical support, in some cases, perceptual conjecture may be the sole basis of conclusions of gender disparity. Whether real or perceived, such gender differences may impact the parties in the setting of mediation. That is, even if the gender differences are merely perceived to exist, 'they may influence the way in which men and women interact when they negotiate, because the participants expect these factors to affect their dealings.' These gender differences may be subtle, unconscious.")

[63] Andrea Schneider, *Negotiating While Female*, 70 SMU LAW REVIEW 695, (2017).

as more effective."[64] Yet, when women do attempt to engage in more "masculine" styles of negotiation they are subject to new challenges. By taking a hard stance during a negotiation or mediation, "[women] may lose both social and economic capital, as in not being liked at work nor being hired or promoted…if a woman successfully negotiates a higher wage, she risks alienating her colleagues, which in turn jeopardizes her long-term earnings."[65]

Whether these differences in negotiation styles are reality or simply perception, female victims who engage in mediation to resolve sexual harassment issues may find themselves at an inherent disadvantage. Societal constructs have indoctrinated women to certain conversational and negotiation norms, which can contribute to greater power imbalances in the mediation room.

II. A Comparison of Sexual Harassment Mediations to Cases Involving Domestic Violence

Sexual harassment mediation holds similar power imbalance concerns as domestic violence and assault claims.[66] Author Mori Irvine explains, "In [these] cases there is more than a simple dispute over money or property. Instead, there is a dynamic present that involves power, fear, and coercion".[67] Mediation of sexual harassment cases risks trivializing workplace harassment by maintaining a dangerous and unsustainable workplace not just for the victim, but also for the female workplace as a whole in society.[68] Arguably, "pressure for the victim to accept at least partial responsibility for this illegal conduct can only be eliminated by using the law to protect her rights and to punish the transgressor".[69] The mediator, working for the ideals of

[64] *Id*.
[65] *Id*.
[66] Mori Irvine, *Mediation: Is it Appropriate for Sexual Harassment Grievances?*, Ohio State Journal on Dispute Resolution, Vol 9:1 (1993).
[67] *Id*.
[68] *Id*. (Explaining, "Sexual harassment grievances involve more than whether the discipline or discharge of the harasser is appropriate. Instead, how these matters are treated, and how harassers are disciplined is a reflection of how women in the workplace are faring".)
[69] *Id.*

impartiality and compromise, cannot impose a message of legal recourse on the abuser without displaying bias.[70]

The first existing dynamic that is present in both domestic violence and sexual harassment cases is unequal bargaining power.[71] The benefit of mediation is the concept that parties hold equal power to negotiate and reach a conclusion that is mutually beneficial in comparison to litigation.[72] However, "[i]n an abusive relationship…mutual participation may be very difficult for a victim because the abuser may have consistently silenced him/her throughout the relationship and the victim may fear retribution if true needs are expressed. If one party fears the other, it is unlikely that party can mediate on equal bargaining ground."[73] Advocates for domestic violence victims believe that there is a fundamental inequity in power and control in abusive relationships, and the argument can be made that sexual harassment constitutes a similar type of relationship.[74] The existence of "psychological terrorism" that abusers may employ in mediations can be any look, action, or statement made in an attempt to intimidate an a victim, who may fear further consequences in the future for asserting their feelings and acting in a positional manner in a mediation.[75]

Victim advocates further argue that it is impossible for mediation to guarantee that victims of domestic violence will not be abused again. Author Alexandria Zylstra explains:

> Further, some argue that mediation cannot overcome the long-standing effects of an abusive relationship within the context of such a brief encounter. Regardless of the power-balancing techniques the mediator uses, critics argue that believing such techniques will actually reduce the power imbalance and ensure a safe and fair settlement is absurd because it presumes that mediators, in a brief amount of

[70] *Id*. (Irvine argues that the litigation process or an arbitrator is more suited to promote sexual harassment law which will lead to fair and just punishments.)
[71] Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, Journal of Dispute Resolution (2001).
[72] *Id*.
[73] *Id*.
[74] *Id*.
[75] *Id*.

> time, are able to accomplish what takes trained psychologists years to accomplish working with violent offenders, and with abuse victims. Not only is this transformation unlikely, critics argue that such false assumptions may, in fact, greatly increase the risk of danger to the victim with this type of intervention by an untrained mediator.[76]

Similarly, a mediator cannot guarantee that a sexual harassment victim in the workplace will not be victimized again, or that the abuser will not go on to harm other employees. The mediation may instead make the abuser feel as if he has been absolved of past wrongdoing because a settlement or agreement was reached and continue abusive behaviors while never truly accepting responsibility for problematic actions.[77]

III. Screening Processes

Screening processes can aid in excluding cases that are inappropriate for mediation. Arguably, screening processes are often inadequate and fail to prevent cases with domestic violence from being mediated.[78] For example, in divorce cases referred to court-annexed mediation, fifty to eighty percent of cases may involve domestic violence.[79] Even though screening procedure may exempt battered women victims from being forced into mandatory mediation, only five percent of cases are actually excluded.[80] One failure of the screening process and court-annexed mediation programs is the weak good-faith requirement standard.[81] Good-faith standards in mediation are generally implemented to ensure some degree of well-intentioned and active participation in mediation.[82] Good-faith standards intend to prevent the mediation

[76] *Id*.
[77] *Id*.
[78] Megan G. Thompson, *Mediating when domestic violence is a factor: Policies and practices in court-based divorce mediation programs*, 86 OR. L. REV. 599 (2007).
[79] *Id*.
[80] *Id*.
[81] *Id*.
[82] *Id*.

process from being purely discovery before a case and a stepping-stone to litigation.[83]

Good-faith standards are intentionally vague to deal with a range of misbehavior by parties, which leads to the total lack of relevance for domestic abusers.[84] Current standards need to be adapted because:

> [i]n large part, the failure to include the needs of battered women in good-faith participation standards has to do with the nature of domestic violence. Domestic violence is often manifested through inconspicuous behaviors, such as a nonverbal signal by the batterer that the victim interprets as a threat, but that someone outside the relationship might not notice. In contrast, existing good-faith participation standards focus on the parties' conspicuous behaviors, such as attending required mediation sessions. Unlike battering behaviors, such conspicuous behaviors are readily apparent.[85]

Mediations involving family issues often employ rigorous screening processes that could be beneficial to the workplace sexual harassment mediation. Family mediators use screening processes to determine the appropriateness of a case for the mediation room and attempt to identify potentially dangerous situations prior to the mediation through an intake process.[86] Mediators must meet confidentially with each party separately prior to the mediation to explain the goals of the mediation and identify party concerns that may deem a mediation inappropriate.[87] In a situation where a mediator, "feels that a case is inappropriate for mediation… because one party is afraid or other power imbalances that cannot be addressed through adaptations in the process, the mediator…should simply decline the case as being

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[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] Hillary Linton, *Best Practices for Screening in Family Mediation-Arbitration*, Riverdale Mediation, Oct. 6, 2017, https://www.riverdalemediation.com/training/news/best-practices-in-screening-in-family-med-arb/.
[87] *Id.*

inappropriate. To disclose any more could put a victim of coercive controlling violence at risk of retaliatory harm."[88]

If the mediator decides to continue with the process, she must design a safety plan and make important decisions about which individuals should be players in the mediation.[89] A mediator can decide whether joint sessions or caucuses are beneficial to the mediation, and decide which individuals may be better kept out of the mediation room.[90] In the case of a sexual harassment, caucus format should arguably always be the norm and a victim should not be forced to face her abuser.

A power imbalance exists in sexual harassment claims in which an abuser may dominate the mediation with a mediator sitting by unknowingly. In workplace harassment situations, abusers that hold power over the fate of a victim's career may intimidate a victim through nonverbal cues that can be seen as a threat, similar to how battered women are treated. Further, screening processes are determinedly unsuccessful in exempting domestic violence cases that are inappropriate for mediation, which leads to the assumption that sexual harassment screening processes may be similarly ineffective in exempting cases in which a power imbalance may threaten the integrity of the mediation.

PROPOSAL

This paper proposes that in an ideal scenario, mediation or dispute resolution processes should not be used as the prime avenue to resolve sexual harassment claims in the workplace. Company internal human resource procedures should modify existing policies that allow for internal dispute resolution processes to be the first and preferred step taken in sexual harassment cases. This would avoid further victimization of employees, particularly female employees. Human Resources departments should instead work with victims who believe they have been sexually harassed by gathering evidence and building a case file. HR should also provide a channel to proper legal guidance for victims if they

88 *Id.*
89 *Id.*
90 *Id.*

believe litigation is necessary for a civil resolution. Companies should avoid confidential settlement of sexual harassment claims in the workplace. By taking a public and hard stance on inappropriate behavior, workplaces may see a possible reduction of harassment incidents. If abusers realize that their actions have actual legal and employment ramifications, rather than relying on private settlement, they may refrain from beginning abusive actions.

Though the initial stance of companies should be to publicly condemn abusers, there must be some form of private resolution available in order to not alienate certain victims. Victims may feel that publicly airing their personal business may hurt their careers and lead to humiliation and possible retaliation. If victims who report to human resources truly feel that the best way to resolve the dispute would be through mediation, their wishes should be respected. For those victims who request mediation, a strict intake procedure modeled after domestic violence intake must occur before mediation is deemed appropriate.

Screening processes should be focused on " [the] use of separate and private interviews to screen prior to mediation; reliance on more than one method of identification; eliciting information in a neutral, safe atmosphere; and making assessments that lead to the conduct of mediation as usual, the conduct of mediation with special conditions, or case referral for alternative treatments".[91] These screenings were proposed for cases involving domestic violence, but as evidenced earlier in the two issues can be dealt with in similar ways. Overall, the main focus should be on the safety of the victims and their ensured comfort level at all times throughout the process.

If a company or organization decides to employ sexual harassment mediation as a dispute resolution process, the process must be voluntary. The process should follow the EEOC model described in the Mediator Interview.[92] Victims must willingly

[91] Jessica Pearson, *Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, https://onlinelibrary.wiley.com/doi/pdf/10.1002/crq.3900140406 (Last visited April 17, 2018).
[92] Phone Interview with Anonymous EEOC Mediator, *supra* note 47.

agree to a mediation that has been designed for their safety through the use of caucuses. Though not ideal, this process may empower victims to control their case outcomes and freely decide that mediation is their best legal path.

Therefore, mandatory mediation in cases involving sexual harassment is never appropriate. The Southern District of New York is an example of a court that mandates mediation in all sexual harassment work cases. Employers should never implement an internal dispute resolution policy that mandates mediation for sexual harassment claims. Advocates of sexual harassment victims worry that mandatory mediation is a hurdle to victims who may need a legal remedy and also downplays the severity of sexual harassment as a crime.[93] Further, mandatory mediation presents the following issues:

(1) victims feel coerced into participating even if given the option to opt out,

(2) the procedure has inherent risks since the adequacy of screening procedures and use of safe mediation practices vary with individual mediators,

(3) its cooperative and compromise-oriented focus is inappropriate for victims, and

(4) it assumes that abusive individuals will bargain in good faith.[94]

These issues present major safety and emotionally traumatic concerns for victims of sexual harassment in the workplace and therefore its use is never appropriate.

CONCLUSION

In conclusion, sexual harassment cases in the workplace need to be monitored under the strictest of guidelines. Victims of harassment should not be forced into dispute resolution processes that may be structurally biased against them. If the victim prefers

[93] *See supra* note 82.
[94] *Id*.

and actively chooses a dispute resolution process such as mediation, screening processes must be adhered to that monitor for power imbalances that may make an appropriate mediation impossible. Preferably, supervisor-subordinate relationships with sexual harassment claims should never be mediated because of the difference in bargaining power and possibility for retaliation on the part of the employer. It is the duty of employers to ensure the safety of their workers and provide them with secure channels to proper resolution, whether through litigation or ADR. Employers must avoid enabling future Harvey Weinsteins and aid in healing the years of abuse the female workforce has endured. Victims should feel empowered to expose their pigs both in the workforce and in the greater society.

Fellow Introduction:

A roadmap. That's what came to mind. A roadmap for anyone wishing to see the benefits of mediation scaled up. To this mediator, who was fortunate to have started practicing in a state with a robust private mediation culture founded by visionaries who saw the importance of a system of court-ordered mediation (Florida), "*Bridge Over Troubled Water: The Case For Private Commercial Mediation In India*" by JUHI GUPTA of Harvard Law School, Cambridge, MA, revealed itself to be a roadmap for those wishing to see the benefits of mediation take root where they have yet to do so, and grow to meet their fullest potential wherever mediation is still not a primary mode of dispute resolution.

The author presented a very well-researched and detailed analysis of the state of commercial mediation in India and a plan to reach the goal of a greater appreciation for and use of mediation in commercial disputes there. In doing so, Juhi Gupta covered terrain that I think reflects much of what has led to mediation being top-of-mind in Florida, and other mediation friendly-jurisdictions. It should be required reading for anyone feeling like mediation has yet to reach its potential where *they* live, for both commercial and non-commercial cases.

Like in India today, obstacles had to be overcome in Florida. Early on, the legal community was a source of some resistance, even though the seeds of the Florida mediation movement were sown by lawyers. Education of interested groups, buy-in by them, work of advocates for reforms, and monitoring of results are all discussed. And the author makes the case that the legal profession, private sector, government and other organizations can and should play a role in helping the mediation of commercial matters become a complement to India's civil justice system. JUHI GUPTA'S observations are insightful, proposals are wise, and vision can be applied elsewhere. Enjoy this well written article.

Richard Lord
Editorial Board
Fellow ACCTM

BRIDGE OVER TROUBLED WATER: THE CASE FOR PRIVATE COMMERCIAL MEDIATION IN INDIA

JUHI GUPTA

Introduction

"*…as a litigant I should dread a law suit beyond almost anything else short of sickness or death*".

– Justice Learned Hand

These words of Justice Learned Hand assume immense relevance in India, a country that on the one hand aims to become a dominant economic power and dispute resolution hub, and on the other hand, deprives scores of citizens from securing or even accessing justice on account of the acute adversarial paralysis. Given these dynamics and prevalence of alternative dispute resolution ("**ADR**") since ancient times in India, it is equally surprising and disappointing that mediation is considered the poorer cousin to litigation and arbitration, and that its potential remains severely untapped.

In particular, commercial disputes constitute only a fraction of mediations conducted by existing institutions, which largely mediate family, matrimonial and property disputes. [1] This encouraged the author to select private commercial mediation in India specifically as the subject of study for this essay because: (1) court-annexed or court-referred mediation (public mediation) has a considerably higher degree of legislative, judicial and institutional backing as compared to private mediation in India; (2) mediation appears to be relatively more accepted and engaged with in the realm of family, matrimonial and property disputes, a development also facilitated by court-annexed mediation of such disputes; and (3) commercial disputes, which in the author's submission are just as ripe for mediation, constitute a significant proportion of disputes involving Indian parties. It is also pertinent to discuss this topic given the acceptance and growth of and importance accorded to

[1] Alok Prasanna Kumar et al., STRENGTHENING MEDIATION IN INDIA: AN INTERIM REPORT ON COURT ANNEXED MEDIATIONS, (2016), *available at* http://vidhilegalpolicy.in/reports-1/2016/7/25/strengthening-mediation-in-india-an-interim-report-on-court-annexed-mediations (last accessed 5 April 2018).

mediation of commercial disputes in jurisdictions such as the US,[2] UK[3] and Singapore[4] that share numerous legal, social and cultural similarities with India.

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[2] Since a comparative analysis is outside the scope of this essay, *see generally* Thomas C. Waechter, *Survey Says: Litigants Like What They See in Mediation* 22(6) ALTERNATIVES TO THE HIGH COST OF LITIGATION 98 (2007); Jerome T. Barrett, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL AND SOCIAL MOVEMENT (2004); F. Peter Phillips, *How Conflict Resolution Emerged Within the Commercial Sector* 25(1) ALTERNATIVES TO THE HIGH COST OF LITIGATION 3 (2007).
For an analysis of factors that contributed to and sustained the growth of private commercial mediation in the US, *see generally*. Thomas Gaultier, *Cross-Border Mediation: A New Solution for International Commercial Dispute Settlement?* 26(1) NYSBA INTERNATIONAL LAW PRACTICUM 38, 40 (2013); Don Peters, *It Takes Two to Tango, and to Mediate: Legal Cultural and Other Factors Influencing United States and Latin American Lawyers' Resistance to Mediating Commercial Disputes* 9(4) RICHMOND JOURNAL OF GLOBAL LAW AND BUSINESS 381, 405-407 (2010); Carrie Menkel-Meadow, *Variations in the Uptake of and Resistance to Mediation Outside of the United States* in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2014 (Arthur Rovine ed., 2015), at 206-209; Thomas J. Stipanowich et al., *East Meets West: An International Dialogue on Mediation and Med-Arb in the United States and China* 9(2) PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL 379, 384 (2009); Kimberlee K. Kovach, *The Evolution of Mediation in the United States: Issues Ripe for Regulation May Shape the Future of Practice* in GLOBAL TRENDS IN MEDIATION 418 (Nadja Alexander ed., 2nd edn., 2006).
[3] For an analysis of factors promoting private commercial mediation in the UK, *see generally*. Loukas A Mistelis, *ADR in England and Wales: A Successful Case of Public Private Partnership* in GLOBAL TRENDS IN MEDIATION 142-146 (Nadja Alexander ed., 2nd edn., 2006); Cyril Chern, INTERNATIONAL COMMERCIAL MEDIATION 13-14 (2008); Jane Player, *Mediation of Corporate Disputes in UK* 14(2) EUROPEAN COMPANY LAW JOURNAL 104 (2017); Giuseppe De Palo and Mary B. Trevor, *Is Mediation Moving Out of the Shadows and Into the U.K. Practice Mainstream* 30(9) ALTERNATIVES TO THE HIGH COST OF LITIGATION 173, 174 (2012); "The Seventh Mediation Audit: A survey of commercial mediator attitudes and experience" (11 May 2016), *available at* https://www.cedr.com/docslib/The_Seventh_Mediation_Audit_(2016).pdf (last accessed 20 May 2018).
[4] For an analysis of factors promoting private commercial mediation in Singapore, *see generally*. Dorcas Quek Anderson and Joel Lee, *The Global Pound Conference in Singapore: A Conversation on the Future of Dispute Resolution* ASIAN JOURNAL ON MEDIATION 70, 83 (2016); George Lim and Eunice Chua, *Development of Mediation in Singapore* in MEDIATION IN SINGAPORE: A PRACTICAL GUIDE 2-4 (George Lim and Danny McFadden eds., 2nd edn., 2017); AN ASIAN PERSPECTIVE ON MEDIATION (Joel Lee and Teh Hwee Hwee eds., 2009); Joel Lee, *Singapore: Cultural Influences in the Historical and*

The aim and objective of this essay is to explore why the potential of private commercial mediation remains untapped in India and what reforms can and ought to be adopted by the various stakeholders to remedy the situation in order for mediation to complement, and not undermine, the civil justice system.

For the purposes of this essay, the author has adopted UNCITRAL's definition of "commercial", which encompasses all relationships of a commercial nature, including exchange of goods and services, joint venture and other forms of business cooperation, and licensing arrangements.[5]

Dispelling myths and heralding reform

"*At first people refuse to believe that a strange new thing can be done, then they begin to hope it can be done, then they see it can be done – then it is done and all the world wonders why it was not done centuries ago*".

– Frances Hodgson Burnett

The perception of mediation generally and commercial mediation particularly in India appears to be one of largely uninformed skepticism and critique. The clear preference for adjudicative methods of dispute resolution suggests legal, social and cultural

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Institutional Development of Mediation in CONFLICT RESOLUTION IN ASIA: MEDIATION AND OTHER CULTURAL MODELS 107 (Stephanie P. Stobbe ed., 2018); Sundaresh Menon, *Building Sustainable Mediation Programs: A Singapore Perspective* 22(1) DISPUTE RESOLUTION MAGAZINE 42, 43 (2015); Dorcas Quek Anderson, "*A Coming of Age for Mediation in Singapore? – Mediation Act 2016* 29 SINGAPORE ACADEMY OF LAW JOURNAL 275 (2017); Dorcas Quek Anderson, *The Development of Mediation for Civil Disputes* in MEDIATION IN SINGAPORE: A PRACTICAL GUIDE 11-12 (George Lim and Danny McFadden eds., 2nd edn., 2017).

[5] "The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road". Article 1(1), footnote 2, UNCITRAL Model Law on International Commercial Conciliation (2002).

impediments to the uptake of mediation. Arbitration continues to be the preferred method to resolve commercial disputes despite a growing opinion that it is increasingly being plagued by the same problems derailing litigation in India.[6] Despite the growing dialogue on ADR and endorsement of mediation in many countries, it is either rarely used or has been perceived wrongly in India for reasons known and unknown. Some common myths of mediation that appear to be prevalent in India include "suggesting or engaging in mediation demonstrates weakness and uncertainty of success at trial", "mediation doesn't work and it is a waste of time" and "mediation yields a lesser form of justice".[7]

Having said this, if viewed relatively, there has definitely been progress in the mediation movement since 1996, which was the first time "mediation" was expressly mentioned in the statute books in India.[8] Allison Malkin and Gracious Timothy express optimism, noting that mediation is more pronounced in public consciousness than ever before due to growing awareness from regularly organized seminars, symposiums, competitions, training and other similar endeavors that are integrating a much-needed dedicated community of mediation professionals and infrastructure.[9] However, there is a long way to go, more so in the realm of private mediation and in turn, before commercial entities in India widely accept it as an appropriate mechanism to resolve disputes.

Why is it relevant to discuss private commercial mediation in the Indian context?

I. Adversarial factors

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[6] Allison M. Malkin and D. Gracious Timothy, *Commercial Mediation: An Evolving Frontier of Alternative Dispute Resolution in India* in ALTERNATIVE DISPUTE RESOLUTION: AN INDIAN PERSPECTIVE 321 (Shashank Garg ed., 2018). *See generally*. Promod Nair, *Surveying a Decade of the 'New' Law of Arbitration in India* 23(4) ARBITRATION INTERNATIONAL 699 (2007); Fali S. Nariman, *Ten Steps to Salvage Arbitration in India: The First LGIA-India Arbitration Lecture* 27(2) ARBITRATION INTERNATIONAL 115 (2011); Badrinath Srinivasan, *Developing India as a Hub of International Arbitration: A Misplaced Dream?* (2016), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2849269 (last accessed 20 May 2018).

[7] Malkin and Timothy, *supra* note 6, at 321-322.

[8] Section 30, Arbitration and Conciliation Act, 1996.

[9] Malkin and Timothy, *supra* note 6, at 365.

A common thread weaving the rise of private commercial mediation in the US, UK and Singapore was excessive litigation and public dissatisfaction with the civil justice system. The Indian judicial system is notorious for being one of the slowest in the world, a malaise which is only compounded by its other deficiencies, such as entrenched corruption and poor accessibility to courts. The country is grappling with an unprecedented explosion of litigation. To give perspective, according to the National Judicial Data Grid, nearly 8.2 million civil cases are pending in domestic courts out of which nearly 0.6 million cases have been pending for more than 10 years and more than 1.2 million cases have been pending between 5 and 10 years.[10]

Arbitration has not proved to be as efficacious an alternative to litigation in India as was hoped. Over the years, it has increasingly become plagued by the perils associated with litigation and excessive judicial intervention heavily diluted some of the very advantages that make arbitration an attractive alternative, namely efficiency in time and costs of resolving disputes. Although there have been marked pro-arbitration reforms in the recent past, it is not going to be a sudden revolution and any positive outcomes will not immediately manifest themselves. Further, if anything, the reforms should provide impetus to pursue an overall pro-ADR movement in which mediation is actively integrated.

Having said this, it is vital to emphasize that mediation should not only be viewed as an antidote to the inconceivable arrears of cases in courts. As a complement to the judicial system, it achieves numerous other fundamental purposes that are of equal, if not greater, importance.[11]

II. Cultural factors

Akin to Singapore, consensual methods of resolving disputes have been prevalent in India for centuries.[12] The "Panchayat" system denotes the ancient Indian model of the determination of issues by an assembly of five ("panch") learned individuals in a community

[10] Data as of 6 April 2018, *available at* http://njdg.ecourts.gov.in/njdg_public/main.php# (last accessed 20 May 2018).
[11] Malkin and Timothy, *supra* note 6, at 332-333.
[12] Geetha Ravindra, *India: Panchayats Mediation, Lok Adalat People's Court Conciliation, and Institutionalization of ADR* in CONFLICT RESOLUTION IN ASIA: MEDIATION AND OTHER CULTURAL MODELS 219 (Stephanie P. Stobbe ed., 2018).

through conciliatory mechanisms and continues even today, albeit in a more limited way. This system is rooted in the ancient Hindu concept of *Dharma* that means "duty" or "virtue" and is considered the foundation of the Indian cultural value of collectivism. Dharma and the collectivist sentiment support dispute resolution processes that promote respect, collaboration and harmony, even in the face of conflict.[13]

The Panchayat provided an opportunity to disputants to share their concerns and be heard. The primary objective was to preserve relationships and generate solutions that were in the best interests of the parties and all community members depending on the nature of the dispute. The "panch" applied their knowledge of local customs and habits as well as their familiarity with disputants to settle disputes in the presence of the entire community. Despite the lack of legal authority or sanctions, disputes were regularly submitted to the Panchayat. People had immense trust in the collective wisdom of the learned individuals and recognized the significance of committing to a process that ensured peaceful resolution of conflicts.[14]

Certain aspects of the Panchayat system distinguish it from mediation as the latter is understood today.[15] They can be analogized to the extent that both mechanisms are rooted in the values of collaboration, preservation of relationships and satisfaction of interests of both parties. However, the "panch" wielded considerable authority, adjudged grievances and delivered diktat when consensus eluded parties. Non-attendance could attract punitive action thereby impinging voluntariness and confidentiality was usually absent since proceedings took place in the presence of other community members.[16]

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[13] Ravindra, *supra* note 12, at 227-228.
[14] Ravindra, *supra* note 12, at 221-222.
[15] Interview conducted via email dated 25 March 2018 with Mr. Arjun Natarajan, advocate and certified mediator based in Delhi, India; Interview conducted via email dated 26 March 2018 with Ms. Chitra Narayan, advocate and certified mediator at Foundation for Comprehensive Dispute Resolution based in Chennai, India; Interview conducted via email dated 15 March 2018 with Center for Advanced Mediation Practice (CAMP) based in Bangalore, India.
[16] Sriram Panchu, MEDIATION PRACTICE & LAW: THE PATH TO SUCCESSFUL DISPUTE RESOLUTION 31, 358 (2nd edn., 2015).

As Indian society became larger and more complex, informal decision-making processes became more structured and gradually evolved into a formal mechanism of delivering justice. Development of a strong dispute resolution framework that facilitated efficient growth of trade and commerce while ensuring peace and harmony in society became critical to the business community. Prior to the advent of colonial rule, the business community consistently employed various methods of resolving disputes effectively, including processes analogous to mediation, despite continued absence of legal sanctions.[17]

However, colonial rule adversely impacted collaborative dispute resolution processes on account of the unequivocal colonial preference for binary decisions and consequent establishment of courts. Accordingly, a gradual decline in procedures based on community mediation and conciliation was witnessed and resulted in depriving poorer litigants of access to justice, an explosion in the number of cases filed in courts, and degeneration of traditional Indian values of collaboration and compromise into conflict and aggression.[18]

Interestingly, and admittedly at variance with the aforementioned submission of the impact of adversarial mechanisms on mediation, another cultural dimension influencing dispute resolution in India has been identified as "Uncertainty Avoidance".[19] This refers to the ways in which society deals with the fact that the future can never be known. India's lowest ranking on this scale has been at 40, compared to the world average of 65, which has been interpreted to suggest that the culture is more open to unstructured ideas and solutions. This assumes particular relevance from the perspective of mediation because it indicates that comfort with informal rules and procedures lends itself to creative problem-solving, which is the bedrock of mediation. According to Geetha Ravindra, "*litigants in India are less focused on rights and remedies outlined in laws and more concerned with fairness, respect and solutions that meet their underlying needs and interests. This mindset is well-suited for more informal dispute resolution processes*".[20]

[17] Ravindra, *supra* note 12, at 222.
[18] Ravindra, *supra* note 12, at 223.
[19] Ravindra, *supra* note 12, at 229.
[20] Ravindra, *supra* note 12, at 229.

III. Economic factors

India is a powerful emerging economy in a rapidly globalizing world. Unprecedented expansion of technology and more frequent international business partnerships have necessitated collaborative dispute resolution mechanisms. It is therefore extremely pertinent to locate and cultivate commercial mediation in India. As corporate entities in many countries are increasingly expected to secure positive settlement outcomes at lower costs and limit conflict resolution budgets, mediation is becoming the preferred method to resolve disputes. This ought to apply to India too given the "*sea of existing commercial disputes and those impending*".[21]

Further, a prominent policy of the current government is to make India a business-friendly jurisdiction and to augment the ease of conducting business in the country. India ranks 101 out of 191 countries in the World Bank's most recent 'Ease of Doing Business' Index. Effective dispute resolution is core to the 'Enforcing Contracts' component of the Index, where India ranks an appalling 164.[22] In the author's estimation, an aspect of the government's mission needs to involve easy resolution of disputes in order to facilitate development of trade and commerce. In today's increasingly connected world, preserving and developing existing business relationships and fostering an environment that is supportive of harboring new relations is critical.[23] Commercial mediation values business relationships and business continuity; therefore, promotion of private commercial mediation ought to be a priority as it would demonstrate the willingness of the government and commercial parties to consolidate and strengthen relationships as well as ease business operations in the country on account of associated time and cost efficiencies.

IV. Market factors

As India aspires to become a dispute resolution hub, it is imperative to adopt and pursue a multi-dimensional approach to resolving disputes. Internationally, a noticeable development over

[21] Malkin and Timothy, *supra* note 6, at 320.
[22] "Doing Business 2018: Economy Profile (India)", *available at* http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Profiles/Country/IND.pdf (last accessed 20 May 2018).
[23] Laila T. Ollapally, "Private mediation can relieve burden of courts" (7 May 2016), *available at* http://www.deccanherald.com/content/544836/private-mediation-can-relieve-burden.html (last accessed 20 May 2018).

the course of the last few years has been to integrate arbitration and mediation, and commercial contracts increasingly require good faith efforts at mediation as a precondition to an adversarial proceeding. Mediation and arbitration can nourish the market for each other – this is because many arbitrations eventually settle using mediation and likewise, mediating parties may realize the need to arbitrate or litigate one or more issues in order to arrive at a global settlement.[24]

Stakeholder analysis

The essay will now proceed to analyze factors creating resistance to the adoption of private commercial mediation in India, and suggest potential reforms and recommendations to mitigate or overcome the same. This analysis will be undertaken from the viewpoint of the central stakeholders which the author has identified as (i) parties; (ii) lawyers, including in-house counsel; (iii) government; and (iv) ADR organizations and industry bodies.

A common impeding factor applicable to all stakeholders expect for ADR organizations is the acute lack of awareness of the nature, techniques and benefits of mediation. An over-arching need of the hour is generating widespread awareness, an endeavor in which all identified stakeholders can play a prominent role. It is telling that the word "mediation" appeared in Indian statutory law for the first time in 1996, yet it is still considered a "new" form of ADR.[25] However, awareness by itself is inadequate;[26] even relatively informed individuals are not using mediation much, which illustrates that the awareness deficit is one among numerous limitations encumbering mediation's penetration of the market. In the opinion of Arjun Natarajan, "*it follows as a logical corollary that generating awareness is one of the solutions and not the only solution to give an impetus to mediation in India, especially, commercial mediation*".[27] Mediation needs to be inculcated in the

[24] Laila T. Ollapally, "The Indian Mediation Journey Thus Far And The Way Forward" (10 November 2017), at 3, *available at* http://simc.com.sg/wp-content/uploads/2017/11/The-Indian-Mediation-Journey-Thus-Far-and-The-Way-Forward.pdf (last accessed 20 May 2018).
[25] Natarajan, *supra* note 15.
[26] Natarajan, *supra* note 15; Interview conducted via email dated 26 February 2018 with Mr. Anil Xavier, certified mediator and President of Indian Institute of Arbitration and Mediation (IIAM) based in Kochi, India.
[27] Natarajan, *supra* note 15.

commercial dispute resolution framework and ethos that requires active participation and efforts by stakeholders.[28]

Before addressing each stakeholder individually, it would be prudent to identify reasons inhibiting acceptance of private commercial mediation that are applicable to both, parties and lawyers:[29]

i) Misplaced conviction that mediation cannot work and is therefore, not worth trying;

ii) Apprehension that mediation denotes weakness;

iii) Misconception, particularly among lawyers, that mediation is contrary to the foundations and culture of the legal discipline that is believed to be advocacy and binary outcomes;

iv) Entrenched sense of righteousness in one's case leading to a disproportionately favorable view of the likelihood of a positive outcome in court. Equally, a need for retribution may become enhanced, thereby diminishing the appeal of mediation that encourages collaboration and compromise.

v) Fear that finances, time and other resources will be wasted in a process that may not result in an outcome, as opposed to an adversarial proceeding where a binding decision is certain;

vi) Absence of uniform standards of professionalism and codes of conduct governing the process and mediators, leading to a lack of credibility and reliability in the process. Therefore, there is a sense that mediation is unregulated and will do more harm than good due to perceived lack of legitimacy in the process; and

vii) Lack of initiative by industry bodies and associations to integrate mediation into dispute resolution processes as well as dispute resolution clauses in commercial contracts.

Parties

Commercial parties in India are generally reluctant to privately mediate disputes, even if aware of its benefits,[30] primarily because

[28] Malkin and Timothy, *supra* note 6, at 365.
[29] Malkin and Timothy, *supra* note 6, at 330.
[30] For example, voting results from the Global Pound Conference (GPC) held in Chandigarh, India on 12 May 2017 illustrate parties' awareness that mediation helps to improve or restore relationships as well as to reduce costs and expenses. Global Pound Conference Series 2016-17 Local Voting Results, at 28, *available*

of the aforementioned reasons.[31] These fears and concerns are intrinsically linked to lawyers' skepticism of mediation that in turn influences parties since the latter generally rely upon lawyers' advice and adopt the strategy they suggest.[32] In addition, parties often dismiss mediation as an additional cost implication when they are already being advised by lawyers (who may not suggest mediation) or if they have had an unfavorable experience in mediation previously.[33]

Although the author acknowledges that commercial parties may require impetus from their lawyers to adopt mediation, the author urges parties to be encouraged from the embrace of mediation by their counterparts in jurisdictions such as the UK, US and Singapore. Anil Xavier notes that the global expansion of mediation, especially in Asia and Europe, is being spearheaded by multi-national corporations who are increasingly demanding faster, cheaper and less disruptive mechanisms to resolve disputes.[34]

This belief is strengthened by results from the Global Pound Conference held in Chandigarh, India in May 2017 wherein, with respect to commercial dispute resolution, parties ranked non-adjudicative processes (either independently or in combination with adjudicative processes) as most effective, and accorded highest priority to non-adjudicative processes and least priority to adjudicative processes in order to improve the future of the discipline.[35] In addition, parties identified time and cost efficiencies as the dominating factors influencing selection of a dispute resolution process.[36] Laila Ollapally, an experienced

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at http://globalpound.org/wp-content/uploads/2017/07/GPC-Series-Chandigarh-2017-Voting-Results.pdf (last accessed 20 May 2018) [hereinafter "**GPC Results**"].

[31] CAMP, *supra* note 15; Xavier, *supra* note 26; Malkin and Timothy, *supra* note 6, at 330.

[32] Interview conducted via email dated 12 March 2018 with Mr. Gracious Timothy, advocate and accredited mediator empaneled at IIAM; GPC Results, *supra* note 30, at 9.

[33] Malkin and Timothy, *supra* note 6, at 330.

[34] Anil Xavier, *Mediation: Its Origin and Growth in India* 27 HAMLINE JOURNAL OF PUBLIC LAW AND POLICY 275, 282 (2006).

[35] GPC Results, *supra* note 30, at 31, 40.

[36] GPC Results, *supra* note 30, at 9.

mediator and proponent of private commercial mediation in India, provides the following insight from her experience:[37]

> "It is most often a pleasure, at mediation, to see the 'Argumentative Indian' disputant once again claim her rightful place as the central figure to her dispute. She is able to quickly revert to the relationship her forefathers had had with the traditional village elder as the primary dispute resolver. She is comfortable, as the mediator is familiar with her culture, her language, and she is able to tell her story along with others she believes to be important to the dispute resolution process".

Managerial leadership in this respect is invaluable and can inspire confidence in business officials, counsel and other corporations to try mediation.[38] In order to demonstrate a serious commitment to mediation, companies and other commercial parties can pursue various courses of action, some of which include:

1) Signing pledges such as the 'Pledge to Mediate' conceived by the Indian Institute of Arbitration and Mediation (IIAM) and the India International ADR Association (IIADRA) in 2013. Akin to the CPR Pledge, any such pledge is a non-binding commitment to channel resources to manage and resolve disputes through mediation with a view to establishing and propagating a sustainable dispute management and resolution process.

   Such explicit expression of support not only sends a signal to other companies that exploring mediation is not a sign of weakness but also introduces a collaborative mindset towards dispute resolution within the organization.[39] Since the perception of appearing weak has been identified as a prominent impediment amongst Indian commercial entities, publication of the fact that a company automatically considers mediation regardless of the size and nature of the case or

[37] Ollapally, *supra* note 24, at 8.
[38] Eileen Carroll and Karl Mackie, INTERNATIONAL MEDIATION – THE ART OF BUSINESS DIPLOMACY 135 (2nd edn., 2006).
[39] Kenneth R. Feinberg, *Mediation – A Preferred Method of Dispute Resolution* 16(5) PEPPERDINE LAW REVIEW 5, 22 (1989).

strength of its legal position will help to mitigate the misconception and demonstrate willingness to mediate.[40]

2) Undertaking public relations campaigns notifying consumers and business allies that mediation will be available as a first-step consideration in resolving any future dispute.[41] As Kenneth Feinberg emphasizes, "*the goal is to make clear to those dealing with the company that resorting to ADR is not reserved for the occasional 'bad' case and should not, therefore, be considered a sign of weakness. Rather, it is a standard technique that will be considered in all cases*".[42]

3) Active involvement of personnel from senior management who have expertise in dispute resolution with in-house counsel in screening all real and potential disputes to determine suitability for mediation. The objective is two-fold: one, to involve individuals who will view a given dispute as a business problem rather than as a legal problem and therefore, derive extra-legal settlement options that can be explored in mediation;[43] and two, to ensure that contractual references to mediation are actually understood and implemented.[44] This also helps to introduce rationality and "right-sizing" into the thinking of both sides of the dispute.[45]

   Disputes pending in arbitration or litigation should also be monitored at regular intervals. This is because even if mediation was initially rejected as unsuitable, it is possible that it may be deemed appropriate and beneficial after completion of limited discovery or exchange of pleadings. Mediation can also be particularly useful in conserving corporate resources (for example, preparing witnesses for trial/hearing), narrowing issues in dispute and resolving certain aspects, even if not the entirety, of a dispute.[46]

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[40] Malkin and Timothy, *supra* note 6, at 340.
[41] Feinberg, *supra* note 39, at 23.
[42] Feinberg, *supra* note 39, at 23.
[43] Feinberg, *supra* note 39, at 24.
[44] Carroll and Mackie, *supra* note 38, at 140.
[45] E. Norman Veasey and Grover C. Brown, *An Overview of the General Counsel's Decision Making on Dispute-Resolution Strategies in Complex Business Transactions* 70(2) BUSINESS LAWYER 407, 417 (2015).
[46] Feinberg, *supra* note 39, at 25.

In this context, Feinberg identifies expedient criteria that can be used, in conjunction with a presumption in favor of ADR, to assess the appropriateness of a particular dispute for commercial mediation, namely:[47]

i) Uncertainty of result;

ii) Inefficiencies in time and money;

iii) Desire to expedite discovery, depositions or both: A "mini-discovery" approach can be useful when parties desire short-circuiting extensive discovery and/or depositions followed by a settlement proposal;

iv) Amount or importance of dispute;

v) Setting parameters for future conduct: A settlement agreement can include provisions in the nature of injunctive relief that are enforceable as contractual obligations; and

vi) Suitability for neutral expert fact-finding.

4) Experimenting with pilot programs for voluntary non-binding mediation of a certain class of corporate disputes as a step towards full-scale institutionalization of ADR. This involves framing governing rules and criteria and identifying a category of cases in which the other side's reluctance to try mediation is minimized. Such cases could include disputes involving on-going business relationships, such as disputes with distributors, suppliers, franchisees and subcontractors.[48] Using in-house counsel and other experts to generate ADR and mediation-specific know-how that must be kept up to date. This could include seminars and training programs as well as preparation and in-house distribution of materials and best practices.[49]

Lawyers

The lack of encouragement and support from lawyers has significantly impeded the growth of private commercial mediation in India. This resistance has stemmed from lack of knowledge of the process and virtues of mediation, anxiety about loss of control over a case once submitted to mediation, strong preference for advocacy, fear of earning reduced fees due to reduced billable

[47] Feinberg, *supra* note 39, at 26-27.
[48] Feinberg, *supra* note 39, at 27-28.
[49] Feinberg, *supra* note 39, at 24.

hours, and long-term impact on livelihood if matters are resolved without or with limited involvement of lawyers, or more expeditiously.[50] These factors have discouraged lawyers from endorsing mediation and taking initiative to enhance its uptake through training, education and other reforms.[51] The highest number of participants at the GPC ranked external lawyers as the constituency likely to be most resistant to change in commercial dispute resolution.[52]

However, as is the case with commercial parties, the author believes that lawyers (including in-house counsel) need to consciously sensitize themselves towards mediation and implement the fiduciary duties they owe to their clients that comprise securing their best interests. India is a jurisdiction where parties rely heavily on their lawyers for advice,[53] a fact confirmed at the GPC wherein 50 percent of the parties indicated that lawyers' advice has the most influence while choosing a dispute resolution process[54] and that insufficient knowledge of options available to resolve disputes is the main challenge in resolving commercial disputes effectively.[55] The conference also revealed a dichotomy between expectations of parties and lawyers wherein parties expect lawyers to collaborate with them to navigate the dispute resolution process, whereas lawyers believe that clients primarily want them to advocate.[56]

The author agrees that the immediate impact on billable hours and long-term implications for personal livelihood are legitimate concerns; however, they do not need to be sacrificed or adversely impacted by engaging in mediation. Although mediation is party-centric, lawyers play a central role in advocating mediation to their clients and in planning and preparation, all of which are significant components of a successful mediation as well as opportunities to

[50] Malkin and Timothy, *supra* note 6, at 330; Ravindra, *supra* note 12, at 240; Interview conducted via email dated 24 March 2018 with Mr. Prathamesh Popat, advocate, certified mediator and founder of Prachi Mediation Chambers based in Mumbai, India; Narayan, *supra* note 159; Xavier, *supra* note 26.
[51] Popat, *supra* note 50.
[52] GPC Results, *supra* note 30, at 44.
[53] CAMP, *supra* note 15.
[54] GPC Results, *supra* note 30, at 9.
[55] GPC Results, *supra* note 30, at 38.
[56] GPC Results, *supra* note 30, at 15.

charge clients professional fees.[57] In addition, their participation in the actual mediation can be extremely constructive in different ways such as by acting as a check on their clients' emotions, furthering the productive conversation, collaborating in creative problem-solving and assisting with drafting of a settlement. Client satisfaction opens doors for more work and resources conserved in mediation can be effectively allocated to other cases that are genuinely more suitable for litigation or arbitration.[58]

Moreover, as lawyers use mediation more frequently, they can enhance their interest-based negotiation skills, develop fee structures that ensure fair compensation, and adapt and expand their range of advocacy skills.[59] They can also become mediators, thereby expanding their scope of practice and channels of income, as has been witnessed in the US.[60]

It follows that external and in-house attorneys can and should play a predominant role in encouraging commercial parties to mediate by:[61]

1) Counseling parties in realizing their interests behind entrenched positions. This is critical because generally, massive commercial entities have a 'take it or leave it' approach and are hasty about initiating adversarial proceedings;
2) Emphasizing the importance of continuity of business and commercial relationships over and above parties' concerns of appearing weak;
3) Navigating hierarchical tensions in that members of senior management may refrain from participating in mediations and inputs of a junior member, who is probably in much closer contact with the dispute, may be dismissed; and
4) Encouraging companies to commit to pledges such as the 'Pledge to Mediate' and to honor them in their actions.[62]

[57] Panchu, supra note 16, at 226.
[58] Carroll and Mackie, *supra* note 38, at 132.
[59] Ravindra, *supra* note 12, at 240.
[60] Xavier, *supra* note 34, at 281.
[61] Malkin and Timothy, *supra* note 6, at 334-335.
[62] Malkin and Timothy, *supra* note 6, at 340.

In-house counsel in particular can provide a major impetus in promoting commercial mediation amongst commercial entities and organizations since they are well-acquainted with business operations and can be relied upon to be commercially sensitive and business oriented. They also play a central role in negotiating and drafting dispute resolution clauses and therefore, should incorporate a well-structured mediation clause in existing and future agreements.[63]

Government

The government should actively pursue mediation-centric initiatives as an integral component of its national commitment to strengthen ADR and build an enabling ADR ecosystem. ADR reforms that have been implemented with welcoming rigor in recent times overlook mediation or refer to it only fleetingly. In the author's opinion, this needs to be rectified. This was also reflected at the GPC wherein the government was ranked as the second-most influential stakeholder having potential to bring about change in the country's commercial dispute resolution landscape.[64]

According to the author, the government needs to specifically endorse and actively engage with private commercial mediation in the following key ways:

I. Legislation

A robust legal foundation is imperative to expedite penetration of a mediation culture. According to Arjun Natarajan, the absence of a dedicated mediation legislation combined with the misplaced perception that mediation is analogous to the Panchayat system wherein the 'panch' had considerable authority has resulted in mediation being viewed as an incompatible tool to resolve commercial disputes. [65] Although commercial mediation has flourished without a statutory and regulatory framework in jurisdictions like the UK, practitioners opine that statutory direction is imperative in a "chaotic" jurisdiction such as India. Allison Malkin and Gracious Timothy write that "*law acts like a pillar in supporting mediation by giving it recognition, credibility, and legitimacy*".[66] This was also confirmed at the GPC wherein all

[63] Malkin and Timothy, *supra* note 6, at 340.
[64] GPC Results, *supra* note 30, at 46.
[65] Natarajan, *supra* note 15.
[66] Malkin and Timothy, *supra* note 6, at 365.

stakeholders unanimously voted legislation as the most important area to improve commercial dispute resolution.[67]

Mediation was formally introduced in the legal system in 2002 thorough Section 89 and Order 10, Rule 1A of the Code of Civil Procedure, 1908. These provisions empower judges to refer appropriate disputes to ADR, in which mediation is expressly included. It is telling to note that the heading of the section is "arbitration". As this essay is confined to studying commercial mediation in the private realm, it suffices to state the key observations which are that this legislative development has definitely been instrumental in inculcating mediation in the consciousness of the stakeholders and general public, and resulted in efforts to establish court-annexed mediation programs and centers across India.

The author submits that an overarching mediation legislation that will also apply to private mediation needs to be enacted. The prevailing semblance of a legal regime governing private mediation is confusing and inconsistent which only serves to devalue mediation in the minds of stakeholders, particularly parties.[68] A summary of the regulatory framework and connected problems is as follows:

(i) In line with the growing consensus internationally and the UNCITRAL International Commercial Conciliation Law, mediation has been interpreted as synonymous with conciliation under Part III of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), which only mentions "conciliation" expressly. This was affirmed by the Indian Supreme Court in *Afcons Infrastructure* [69] wherein the Court undertook an exhaustive interpretation of section 89. Accordingly, Part III is presumed to govern private mediations.[70]

[67] GPC results, *supra* note 30, at 42.
[68] CAMP, *supra* note 15; Narayan, *supra* note 15.
[69] *Afcons Infrastructure Ltd. and Anr. v. M/s Cherian Varkey Construction Co. (P) Ltd. and Ors.*, JT 2010 (7) SC 616 (Supreme Court of India) [hereinafter "**Afcons Infrastructure**"].
[70] Panchu, supra note 16, at 16.

(ii) However, in the author's view, the position is unclear.[71] In *Afcons Infrastructure* itself, subsequent to observing that mediation is a synonym of conciliation, the Court refers to both processes individually in different parts of the judgment as if they are distinct.[72] The Court even expressly states that mediated settlements will be governed by another statute altogether, namely the Legal Services Authority Act, 1987.[73] Further, mediation and conciliation continue to be stated separately under section 89 of the Code of Civil Procedure, and under section 30 of the Arbitration Act itself that addresses settlement in the course of an arbitration. It has also been commented that notwithstanding the commonality of involvement of a neutral third party, the processes are different because conciliation envisages a significantly more proactive and evaluative role for the conciliator who can propose solutions *suo motu*.[74] Accordingly, conciliation has also been referred to as evaluative mediation wherein the mediator's intervention is at a peak.[75]

(iii) Following from the above, the lack of conceptual clarity, and statutory definition of mediation, has directly impacted the enforcement of privately mediated settlements. The current position is confusing and convoluted. Although the *Afcons* court attempted to carve out different avenues to enforce such settlements and provide legal and judicial legitimacy, it only ended up creating confusion and conflating the processes of mediation and Lok Adalat, which are distinct. The outcome is that private mediated settlements are only enforceable as ordinary contracts under the Indian Contract Act, 1872, unless parties satisfy the terms of any of the avenues carved out in *Afcons*, a study of which is outside the scope of this essay.[76]

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[71] Xavier, *supra* note 34, at 278; Natarajan, *supra* note 15; Rajiv Dutta, "Mediation in India: Building on Progress", *available at* https://www.ibanet.org/Document/Default.aspx?DocumentUid=B705AE33-0AF0 (last accessed 20 May 2018). *See also*. Panchu, supra note 16, at 302-303.
[72] Afcons Infrastructure, *supra* note 69, at ¶¶ 20-21, 26.
[73] Afcons Infrastructure, *supra* note 69, at ¶29.
[74] Xavier, *supra* note 34, at 278-279.
[75] Malkin and Timothy, *supra* note 6, at 371.
[76] CAMP, *supra* note 15.

(iv) Proceeding with the assumption that mediation and conciliation can be equated, including mediation/conciliation within an arbitration statute is problematic because of the fundamental distinctions between adjudicative and non-adjudicative mechanisms. Both mechanisms should be governed by independent statutes to ensure legislative and legal clarity.

(v) The use of both 'mediation' and 'conciliation' can create confusion in light of the lack of clarity on this point. For example, if a process is labeled mediation and the neutral third party plays a proactive role in identifying issues and generating options, it may be argued that the third party overstepped his/her role.[77]

(vi) Part III of the Arbitration Act treats conciliated/mediated settlements as consent awards in arbitration. Therefore, the execution of such an agreement and recourse against it would be the same as arbitration awards, which is inappropriate. The scope of issues that can be addressed in a conciliation/mediation are much broader than in arbitration and therefore, challenges to a conciliated/mediated settlement need to be addressed differently.

(vii) Further, Part III does not appear to completely reflect the core values of mediation, namely self-determination and party control, as it prescribes a broad role for conciliators.[78] For example, under section 67(4), the conciliator can suggest proposals for settlements to the parties at any stage of the proceedings and under section 73(1), the conciliator is obligated to formulate terms of a possible settlement for parties' consideration when it appears to him that such terms exist.

(viii) A private commercial mediation that occurs under an institution's auspices is currently governed by the institution's rules. For example, Rule 10 of IIAM's rules states that "*when the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them. The settlement agreement shall have*

[77] Panchu, supra note 16, at 305.
[78] Narayan, *supra* note 15.

the same status as that of an arbitral award and can be executed and enforced as a decree of a court". On the other hand, rules of the Centre for Advanced Mediation Practice (CAMP), an institution providing private mediation services, are silent on enforceability. Therefore, a settlement mediated at CAMP can only be enforced as an ordinary contract.

(ix) Examples of statutes providing for mediation and/or conciliation include the Companies Act, 2013 that requires establishment of the Mediation and Conciliation Panel at the National Company Law Tribunals and the Real Estate (Regulation and Development) Act, 2016 that requires "amicable conciliation" of disputes between promoters and buyers. Once again, there is a high potential that the implications of using "mediation" or "conciliation" have not been considered which only perpetuates the legal confusion. The central government's Ease of Doing Business Task Force had asked the Ministry of Law and Justice to introduce a law to regulate private voluntary mediation in May 2017. However, the Ministry does not appear to have made any progress since then.[79]

Sriram Panchu, widely acknowledged as the pioneer of mediation in India, makes the following pertinent observations as regards the regulatory framework governing private mediation:[80]

- A legislative framework must be established to assist in realizing and achieving the potential of private mediation.
- The conduct of mediators in the private realm must be regulated in order to ensure success and accountability. Presently there is a glaring lacuna in enforcing requirements of training and certification.
- Equally, there is a vacuum in protecting mediators for *bona fides* things done or omitted in the course of private mediation.

[79] Sriram Panchu and Avni Rastogi, "Mediation: India" (November 2017), *available at* https://gettingthedealthrough.com/area/54/jurisdiction/13/mediation-india/ (last accessed 20 May 2018).
[80] Panchu, supra note 16, at 321-322.

Therefore, in light of the above, a coherent legislative framework needs to be enacted in order to legitimize mediation in minds of stakeholders.[81] This will also ensure uniformity and certainty in respect of critical aspects, which are many times the subject of judicial decisions but decided without reference to a corresponding provision in Part III of the Arbitration Act, such as the enforceability of mediated settlements, and the confidentiality and admissibility of communications made during a mediation.[82] This is indispensable in context of commercial mediation because commercial parties require certainty and efficiency of process and outcomes, especially in the Indian context for all the reasons discussed above. Further, the statute should once and for all clarify the confusion between "conciliation" and "mediation". In the event the conclusion is that both terms are completely interchangeable, then only "mediation" should be used in all statutes and regulatory instruments, and all references to "conciliation" should be uniformly deleted or replaced with "mediation" as the case may be.[83]

A national statute should comprehensively address procedural, substantive and ethical aspects of mediation and mediators.[84] It should stipulate clear rules on qualifications and accreditation of mediators, standards of practice, confidentiality obligations, enforceability of mediated settlements, continued education requirements, integrity of mediators, self-determination, neutrality, voluntariness and liability of mediators, among other aspects.[85] According to the author, Singapore's mediation legislation presents a model precedent because: (i) it addresses the aforementioned concerns; (ii) it was the product of extensive deliberations; and (iii) the priority accorded to commercial dispute resolution in

[81] CAMP, *supra* note 15.
[82] For example, see *Moti Ram (D) Tr. Lrs. and Anr. v. Ashok Kumar and Anr.*, [2010] 14 S.C.R. 809 wherein the Supreme Court asserted the confidentiality of mediation proceedings without expressly referring to section 75 of the Arbitration Act which covers confidentiality.
[83] Panchu, supra note 16, at 306.
[84] *See generally*. Michael L. Moffitt, *The Four Ways to Assure Mediator Quality (And Why None of Them Work)* 24(2) OHIO STATE JOURNAL ON DISPUTE RESOLUTION 191 (2009).
[85] Ollapally, *supra* note 24, at 11; Natarajan, *supra* note 15; Panchu, supra note 16, at 322.

Singapore was taken into account in the deliberations and ultimate drafting.[86]

In addition, legislations currently applicable to lawyers such as the Advocates Act, 1961 and the Bar Council of India Rules, 1975 ought to be amended to incorporate a duty for lawyers to inform clients about alternative dispute resolution and specifically, the availability of mediation.

An additional regulatory reform that could be considered in the long run is the "opt-out" model of mediation as practiced in Italy. Italy's mediation law mandates parties in certain civil and commercial disputes to attend an initial information session with the mediator. The session provides them an opportunity to learn more about mediation and make an informed decision about whether to attempt it or initiate litigation. Voluntariness of the process is protected, as parties are not obligated in any way to participate in an actual mediation session, which was the position under Italy's prior law that was heavily opposed.[87]

Notwithstanding the positive reception of the amended law in Italy and its understandable utility,[88] the author opines that this would be premature for the foreseeable future in India given the acute lack of awareness and governing regulatory framework for mediation. However, this could definitely be considered in the long-term. In fact, at the GPC, a significant proportion of stakeholders at the GPC were of the opinion that the government should focus its attention on making non-adjudicative processes mandatory and/or a process that parties can opt-out of before initiating adjudicative processes.[89]

II. Education

Prevailing curricula of national law schools and business schools in India do not dedicate adequate time, focus and resources to ADR and mediation specifically. Most ADR instruction is

[86] Interview conducted via email dated 26 March2018 with Mr. Joel Lee, mediator with SMC and Associate Professor in Faculty of Law, National University of Singapore.
[87] Raffaele Aveta, *The Italian Model of Civil and Commercial Mediation* (2016), *available at* https://ebuah.uah.es/dspace/bitstream/handle/10017/28939/italian_aveta_AFDUA_2016.pdf?sequence=1&isAllowed=y (last accessed 20 May 2018).
[88] CAMP, *supra* note 15.
[89] GPC Results, *supra* note 30, at 58.

dominated by arbitration, with mediation largely relegated to background discussion.[90] This needs to change, a view affirmed at the GPC wherein education in law and business schools received the highest votes for being the most effective way to improving parties' understanding of their options to resolve commercial disputes.[91]

In order to foster a culture of mediation in the years to come, it is critical to attune students to its practice in such a way that they seriously pursue it as a career or at least as a part of their legal practice. In the recent past, there have been positive developments in this direction in the form of competitions and seminars. Such efforts should be sustained and expanded, particularly clinical education so that students can receive hands-on exposure to and training in the skills involved in mediation.[92]

III. Sector-specific programs

The government should develop industry-specific mediation schemes. Such schemes could tailor procedures, logistics, and requirements for the qualifications of mediators and their fee structure to the typical profiles of disputing parties and the nature of disputes encountered in the industry. This may be particularly effective in industries lacking proper or successful ADR mechanisms and which suffer from a disputes bottleneck, such as the construction industry.[93] It is believed that significant sums amounting to millions of Indian rupees are trapped only in disputes relating to the construction sector.[94] The government should continue its initiative of introducing ADR mechanisms such as the ombudsman the banking, insurance and income tax sectors over the years and introduce mediation in the construction industry as well as the telecom industry, where in the case of the latter, the setting up of an ombudsman has been in the works for more than a decade.

[90] Popat, *supra* note 50.
[91] GPC Results, *supra* note 30, at 56.
[92] Natarajan, *supra* note 15.
[93] Sudip Mullick and Niharika Dhall, *Dispute Resolution in the Construction Industry* (6 October 2016), *available at* http://www.lexology.com/library/detail.aspx?g=789f154b-171a-490f-800e-6288b56925c5 (last accessed 20 May 2018).
[94] Malkin and Timothy, *supra* note 6, at 336.

ADR organizations and industry bodies

I. Awareness

Institutions such as the IIAM and CAMP have been instrumental in expediting the spread of mediation in the country as well as generating awareness about private commercial mediation by conducting seminars, training programs, and publishing literature. They report considerable success in commercial mediations they conduct and recognize the huge potential of commercial mediation waiting to be untapped.[95] In fact, CAMP was conceived in 2015 in light of the positive experience of mediating commercial disputes. In the words of Laila Ollapally, founder of CAMP: "*One client during a mediation at the Court annexed program remarked 'Why did we not do this earlier? All commercial disputes necessarily must be mediated'. Another lawyer remarked 'This is a silent revolution in our court system'. This gave birth to CAMP*".[96]

The 'Pledge to Mediate' is a step in the right direction and ADR organizations must actively spread awareness of the same. There appear to be only three signatories to the Pledge currently as per IIAM's website. Another recommendation is to adapt any such pledge for use by lawyers and law firms which should be drafted in terms of recommending consideration of ADR to clients in order to ensure that companies' external counsel are considering mediation while advising clients on a dispute resolution.[97] In addition, it would be very useful for any pledge to suggest sample dispute resolution clauses requiring disputing parties to first mediate before arbitrating or litigating.

In addition, the need for industry sensitization about mediation has been a constant effort that has gained significant popularity in India.[98] Industry associations such as the Confederation of Indian Industries should report useful statistics on their websites and publish industry-specific information about rates of use and successful mediations, guidelines for prospective parties and recommendations to promote commercial mediation.

[95] CAMP, *supra* note 15; Xavier, *supra* note 26.
[96] CAMP, *supra* note 15.
[97] Feinberg, *supra* note 39, at 22-23.
[98] Malkin and Timothy, *supra* note 6, at 335.

II. Training

Apart from generating awareness, institutions can be instrumental in building a pool of highly skilled mediators to mediate commercial disputes, which India lacks currently and urgently requires.[99] Credibility, acceptability and respect for mediators are important factors to the acceptance of mediation, especially given the reluctance with which the profession is viewed. There is a need for accredited training, evaluation, certification and continued assessment of the mediators in order to maintain high quality standards. In order to ensure uniformity of standards, adopting universal certification criteria like that of the International Mediation Institute would not only repose faith in mediators but also enhance the credibility of the process.[100]

In this regard, both IIAM and CAMP have undertaken notable endeavors to conduct training programs and sensitize lawyers, judges and other individuals to the benefits and nuances of mediation. Both institutions have trained more than 200 mediators respectively. In a noteworthy achievement, both IIAM and recently CAMP are approved by the International Mediation Institute (IMI) as Qualifying Assessment Programs, which attests the compatibility of their mediator training and assessment with IMI's criteria for certification.[101]

In addition and crucially, IIAM and CAMP have given attention to 'Mediation Advocacy', which is specifically directed at cultivating a more active role for lawyers in the mediation process. This is a significant contribution given that lawyers' fear of loss of control of a case has proved a major impediment to their acceptance of mediation. CAMP has conducted such a training program in the past whilst the IIAM intends to commence such a program soon. Anil Xavier, President of the IIAM, explains the purpose of mediation advocacy training:

> "The role of lawyers participating in mediation and the concept of mediation advocacy, whereby the expertise of lawyers in negotiation skills and advising the parties to maximize their mutual gain by identifying

[99] CAMP, *supra* note 15.
[100] Xavier, *supra* note 26.
[101] http://www.imimediation.org/practitioners/becoming-imi-certified/find-qualifying-assessment-program/ (last accessed 20 May 2018).

> innovative options, has to be emphasized. Once their role as a professional, having expertise in principled negotiation, bringing out maximum gain for the parties, is accepted, I feel there would be more encouragement and support from the lawyer community towards mediation".[102]

Commercial mediation generally requires mediators and lawyers to apply a distinct skills-set and have familiarity with basic concepts of commercial law, business operations and broad functioning of commercial entities. Ideally, mediators ought to have exposure to the manners in which businesses perceive and operate and the reasons behind decision-making in a particular scenario. [103] Accordingly, training for commercial mediators should be customized, by equipping them with practical aspects of contract law, company law, economics, finance and accounts.[104] CAMP has conducted a 40-hour certified training program in commercial mediation wherein the faculty included Indian and American experts.[105]

Sriram Panchu writes that proper governing standards combined with emphasis on training and accountability of mediators will enable the development of mediation as a professional practice. This will in turn widen the pool of mediators, make ADR an attractive career option and bring viability and sustainability to ADR efforts.[106]

III. Singapore Model

The author proposes establishing a dedicated institution for domestic and international commercial mediation ("**Mediation Institution**") in collaboration with the Mumbai Centre for International Arbitration ("**MCIA**"), the headlining addition to India's disputes resolution regime in 2016. The MCIA's principal mandate is to resolve international commercial disputes. Such collaboration could pave the path to apply "Arb-Med-Arb".

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[102] Xavier, *supra* note 26.
[103] Malkin and Timothy, *supra* note 6, at 333.
[104] Natarajan, *supra* note 15.
[105] CAMP, *supra* note 15; http://www.campmediation.in/event/40-hour-mediator-training-program-in-commercial-mediation-17th-to-21st-february-2017/ (last accessed 20 May 2018).
[106] Panchu, supra note 16, at 309.

The "Arb-Med-Arb" model would allow parties who have agreed to refer disputes to the MCIA to opt for mediation upon mutual consent before commencement of, or during, an arbitration. If mediation is successful, parties could request the arbitral tribunal to convert the settlement into a consent award to the extent the settled dispute falls within the tribunal's jurisdiction. If mediation is unsuccessful, parties could commence or resume arbitration. The Arb-Med-Arb model is not new to India; in fact, IIAM introduced it on 1 January 2017 where parties using IIAM Arbitration Rules for resolving disputes, attempt to resolve the dispute through mediation. The GPC results affirm the preference of parties and lawyers to combine adjudicative and non-adjudicative methods of resolving disputes.[107]

This model ensures confidentiality since the tribunal and mediation panel are distinct. It also provides commercial certainty since a consent award is binding and enforceable in India pursuant to the New York Convention 1958.

To expedite the establishment and ensure the efficient functioning of the Mediation Institution, it could partner with the SIMC, which has adopted the "Arb-Med-Arb" model. The partnership could provide for:

1) Adopting the SIMC's Rules including the model "Arb-Med-Arb" clause with modifications as necessary. This is important because India does not have any statute or comprehensive guidelines to serve as the basis of the Mediation Institution's rules. Moreover, the SIMC's Rules are tested and administered by a sophisticated dispute resolution center.

2) Sharing the SIMC's panel of independently certified mediators and technical experts who have experience in various sectors of commercial law. There are limited accredited experienced mediators in India. Such sharing would enhance the credibility of the Mediation Institution and the confidence of parties.

3) Professional training of existing and aspiring mediators by the SIMC and by dispute resolution practitioners in Singapore. Practitioners in Singapore are often involved in resolving commercial disputes between Indian parties and could employ

[107] GPC Results, *supra* note 30, at 40.

their experience and understanding of the ethos of the latter to suggest specific strategies and techniques.

Conclusion

In this essay, the author has endeavored to argue in favor of inculcating private commercial mediation in India and suggest reforms and courses of action that the key stakeholders should pursue that are commensurate with their capabilities. Based on the study, the author is convinced that private mediation of commercial disputes definitely needs to be promoted and introduced more widely in the public consciousness. The author acknowledges that mediation will not be appropriate for all commercial disputes and that it does not guarantee a settlement in the end; however, its numerous benefits outweigh the risks and there is a lot to gain from a mediation independent of securing a settlement. As stated in the beginning of this essay, the objective is to promote private commercial mediation as a complement and ally to the civil justice system, not to supplant it.

Commercial parties and lawyers in India have legitimate reservations in adopting mediation with open arms. However, the challenge is to break the cycle of 'no experience, no use' which only perpetuates misplaced assumptions, apprehensions and skepticism. While encouragement and impetus from the government and ADR organizations is vital, this will not be completely successful until a mediation-oriented mindset is accepted and internalized by parties and lawyers.

The solutions and reforms proposed by the author admittedly involve risks such as (1) significant capital investment to establish a dedicated institution; (2) considerable time for implementation and any impact to become visible; and (3) uncertainty of whether stakeholders would demonstrate the initiative and mindset necessary for such reforms to succeed. However, conscious and committed efforts need to be made by all stakeholders in order to determine how best to mitigate and overcome such risks and bring about these much-needed reforms.

In the author's opinion, as India takes reformative steps towards becoming a leading jurisdiction for commercial dispute resolution, the climate is ripe for private mediation to finally become an integral force of this trajectory.

Fellow Introduction

Brene' Brown is a research professor at the University of Houston Graduate School of Social Work who has written several best sellers on vulnerability, courage and worthiness. In her book *Rising Strong,* she reminds us that we are "wired for story". She recounts Neuroeconomist Paul Zak's research in which he found that hearing a story—a narrative with a beginning, middle and end-causes our brains to release both cortisol and oxytocin which cause us to connect, empathize and make meaning. Narrative mediation focuses on story not settlement. Understanding is the goal rather than a settlement, although an agreement may well result. Narrative mediation holds particular promise for addressing disputes governed in large part by emotions, personal beliefs, and narratives – as opposed to those governed largely by objective facts. The author, JONATHAN ROSENBLUTH, demonstrates the value of narrative mediation in the family context through a close examination of an illustrative extended-family situation. Remembering we are all wired for story is useful for practitioners as well as parties to mediation.

The Reverend E. Wendy Huber is an Episcopal Priest, retired attorney and mediator, and certified Daring Way™ Facilitator (teaching Brene' Brown's work).

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A HOUSE DIVIDED
APPLYING NARRATIVE MEDIATION TO A FAMILY CONFLICT

Jonathan Rosenbluth

In 2016, Oxford Dictionaries selected "post-truth" to be the Word of the Year.[1] Post-truth is defined as "relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief."[2] Since 2016, emotions, personal beliefs, and narratives – rather than objective facts – have shaped the manner in which many Americans engage with politics, discourse, and personal relationships. As such, narrative mediation is uniquely positioned to be an effective framework for managing conflict in our "post-truth" world. This paper, broken down in four parts, applies narrative mediation concepts and frameworks to a real life family conflict. Part one provides a brief overview of narrative mediation. Part two tells the story of the Smith family conflict through the narratives of the key parties. Part three analyzes the Smiths' respective narratives based on the key concepts in narrative mediation. Part four provides recommendations for how I, as a narrative mediator, would approach mediating the conflict. Finally, the appendix includes a tongue-in-cheek narrative from a party that is often unheard in these conflicts—the family dog.

Part One: Overview of Narrative Mediation

Narrative mediation is distinguished from its sibling forms of mediation based on its theory of conflict. The narrative framework – primarily developed by John Winslade, Gerald Monk, and Sara Cobb – understands conflict as arising because parties view a given situation from their own perspective (and cultural

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[1] *See* Amy B. Wang, *'Post-Truth' Named 2016 Word of the Year by Oxford Dictionaries,* THE WASHINGTON POST, Nov. 16, 2016, https://www.washingtonpost.com/news/the-fix/wp/2016/11/16/post-truth-named-2016-word-of-the-year-by-oxford-dictionaries/?noredirect=on&utm_term=.b3c84bcc8bc7.

[2] *Id.*

position), and are unable to directly access the truth of a situation.[3] This differs from more traditional mediation practices that view conflict as the result of polarizing positioning.[4] As such, in narrative mediation, the mediator engages with the stories that the parties tell, in order to deconstruct the parties' (often) opposing narratives and to reconstruct an alternative and shared narrative. In this sense, the goal of narrative mediation is not to reach a solution, like in problem-solving mediation, but to create the conditions for building a shared narrative among the parties.[5] Rather than striving to find the single truth, the narrative approach invites the complexity of competing stories and recognizes the powerful influence of the parties' backgrounds.

The structure of a narrative mediation differs from a problem-solving mediation, which entails moving the parties from positions to interests and generating options based on the interests. Narrative mediation, rather, is based on three phases: engagement, deconstruction of the conflict-saturated story, and construction of an alternative story.[6]

During the engagement phase of narrative mediation, the mediator focuses on establishing a relationship with the parties and on the stories that the parties tell. The mediator pays specific attention to the discursive positions that parties call each other into.[7] During the deconstructive phase, the mediator (gently) seeks to separate the parties from the conflict-saturated story, and move the parties from narrative certainty to narrative complexity.[8] In so doing, the mediator might make visible the parties' position calls,[9]

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[3] *See* JOHN WINSLADE & GERALD MONK, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION 41 (2001); *see also* JOHN WINSLADE & GERALD MONK, PRACTICING NARRATIVE MEDIATION: LOOSENING THE GRIP OF CONFLICT 6 (2008).

[4] *See* Nikolaj Kure, *Narrative Mediation And Discursive Positioning In Organisational Conflicts*, 2 EXPLORATIONS 24 (2010), https://dulwichcentre.com.au/explorations-2010-2-nikolaj-kure.pdf.

[5] *See Id.*

[6] *See* JOHN WINSLADE & GERALD MONK, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION 58 (2001)

[7] *See Id.*

[8] *See Id*. at 74-5.

[9] Position calls in narrative mediation have a different meaning than positions in a problem-solving mediation, where they represent a party's initial desired outcome. A position call is when one person, through their words, labels another

invite the participants to view the dispute from a different vantage point, and encourage them to consider unique events that seem out of line with their general story.[10] Narrative deconstruction enables the parties to craft an alternative, shared story. While this might lead to a resolution, problem solving is expressly not the goal of narrative mediation. An alternative narrative might also foster cooperation and mutual respect, which could be more important than a substantive agreement.[11]

Part Two: Conflict Narratives

Part two is broken down into a) background information that is relevant to, and undisputed among, all of the parties, and b) the parties' narratives. This is based on a true conflict and changes to their names, locations, and other details have been done to preserve their confidentiality.

Background information:

The Smiths live in Yarmouth, Maine. Steve and Linda are in their early 50s and have been married for almost thirty years. They have two children: Suzy (age 24), and Daniel (age 18). Suzy lives in Portland, ME and works in marketing, and Daniel is a freshman in college. Steve has three siblings – a younger brother and sister, and older sister named Michelle. During the fall of 2015, with encouragement from Steve and Linda, Michelle left Randy—her alcoholic and verbally and emotionally abusive husband of over 20 years—and moved from Detroit into the Smith house in Yarmouth.

Both Steve and Linda grew up in difficult households. Linda's father was an abusive alcoholic, and she stopped speaking to him years before his death. Steve's siblings are (in Suzy's words) "train wrecks", and Steve is the only one of his siblings to

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person and calls them into a relative position. For example, imagine a conversation between two adult siblings where the older sibling says to the younger sibling, "let's act like mature adults here". The older sibling, in this scenario, is establishing him/herself as a mature adult, and is potentially calling the younger sibling into the position of the childish, and/or immature.

[10] *See* JOHN WINSLADE & GERALD MONK, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION 74-75 (2001)

[11] *See Id.* at 82.

have a stable life and family. The Smiths are a tight-knit family and get along well. Steve and Linda succeeded in creating a home that feels nothing like the homes they grew up in.

Conflict Narratives:

(The following narratives discuss events up to September 2015)[12]

Steve

My name is Steve Smith. I live in Yarmouth, Maine and work for the state government. I am the second child of four. I was born and raised in rural New Hampshire, but moved to Yarmouth after Daniel was born; to pursue better economic opportunities . Suzy now works and lives in Portland and Daniel just started college at Ohio State – go Buckeyes!

Michelle moved into our house in late September. For almost twenty-five-years, Michelle was married to Randy. While they had four kids together, who seem to be good kids, their marriage was terrible. Randy is an alcoholic, and verbally and emotionally abused Michelle for years. What a horrible situation for her. Over the past year, Linda and I learned the extent of Randy's behavior. We both told Michelle to leave Randy. I need to give Linda credit, as she spent hours on the phone with Michelle encouraging her to leave.

We offered for Michelle to come live with us in Maine. Michelle and Randy lived together in Detroit, and I knew that she would need a place to stay to get on her feet. I didn't have to think twice; obviously we were going to offer our home to her. Michelle is family. And while Michelle and I weren't particularly close as kids (I was always out running around with friends), she's still my sister. This is what family is supposed to do for each other.

[12] Michelle's narrative is not included in this article for two primary reasons. 1) This article is focused on the conflict between Steve, Linda, and Suzy. While a conflict exists between Michelle and other parties, it is beyond the scope of this article. 2) Issues of domestic violence and alcoholism are complex and difficult. I had few conversations with Michelle and am unable to articulate her perspective with the requisite depth and complexity. Not including Michelle's perspective is in no ways an attempt to discount her experience or perspective.

Linda

"Poor Michelle; Randy is such a terrible guy; she's got to leave him", I thought as I spent hours on the phone in October and November talking to Michelle. For decades, Michelle has been putting up with Randy's alcoholism and abusive behavior. I've seen this before: my dad was a raging alcoholic, and physically abusive of my mother and us, his kids. I know first-hand just how terrible living with an addict can be, and I also know how paralyzing it can be for someone to even think about leaving. And I liked Michelle, she's always been a friendly person in the family.

So when we heard about Randy, I thought it was important to encourage Michelle to leave. Steve's a guy, he wasn't going to be able to talk to Michelle in the same way that I could, so I became the point person in helping Michelle manage. I was happy doing this. I like to help others—I'm a nurse at the local hospital. Knowing what it is like to live with an addict, I wanted to help in any way that I could.

I was so happy for Michelle when she actually left him. I didn't know whether she would do it. And I was thrilled to be able to open our doors and help her get back on her feet.

Suzy

I remember when I heard that Michelle might move in with my parents. I had pretty mixed feelings. On one hand, I've heard about how nasty Randy can be. On the other hand, I thought my parents were signing up for more than they realized. My parents didn't set any expectations or boundaries up front, which made me nervous. Things finally seemed to be going so well for them, and I worried that this would disrupt that momentum.

This past summer was our best summer in recent years, but the summer before was one of our worst. During the spring of 2014, my mom was really sick. Doctors still don't know what she had, and the whole summer we were dealing with trips to the hospital and our fear that she wouldn't recover. But she did recover. By the fall, she was back to normal and working again. My folks seemed to have a new lease on life—they wanted to

explore, to go on a family trip, and they were actually treating themselves. This wasn't usual behavior; money was tight growing up, and my folks never splurged on family vacations or on themselves.

My parents' savings are up and their expenses are down, as I'm fully self-sufficient and my brother got a full-ride to the U. He's such a braniac. So, because of their increased savings and epiphany from my mom's illness that life can be short, they have started to treat themselves. In the summer of 2015, my family went on a trip to Peru. This was the first time my parents in 15 years that my parents had left the country and they had the most amazing time. I was so happy. As the summer continued, so did their attitude of having fun, enjoying life, and – within reason – treating themselves. My parents seemed so happy together. I was overjoyed.

And then I heard Michelle was moving in. I know my parents lean towards helping people, and I was worried that this would make life complicated again. I suggested that my parents set some norms and expectations about duration of stay up front, but they brushed me aside. I was honestly pretty nervous… little did I know just how bad it would get.

(The following narratives discuss events between September 2015 and February 2016)

Steve

Initially, it started out well. Michelle was so appreciative that we gave her a home, and it felt really good to provide my sister with a fresh start. Michelle joined Linda and me for dinner every night; we'd have some drinks and hang out. But by the time Halloween rolled around, things had begun to sour. Michelle didn't just have a couple drinks. Michelle drank a lot. And she would say some pretty rude things to Linda. I mean, they were just jokes, and I know Michelle appreciates all the things that Linda did for her, but they still rubbed Linda the wrong way.

Fast-forward through Christmas, and things have just gotten worse and worse. It seems everything Michelle does bothers Linda in some way. From the dogs shedding and barking, to

Michelle's jokes, to Michelle not cleaning up after herself, it feels like there is always something.

Linda is livid, and wants me to do something about it. But what can I do, kick Michelle out of the house? She doesn't have anywhere else to go. My siblings are such messes that she can't live with any of them. My mom passed away eight years ago, and my dad has dementia. I can't believe Linda is asking me to do something about Michelle, especially after all Michelle has been through. The least we can do is put up with a few bad jokes and her not cleaning up. Plus, it's not like it will last forever. When Randy and Michelle finalize the divorce agreement, Michelle will have some money to move out.

Linda

My husband has betrayed me. At dinner (and in front of Steve!) Michelle makes all kinds of rude, snarky comments to me and Steve doesn't say a thing. Just the other night, she told me that I'm so boring and a waste of time to talk to. Steve just sat there silently. I wanted to explode.

Who does this woman think she is waltzing into our home, eating our food, drinking our beer (and I mean drinking A LOT), and being so rude to me?! I can't stand her. She acts like a damn child. She brings food home from her work, at a local diner, and just leaves it on the counter. She leaves dirty plates sitting on the counter. She never cooks, cleans, or offers to help. It's like I have a moody 14-year-old daughter again—except she's also a drunk.

The other week I told Steve that I would leave if he doesn't do anything. This situation is not sustainable for me. Honestly, it feels eerily similar to my family's dynamic growing up, where people put each other down and would drink way too much. I worked so hard to remove myself from that situation and build a kind, loving family. I refuse to fall back into that.

I also thought Steve would stand up for me, and watching him do nothing when Michelle insults me really hurts. I need an ally (which is crazy, because I'm in my own home and should not have to feel like I'm at war), and I'm so worried that he is siding with Michelle.

It's gotten so bad that I now stay at work longer, because I would rather be there than at home. When I come home, I need to clean up after Michelle, deal with her two massive shedding dogs (she NEVER vacuums, it drives me nuts), and cook and clean for three.

I'm grateful that I have been able to vent to Suzy. She's been there through all of this, and I know she is angry with Michelle too. I don't think I could go through this without having someone to vent to, and I could never really vent to Daniel.

What do I want? Short term, I want Steve to set some boundaries, including telling Michelle to: a) stop being rude to me, b) start pitching in and cleaning up after herself, c) clean up after her dogs, and d) drink less. Long term, I want Michelle to move out. I wish I had my husband back. I wish he would listen to me. I wish he would see the impact this is having on me. After all, he's my husband, not Michelle's.

Suzy

It's been a really rough go lately. I'm frustrated with both of my parents right now. My mom has started venting to me about her frustration with Michelle and with my dad. I really sympathize with her, and – I'm kind of am embarrassed to say this – I hate Michelle. I hate her for what she has done to my parents' lives and to their relationship. A few weeks ago, my mom told me that she threatened to leave my dad if he doesn't do something / the situation doesn't change. I was… pretty crushed to hear that things had snowballed to this point. I don't know how serious she was, but that's pretty hard for a kid (even an adult kid) to hear.

I am shocked that it got so bad so quickly. I am also torn. I agree with a lot of what my mom feels, and from what she told me Michelle was very rude and unkind to her. And I know my dad—he's very non-confrontational. I don't want to pick sides, and am frustrated with both of them for not setting boundaries. It all comes back to that – there is a way to fix the situation and they aren't acting on it. Now the ramifications are potentially catastrophic for our family. I tried encouraging my mom to share the impact of the situation on her to my dad, to acknowledge that it must be hard for

him too, and to ask him to set some boundaries… but it seemed she didn't even hear me. It's so frustrating: I'm adult enough for my mom to tell me how she threatened to leave my dad, but not adult enough for my advice to be taken seriously.

This past weekend, though, things hit a real low point with my dad. I was home for a couple days, and the vibe was generally pretty tense and icy. But it got worse, as my dad just started snapping at us. I've never seen him behave this way. Whenever he didn't get what he wanted – be it what we were going to eat for dinner or watch on TV – he would make a snide comment about it. As I mentioned, he's extremely non-confrontational, so this was particularly different and disturbing.

It was the first time in my life where I felt like my dad didn't have my back. I've never doubted his love and support before, but his tone this weekend did not feel secure. He was being a jerk. I thought he was ready to snap at anything that didn't go his way. It was so unlike him. He even snapped at Daniel a bunch, like what the fuck? He's like the perfect, nerdy child. Sorry for my language…. It was just so shocking. I was rattled and really sad after the weekend.

I'm kind of like my dad in that I am also non-confrontational. But, I spoke to him on the phone earlier today and expressed some of my feelings about this past weekend. He seemed to hear me that his behavior was off, which was reassuring. He also tried to tell me that he has control of the situation and that I shouldn't worry. If only I believed him…

(The following narrative discusses an event that took place in early March 2016)

Steve

I didn't realize how much this situation had gotten out of hand until I spoke to Suzy earlier today. This past weekend was hard, and I know the pressure I've been feeling has impacted my behavior. But I didn't realize the extent until I spoke to Suzy. She told me about the impact that my behavior had on her and Daniel, and her concern that Linda and I would break up. I hadn't thought

that this situation was affecting our kids. Clearly, I was acting out of character this past weekend and was a little rude to Linda and the kids. I think the pressure and stress has been getting to me, and only now do I see that the impact is pretty wide-ranging and even apparent to the kids. I told Suzy not to worry and that I have control of the situation. After all, she's my daughter and this is my problem, not hers. I think she was comforted by my words.

Part Three: Conflict Analysis

Each actor in this conflict has built his or her own hero/victim narrative. Each actor's self-perception as, simultaneously, the hero and victim of the conflict contributes to narrative closure. Their stories are neat, feel good to them, and they interpret events through this lens. As the actors interact with each other, they call each other into delegitimizing positions based on their own narratives. The gaps between the positions they get called into and their own perception serves to reinforce their respective sense of victimhood, widen the gulf between their narratives, and exacerbate their own experience of the differend.

Following the difficult weekend, Suzy's phone call with Steve creates a liminal space in which Steve moved from narrative closure to narrative complexity; Steve began to see his own contribution to the conflict, which muddied his hitherto simplified hero/victim narrative. This space provides an opportunity for a narrative mediator to further deconstruct Steve's narrative, and eventually construct a new, shared narrative.

Hero/Victim Narratives

Each actor considers himself or herself to be both the hero and the victim in this conflict. Prior to the phone call with Suzy, Steve is the hero in his narrative for fulfilling his familial obligation to his sister, Michelle. Steve's perception that Linda wants him to kick Michelle out of the house makes him feel like the victim, as he perceives Linda to be asking him to violate his moral code. In contrast, in Linda's narrative, she is the hero, as she is the one who spent hours on the phone convincing Michelle to leave Randy. Yet, at the same time, Linda is the victim: Michelle insults her, she cooks for Michelle, she cleans up after Michelle

and the dogs, and she feels that Steve has abandoned his responsibility to her. Suzy, similarly, views herself as the hero, as she believes that she knows the answer to their problems—they need to set boundaries. *If only her parents would listen to her advice*. Suzy's sense of victimhood stems from not feeling listened to.

Position Calls

Steve calls Linda into the position of the unsympathetic and selfish sister-in-law. He emphasizes that he feels obligated to help Michelle and implicitly suggests that Linda is only looking after herself. Linda, meanwhile, calls Steve into the position of the bad husband, as she accuses him of taking Michelle's side when Michelle bullies Linda. Steve, a family-first guy, bristles at the notion of failing to live up to familial obligations, and rejects Linda's call by insisting that she is blowing the situation out of proportion. This contributes to Linda's experience of the differend (more on this below). Suzy, while speaking with her dad after the difficult weekend, suggests that he is not acting like himself in this conflict. As such, her position call is twofold: 1) of not handling conflict optimally, 2) of generally being a good father. Notably, this call does not pass negative judgment on Steve's identity. It also provides Steve with an opportunity to agree without compromising his self-narrative of being motivated by obligations to family. In so doing, Suzy opens the door to a liminal space (more on this below).

Differend[13]

Each actor experiences the differend in this conflict. This experience contributes to each actor's feeling of isolation and frustration. Steve feels that Linda and Suzy do not recognize that he is motivated by his familial obligation to Michelle. Steve believes that Linda and Suzy's pressure to set boundaries is at odds with his obligations to be supportive of his sister. Linda's position call to him as being a bad husband ignores his noble intentions, leaving him feeling wronged and misunderstood.

[13] The differend is the pain associated with not being heard.

Linda, meanwhile, feels abandoned by her husband. Steve discusses his obligation to Michelle, but not his obligations to his wife. When Michelle insults Linda – while sitting around Steve and Linda's dinner table, eating the food Linda prepared – Steve stays silent. Not a word in defense of his wife. Not only was Linda instrumental in encouraging Michelle to leave Randy and has Linda born the brunt of cooking for and cleaning up after Michelle, but Steve does not even defend her. When Steve dismisses Linda's concerns about the whole situation, she feels that her problems are being ignored. Her marriage feels like it is crashing down, yet her husband seems unperturbed, leading her to experience the differend.

Since Suzy heard that Michelle might move in, she recommended that her parents set norms and expectations with Michelle. She told her parents to make it clear to Michelle that staying with them was temporary, as Suzy was concerned that Michelle would stay too long. Yet, every time Suzy voices these thoughts to her parents, she feels that they either dismiss the ideas outright or do not take them seriously. In her mind, she knows the solution to these problems: a conversation with Michelle about norms of behavior in the house, about how long she plans to stay with them, and how long they would be open to her staying. By not engaging with Suzy's ideas, Suzy feels left out and does not feel heard.

Liminal Space[14]

During Suzy's phone call with her dad, she told him that his behavior over the weekend seemed out of character and of her fear that he and Linda might get divorced. This creates a liminal space for Steve, as Suzy raises issues without attacking Steve's

[14] A liminal space is a threshold moment (or moments) in time where a party is able to overcome a mental obstacle. Sara Cobb writes that liminal spaces are implicated in tipping points during a negotiation, and that "in liminal phases, the binary opposition between good and evil, victim and victimizer, dissolves, materializing the morality of both characters and narrators". Sara Cobb, *Liminal Spaces in Negotiation Process: A Case Study of the Process of Crossing Relational and Interpretive Thresholds*, 1 J. OF CONFLICT MANAGEMENT 27 (2013).

identity or intentions; this allows Steve to see the truth in Suzy's comments rather than being blinded by defensiveness.

Suzy made a somewhat positive position call of her dad, as she said that his behavior over the past weekend was out of character. In doing so, Steve was able to agree that he contributed to a difficult weekend, without sacrificing his identity as a good husband and father. While recognizing his own contribution makes Steve's narrative more complex, it does not radically upend his virtuous self-perception. As such, Suzy gently enables the process of narrative deconstruction for Steve, without attempting to bulldoze his narrative (which would likely be met with resistance).

Furthermore, this is a unique moment, as it is a role reversal for Steve and Suzy.[15] Typically, parents worry about their children, not vice versa. In this situation, however, Suzy is afraid that her parents will break up. This role reversal is not consistent with Steve's dominant story that he is fulfilling his familial responsibilities, as a daughter should not have to be concerned about her parents' relationship. In deviating from the dominant story, this unique moment provides an opportunity for Steve to open his narrative and embrace some complexity.

In responding to Suzy's comments, Steve has an opportunity to return to the role of supportive father by comforting Suzy and reassuring her that the situation will work out. The only way for him to credibly do so, however, is to acknowledge that there is a conflict and that he behaved out of character over the weekend. Steve's desire to fulfill the role of supportive father leads him to acknowledging joint-contribution, which up until this conversation he had not considered.

[15] Unique moments in narrative mediation are moments that do not fit with a party's general narrative. Unique moments often contribute to the creation of a liminal space, as they can spark movement from narrative closure to narrative complexity.

Part Four: Recommendations

If I were mediating this conflict as a narrative mediator, I would first meet with only Steve and Linda.[16] In the first session, I would provide a space for Steve and Linda to share their experiences. Given that they emphasize different moments and conversations in their narratives, this would enable Steve and Linda to have a shared pool of data to draw from, and would allow them to hear how the other perceives the conflict. While simply sharing their perspectives is unlikely to lead to deep understanding, it could lay the groundwork for narrative deconstruction. In addition, they are both experiencing the differend and have not expressed the gravity of their feelings to each other. Simply expressing their perspective and being heard by the other party would mark a unique moment in the conflict and combat their experiences of the differend.

I would probe deeper when the parties describe heated interactions or use loaded language. My questions would be designed for both parties to express their intentions in the aforementioned heated interactions, and the impact that these interactions had on them. These questions might be useful in guiding Steve and Linda away from narrative closure and towards complexity, as there is likely a gap between their intentions and the impact that the other party felt. In particular, it would be important to broach the topic of Steve's silence in the face of Michelle's insults. As the narratives demonstrated, Steve and Linda each experienced that situation differently, and it forms the basis of Linda's feelings of abandonment by her husband. If Linda were to express the impact she felt, it might be powerful to push against the simplicity of Steve's hero/victim narrative.

[16] I wrestled with whether to initially include Steve, Linda, and Suzy, or just Steve and Linda in the mediation. I am of aware of the general narrative mediation preference to meet with all the parties, as there is value for the participants to engage with, and hear the narratives of, each other. With that said, I worry that including Suzy would alter the dynamic between Steve and Linda. While I think that Linda would not be affected, Steve would be much more reticent to appear vulnerable in front of his daughter. This might limit his willingness, and even ability, to engage with Linda's narrative and to look critically at his own narrative.

I would also focus on the events leading to Michelle moving into the Smith household. Until Michelle moved in, Steve and Linda seemed to be on the same page, and were impressed and respectful of how the other was handling the situation. Steve was grateful for Linda spending time on the phone and encouraging Michelle to leave Randy. Linda, meanwhile, respected that Steve felt an obligation to support his sister and that he wanted to open his home to her. These feelings, however, have been pushed aside by the stronger feelings associated with experiencing the differend. Providing an opportunity to vocalize gratitude and respect would be a marked difference from their interactions over the past couple months. This could assist them in seeing the other as more nuanced than simply a bad actor. In so doing, it might contribute to narrative deconstruction.

I would ask Steve and Linda to share their fears about this conflict. At this point, neither of them realizes the depth of the other's fears. In line with the conversation about Steve's silence, Linda might be inclined to share her fear that she is losing her husband. Steve, meanwhile, might share his fear that in order to appease Linda, he needs to kick Michelle out of their home. This line of questioning would drive towards recognition that Steve overestimates what Linda is asking for. In the short term, Linda wants Steve to encourage Michelle to stop being rude, start pitching in, clean up after herself and her dogs, and drink less. Steve thinks that Linda wants him to kick Michelle out of the house, which is a significant source of anxiety for him. In recognizing that Linda is not asking for Michelle to be kicked out of the house, Steve's anxiety, of having to make an "impossible decision", would be minimized. This misunderstanding might also garner sympathy from Linda.

By this point, each party would hopefully view the conflict with more complexity than upon entering mediation. I would then encourage Steve to share his realizations after his phone call with Suzy, which took place after the difficult weekend. That conversation prompted Steve to realize that he had contributed to the situation. Steve acknowledging his contribution might free Linda to see, and vocalize, her own contribution to the conflict. I would ask both Steve and Linda to write down (and share) ways in which they have contributed to conflict. If they are having

difficulty coming up with their own contributions, I might prompt them to think of some particularly difficult moments. Sharing their own contributions might enable Steve and Linda to build an alternative shared narrative. If the parties seem to be taking strides away from delegitimizing each other, I might ask them to share with each other something about the other person for which they are grateful.

It is difficult to predict how mediation will go. As I move further into the steps that I would take, it becomes harder to predict how the parties will respond. At some point, I would engage Suzy in the process, and encourage Steve and Linda to share with Suzy some of their progress and their appreciation for the role that Suzy has played in the conflict. I would ask Suzy to tell her parents how excited she was that they seemed so happy this past summer, her fears, and the difficulties that she has experienced over the course of this conflict.

At the end of the process, I would write a letter to the Smith family describing the arc of their journey, and include my hopes for them going forward. This letter would be intended to capture their progress and alternative shared narrative. In addition, it would provide them with a resource to return to if they experience more conflict or hardship in the future.

Conclusion

This paper is designed to demonstrate the application of the narrative mediation framework to a contemporary real life conflict and to stimulate attention and scholarship on narrative concepts. Narrative mediation is an increasingly relevant and effective tool for addressing conflicts as we continue to shift towards a "post-truth" society. In addition, the concepts and techniques of narrative mediation are not limited to use by narrative mediators; narrative techniques could be adopted by mediators trained in different mediation systems. For example, problem-solving mediators could draw upon the narrative approach in highly emotional negotiations as a means to move parties away from their positions. Finally, the scholarship on narrative mediation is much more limited compared to other strands of mediation. Increased attention and thought on narrative mediation will build upon the existing scholarship and

improve the narrative approach. In writing this paper, I hope to draw attention to narrative mediation and spark greater attention to this relevant approach to mediation.

Appendix: Milton's Narrative (March, 2016)

I am Milton Smith. I was born in Tennessee, but have lived most of my life in Yarmouth with my adoptive family. While I remember feeling afraid, I hardly remember anything else before being adopted. I love my new family. Since day one, they have shown me love and kindness. With that said, the past few months have been pretty difficult and really different.

For the first year living with the Smiths, life was great. In the summer, we go to the ocean, and in the winter I curl up by the fire. We have a backyard that I can run around and dig holes in. My mom yells when I dig holes, although I think she actually finds it funny. Maybe one day I'll dig all the way to China!

About five months after I became part of the family, Suzy adopted a dog. Her name is Penny and she is my best friend. She's a little smaller than me, but she does all of the fun stuff that I do: we run around, chase balls, dig holes, eat peanut butter, and snuggle. I LOVE it when she comes to Yarmouth, and whenever I hear her name I get so excited. One day, I'm going to marry her.

Life was so good until this past November, when Michelle and her two giant, slow, middle-aged dogs (Janet and Jenny) moved into our house. I thought they were just visiting for a few days (like Suzy and Penny do), but they never left! Her dogs are such jerks, and Michelle doesn't do anything about it. I also noticed that a few weeks after they moved in my parents seemed upset with each other… there's still a tense aura in the house and I don't like it.

Every so often, one of Michelle's dogs does something that crosses a line. Sometimes it's bullying me, sometimes it's eating my food, other times its just cramping my space or taking my favorite napping spot. At first, I tried being nice about it. But I've noticed that no one is standing up to Michelle and her dogs. So now when one of them crosses a line, I snap at them. I need to

stand up for myself. How dare they call me into the position of beta dog? This is my home. They're not the alpha, nor is Michelle. Steve, Linda, and I are the alphas. It's been really disappointing that, when I snap, my parents have disciplined me… Woof, are they intentionally ignoring my pain?

The other day, I had enough. I was sick and tired of dealing with Michelle and her dogs. I was in Michelle's room, and Michelle and her dogs were acting like they owned the place. So, I decided to send them a message. I looked Michelle straight in the eye and – while making eye contact – I peed on her bed. It felt so good. It was cathartic. It felt like I was peeing truth to power.

The funniest part about all of this? I think my parents are secretly really pleased with me. I thought I was going to get disciplined, but my mom and dad snuck me a treat. Maybe they are no longer mad at each other? Maybe they realize they need to do something about Michelle, Janet, and Jenny? I hope so. I can't wait until they are gone. Then, everything will be good again.

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Fellow Introduction

One of the pleasures of serving on the editorial board of the American Journal of Mediation is that we get to read a large number of interesting, creative and well-written articles. Choosing which ones to publish out of such an abundance of excellent submissions is a very difficult task. Fortunately, the burden of having to make those decisions is made lighter by the collaborative work and extensive and informed discussions among the editors about the merits of each submission which often leads to re-reading of articles.

I chose to introduce the article by Dominic D. Saturday, "Get Off the Courts: Using Mediation Principles to Resolve High School Sport Disputes" because it struck me as a particularly relevant and insightful paper. It opens with the sad story of a high school quarterback who killed himself after the high school administrators suspended him from school for two weeks and disqualified him from participating in all varsity sports for an indefinite period of time as a result of a relatively minor offense (which he may not have even committed). The swift and harsh process of suspension and banning from sports lacked even a modicum of due process and led to a heart-wrenching tragedy.

In this well-researched and beautifully written article the author develops a carefully crafted argument that incorporating mediation principles into high school sport disputes and disciplinary actions would not only introduce an element of fundamental fairness into the process, it would also lead to better results since the athlete would get to participate directly in the process which, among other benefits, would "encourage the exchange of new information; help student-athletes and administrators understand each other's views; support emotional expression; stimulate creative options; and design win-win settlements." This wonderful article deserves to be read by school administrators, school board members, high school counselors and student athletes coast to coast.

J. Joaquin Fraxedas
Editorial Board
Distinguished Fellow ACCTM

GET OFF THE COURTS: USING MEDIATION PRINCIPLES TO RESOLVE HIGH SCHOOL SPORT DISPUTES

Dominic D. Saturday*

INTRODUCTION

A two-week suspension from high school and an indefinite disqualification from all varsity sports: that was the punishment that made quarterback Hayden Long kill himself.[1]

On October 3, 2015, Geneva High School administrators accused Long and five other student-athletes of smelling like marijuana at the homecoming dance. In a private room, the principal and his assistant interrogated the students and ordered police to search their cars. Long and his friends asked to speak with their parents before they consented to the searches. Administrators responded to their request with laughter, telling the young men that it was "cute" how "they thought they knew their rights."[2]

The Ashtabula County Sheriff confirmed that *some* of the student-athletes possessed drug paraphilia (a minor misdemeanor in Ohio). Geneva High School administrators handed down a two-week suspension from school and an *indefinite* disqualification from all varsity sports. Long committed suicide two days later.[3]

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* Dominic D. Saturday, J.D., is a Union Representative for AFSCME Ohio Council 8 in Youngstown. He thanks his girlfriend, Brenna, for her patience, love, and support; his friends and family for their unwavering confidence in him; and Professors Sarah Cole and Bill Froehlich for their helpful advice and caring instruction both inside and outside the Mediation Clinic at The Ohio State University Moritz College of Law.

[1] Kara Pendleton, *High School Quarterback Chose to End His Life. A Damning Letter Shows Who Some Students Are Blaming*, INDEPENDENT JOURNAL REVIEW (Oct. 10, 2015), http://ijr.com/2015/10/439921-ended-life-discipline-school-admin-now-classmate-fights-hold-responsible/.

[2] *Id*.

[3] *Id*.

Hayden Long's story illustrates just how closely a student athlete's personality can be linked to his sport participation. And countless other United States high school students are just as passionate about their athletic identities.[4] Indeed, there are millions of them.

During the 2016-2017 school year, participation in high school sports reached an all-time high of 7,963,535 student-athletes—a one-year increase of almost 100,000 participants.[5] Statistically speaking, this increase in the number of participants brings with it a growth in the number grievances filed by interscholastic athletes on an annual basis,[6] especially when school administrators make sweeping accusations and dole out harsh punishments for arguably minor offenses (e.g., tweeting,[7] being a designated driver,[8] or associating with students who smoke marijuana[9]). While Long's case was tragic, his circumstances were certainly not unique.

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[4] By participating in sport, people make social statements about who they are and how they want others think about them. Athletic identity often defines the way people evaluate their own competence. And the amount of emphasis that people place on their athletic identity often influences their self-esteem and motivation. *See* B.W. Brewer, J.L Van Raalte & D.E. Linder, *Athletic identity: Hercules' muscles or Achilles heel?*, 24 INT'L J. SPORT PSYCHOL. 237 (1993).

[5] National Federation of State High School Associations, *High School Participation Increases for 28th Consecutive Year*, NFHS.ORG (Sept. 6, 2017), https://www.nfhs.org/articles/high-school-sports-participation-increases-for-28th-straight-year-nears-8-million-mark/.

[6] Amanda Siegrist, W. Andrew Czekanski & Steve Silver, *Interscholastic Athletics and Due Process Protection: Student-Athletes Continue to Knock on the Door of Due Process*, 6 MISS. SPORTS L. REV. 1, 2 (2016).

[7] Ricardo Arguello, *Wisconsin athlete suspended for tweet about state athletic association*, USA TODAY HIGH SCHOOL SPORTS (Jan. 10, 2016), http://usatodayhss.com/2016/wisconsin-athlete-april-gehl-hilbert-high-suspended-for-tweet-about-state-athletic-association (5-game suspension for Wisconsin women's basketball player who tweeted "EAT SHIT" in response to a [Wisconsin Interscholastic Athletic Association] email).

[8] Brendan Hall, *Athlete suspended for driving friend*, ESPN BOSTON (Oct. 15, 2013), http://www.espn.com/boston/story/_/id/9826842/high-school-athlete-massachusetts-suspended-driving-drunk-friend (5-game suspension for Massachusetts volleyball player who drove her drunk friend home).

[9] Claudette Riley, *Parkview High teen fights suspension, loss of A+ scholarship*, SPRINGFIELD NEWS LEADER (Dec. 18, 2016, 4:21 PM), http://www.news-leader.com/story/news/education/2016/12/18/parkview-high-teen-fights-suspension-loss-scholarship/95197434/ (28-day athletic suspension

Unfortunately, many state athletic associations still lack uniform standards for how students should conduct themselves off-the-field.[10] And without good bylaws at the state or national levels, it's no surprise that local administrators, coaches, and athletic directors create their own policies and dish out their own—often questionable—penalties.[11]

These inconsistent punishments are the result of wide-ranging athletic codes. On one hand, most schools craft exceptional codes of conduct that outline particular off-the-field actions and the corresponding progressive discipline.[12] On the other hand, many schools construct poorly written or purposely vague codes of conduct to preserve the status quo.[13] Worse yet, some schools have no codes of conduct at all.

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and loss of scholarship for Illinois wrestler who went to school dance with friend who smoked marijuana).

[10] Siegrist et al., *supra* note 6, at 2.

[11] Take, for example, the Ohio High School Athletic Association's (OHSAA) bylaw 4-5-1. This bylaw gives member high schools a seemingly unlimited amount of freedom to sanction off-the-field conduct: "In matters pertaining to personal conduct in which athletic contests and their related activities are not involved, *the school itself is to be the sole judge as to whether the student may participate in athletics*." OHSAA bylaw 4-5-1, *reprinted in* OHIO HIGH SCH. ATHLETIC ASS'N, 2017–18 OHSAA HANDBOOK 50 (2017) (emphasis added).

[12] *E.g.,* UPPER ARLINGTON HIGH SCH. ATHLETICS DEP'T, 2017–18 ATHLETICS & EXTRACURRICULAR ACTIVITIES CODE (2017). This code goes to great lengths to outline specific progressive discipline actions. It also describes the evidentiary standard administrators must use for deciding violations: "The standard used to determine whether a student has violated the Athletics and Extracurricular Activity Code will be the preponderance of evidence standard. The administrator making a determination. . . will consider evidence presented to him/her, including assessing the credibility of witnesses. . . [T]he anonymity of the source or complaint will be considered when assessing the quality of the evidence." *Id*. at 4.

[13] Consider a high school who tells its student-athletes that a "[v]iolation of these rules and regulations. . . is prohibited and will result in disciplinary action." This particular athletic code is purposely ambiguous about discipline: "Such disciplinary action *could lead to* suspension, expulsion, or *removal from school and/or the athletic activity*. . ." TROTWOOD-MADISON HIGH SCH. ATHLETICS DEP'T, 2017–18 STUDENT CODE OF CONDUCT 1 (2017) (emphasis added). Presumably, even minor violations could result in removal from athletic activity.

Ambiguous or non-existent codes give power-hungry administrators almost-unfettered disciplinary discretion. And as a result, they can ban student-athletes from the fields and courts without any investigation, evidence, or hearing. Nevertheless, student-athletes and their parents—with the help of sport lawyers—have taken athletic disputes to a new kind of "court," filing thousands of lawsuits alleging violations of their free speech, due process, and equal protection rights.

Historically, judges loathed code of conduct cases. And they relied on inconsistent legal precedent to rule against student-athletes.[14] Without much serious consideration, most courts held that high school students have no constitutional right to participate in sports or other extracurricular activities.[15] In addition, courts reasoned that students have no property interest in their athletic participation, even when hefty college scholarships were on the line.[16] After wasted time and wasted money,[17] the cases were usually dismissed on summary judgment motions.

The process could have been quicker and cheaper. In fact, many high school sport disputes could be resolved using mediation, arbitration, or med-arb-like[18] processes. Yet, no one—

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[14] Siegrist et al., *supra* note 6, at 3. *See also* Ray Yasser & Matthew Block, *Upon Further Review: Recognizing Procedural Due Process Rights for Suspended High School Athletes*, 26 ENT. & SPORTS L. 1 (2008).

[15] Seger v. Ky. High Sch. Athletic Ass'n, 453 F. App'x 630, 634 (6th Cir. 2011); Taylor v. Enumclaw Sch. Dist. No. 216, 133 P.3d 492, 497 (Wash. App. 2006); Angstadt v. Midd–West Sch. Dist., 377 F.3d 338 (3d Cir. 2004); Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 180 F.3d 758, 763 (6th Cir. 1999); Alerding v. Ohio High Sch. Athletic Ass'n., 779 F.2d 315 (6th Cir. 1985); Niles v. Univ. Interscholastic League, 715 F.2d 1027 (5th Cir. 1983).

[16] Ryan v. Cal. Interscholastic Fed'n-San Diego Section, 94, 114 Cal. Rptr. 2d 798, 807 (Cal. App. 2001) (holding that scholarship opportunities do not elevate athletic participation to a protected property interest); Jordan ex rel. Edwards v. O'Fallon Twp. High Sch. Dist. No. 203 Bd. of Educ., 706 N.E.2d 137, 141 (Ill. App. 1999) (same).

[17] Schools risk "large amounts of money, resources, and. . . unwanted press in defending" against interscholastic athletic disputes. Siegrist et al., *supra* note 6, at 20.

[18] Med-arb has features of both mediation and arbitration. The parties first try to resolve their disputes through mediation. If mediation does not resolve the

including the parties with a vested interest in designing an effective dispute system—seems eager to apply ADR principles in the interscholastic athletic arena. Only one state athletic association has incorporated mediation into its bylaws.[19] Overall, student-athletes, parents, school districts, colleges, communities, and courts (who are ultimately tasked with deciding the rising number of sport cases on their dockets) lack the necessary motivation.

That motivation is coming. In 1975, the United States Supreme Court ruled that, because students are required to attend school up to a certain age, they have a governmentally created expectation to an education.[20] When a student has a governmentally created expectation to an education, she has a property interest in her education.[21] A property interest in education naturally creates a procedural due process right.[22]

In theory, administrators who suspend student-athletes without due process will only encounter problems if courts find a property interest in sport participation. And while sports have always played an important role in education,[23] few—if any—courts were willing to say that athletic participation or other extracurricular activities played an "integral role."[24] Until recently,

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dispute, then the process switches to a binding arbitration, with the mediator serving as the arbitrator.

[19] In 2014, Florida designed a mediation process for eligibility (i.e., grade-related) appeals. Florida High School Athletic Association, *FHSAA adopts PED, enrollment, mediation changes to protect student- athletes and fair play*, FHSAA.ORG (Jan. 14, 2014), https://www.fhsaa.org/news/2014/0114.

[20] Goss v. Lopez, 419 U.S. 565 (1975).

[21] *Id*. at 572.

[22] *Id*. at 576.

[23] The objective of school sports is to enrich the school experiences of students in the context of the educational mission of schools. School sports should be educational and contribute to the overall education of all students, not just student-athletes. *See* Thomas W. Gutowski, *Student Initiative and the Origins of the High School Extracurriculum: Chicago, 1880–1915*, 28 HIST. EDUC. Q. 49 (1988); *but see* Bradley James Bates, *The Role and Scope of Intercollegiate Athletics in U.S. Colleges and Universities*, EDUCATION ENCYCLOPEDIA, http://education.stateuniversity.com/pages/1853/College-Athletics.html (last visited Nov. 8, 2017).

[24] Ind. High Sch. Athletic Ass'n, Inc. v. Carlberg by Carlberg, 694 N.E.2d 222, 228 (Ind. 1997) (athletics play an "integral role" in the state's "constitutionally-mandated system of education. . .").

"[t]he main purpose of high school" has been "to learn science, the liberal arts, and vocational studies, *not* to play football and basketball."[25] But due process tides are changing. The present day "intertwining of [interscholastic athletics] and education[26] creates a much stronger argument" that high school sport is, in fact, part of the total educational process.[27]

If courts begin recognizing that the "intertwining"—as Professor Siegrest calls it—of sport and education creates a procedural due process right,[28] then the number of winnable lawsuits will skyrocket.[29] Ultimately, at some point in the not-so-distant future, high school athletes may have viable Fourteenth Amendment claims[30] when they're suspended or disqualified from interscholastic competition.[31] Sport lawyers can hear the echo of

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[25] Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 980 F.2d 382, 387 (6th Cir. 1992).

[26] For example, some schools offer academic credit for sport participation or write educational goals into their athletic department's mission.

[27] The Tenth Circuit, in dicta, suggested that "[t]he educational process is a 'broad and comprehensive concept' with a variable and indefinite meaning. It is *not* limited to classroom attendance but 'includes innumerable separate components, *such as participation in athletic activity* and membership in school clubs and social groups, which combine to provide an atmosphere of intellectual and moral advancement.*'"* Albach v. Odle*,* 531 F.2d 983, 985 (10th Cir. 1976) (emphasis added).

[28] Siegrist et al., *supra* note 6, at 4. Combine this "intertwining" effect with the chance to earn competitive college scholarships at progressively younger ages, and the argument is even stronger. Today, it's not uncommon for elementary school students to receive verbal athletic scholarship offers. *Nevada offers 9-year-old football star, trainer says*, USA TODAY HIGH SCHOOL SPORTS (June 23, 2017), http://usatodayhss.com/2017/havon-finney-jr-nine-year-old-nevada-football.

[29] Secondary schools should be prepared to see an increase in lawsuits fighting eligibility, suspension, and expulsion issues in sport. The continual growth in prominence of sport in our society suggests that The Supreme Court may be called upon to address the issue in the near future. Siegrist et al., *supra* note 6, at 4.

[30] *See* Robbins by Robbins v. Indiana High Sch. Athletic Ass'n, Inc., 941 F. Supp. 786, 791 (S.D. Ind. 1996) (indicating that adequate notice and a hearing might be required for athletic suspensions because "[p]articipation in. . . sports, even if not a constitutional right, is perhaps a non-constitutional 'privilege' *protected by the Fourteenth Amendment*") (emphasis added).

[31] Several lawsuits illustrate that due process tides are changing. For example, the U.S. District Court for the District of Oregon granted a temporary

Justice Fortas's oft-cited rebuke in *Tinker v. Des Moines Independent Community School District*: Students do not shed their constitutional rights at the schoolhouse gates.[32] Local administrators and state athletic associations should be concerned.

To help avoid lawsuits, schools should follow a standard process before suspending or expelling student-athletes. A consistent procedure would establish consistent punishments and would more fairly govern each individual case.[33] This article discusses developing a mediation system to resolve high school sport disputes in the quickest, cheapest, and fairest way possible; how at least one state athletic association has implemented and codified in its bylaws a basic mediation process; and how the National Federation of State High School Associations (NFHS)—if it wants to lead by example—should recommend uniform sport mediation clauses for all of its member institutions in the United States.

MEDIATION PRINCIPLES

Mediation is negotiation carried out with the assistance of a neutral third party.[34] In mediation, the mediator leads parties who disagree to common ground.[35] A mediator is basically a non-party

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restraining order and preliminary injunction against the Portland Public School System when administrators issued a 28-day suspension to a lacrosse player who was accused of asking a friend to buy him alcohol. *See* Ben Rohrbach, *Parents successfully overturn lacrosse player's drug-and-alcohol suspension in court*, YAHOO! SPORTS (Apr. 18, 2014), https://sports.yahoo.com/blogs/highschool-prep-rally/parents-successfully-overturn-lacrosse-player-s-drug-and-alcohol-suspension-in-court-164930191.html. In addition, many courts are now refusing to apply the legal standard that interscholastic sport participation is a privilege (rather than a right) when freedom of speech issues are involved in sanctions imposed on students. *See* Lee Green, *2016 Sports Law Year-In-Review*, NFHS.ORG (Jan. 4, 2017), https://www.nfhs.org/articles/2016-sports-law-year-in-review/.

[32] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[33] Siegrist et al., *supra* note 6, at 21.

[34] *See* STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS & SARAH R. COLE, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION, AND OTHER PROCESSES 121 (6th ed. 2012).

[35] *See* JOHN M. HAYNES & GRETCHEN L. HAYNES, MEDIATING DIVORCE 1 (1989).

to the negotiations.[36] She helps participants navigate their contested issues and reach a mutually acceptable resolution.[37] In addition, the mediator typically reminds the parties about privileged communications and that the mediation process itself—with some exceptions—is confidential.[38]

Unlike an arbitrator or judge, the mediator has no power to impose an outcome on the participants or make decisions for them.[39] Instead, the disputing parties have significant control over the mediation process and its substance.[40] In this regard, mediation is much different than traditional dispute resolution forums like arbitration or litigation.

At the end of the day, mediation is less time-consuming, less formal (e.g., there are no specific discovery rules or evidentiary requirements), less costly, and less intimidating for unwary or inexperienced participants.[41]

MEDIATING INTERSCHOLASTIC ATHLETIC DISPUTES

Mediation has secured a permanent place in the pantheon of dispute resolution mechanisms.[42] But there are few, if any, cases illustrating court-ordered mediation in amateur sports.[43] School districts and athletic associations need to understand why they

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[36] GOLDBERG, *supra* note 34, at 121.

[37] MERRICK T. ROSSEIN, 2 EMPLOYMENT LAW DESKBOOK FOR HUMAN RESOURCES PROFESSIONALS § 39:6 (2016).

[38] *See* Sarah Rudolph Cole, *Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 U. KAN. L. REV. 1419, 1423 (2006). It is fairly common for parties, either in a court-ordered or voluntary mediation, to sign a separate confidentiality agreement that is intended to ensure *all communications made during the mediation* will not be revealed either in subsequent proceedings or to the public or the media. *Id*. (emphasis added).

[39] GOLDBERG, *supra* note 34, at 121.

[40] *See* Nancy A. Welsh, *Integrating "Alternative" Dispute Resolution into Bankruptcy: As Simple (and Pure) As Motherhood and Apple Pie?*, 11 NEV. L.J. 397 (2011).

[41] *See* Tom Arnold, *A Vocabulary of Alternative Resolution Procedures, in ADR: How to Use It to Your Advantage!*, A.B.A (1996).

[42] Cole, *supra* note 38, at 1419.

[43] Arbitration has been used in many amateur sport cases where courts were forced to send disputes to the American Arbitration Association under the Amateur Sports Act of 1978, 36 U.S.C. §§ 371-96 (1994).

should mediate sport disputes in the first place. Once they understand why sport disputes are worth mediating, they need to know how they can incorporate mediation clauses into their codes of conduct and bylaws. Then, schools and state associations can begin developing mediation programs that resolve interscholastic athletic conflicts in the quickest, cheapest, and fairest way possible.

Why Should High Schools Mediate Athletic Disputes?

Student-athletes can participate directly in mediation and can craft tailor-made solutions for the specific dispute at hand. Depending on the reason for the mediation, the mediator might encourage the exchange of new information; help student-athletes and administrators understand each other's views; support emotional expression; stimulate creative options; and design win-win settlements.[44]

Student-athletes obviously benefit from this process.[45] But, they are not alone. As parties to a mediation, school administrators are in a much better position to adopt utilitarian philosophies on punishment, rather than doling out traditional (retributive) athletic disqualifications.[46]

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[44] GOLDBERG, *supra* note 34.

[45] Countless case studies have documented the success of mediation in high school education. *See* Kathy Kolan, *An Analysis of the Short-Term Impact of Peer Mediation on High School Disputants in an Ethnically Diverse Suburban School System*, GEO. WASH. U. (1999) (doctoral dissertation) (in-school suspensions decreased by 15%; out-of-school suspensions decreased by 29%); *see also* Raija Churchill, *Today's Children, Tomorrow's Protectors: Purpose and Process for Peer Mediation in K-12 Education*, 13 PEPP. DISP. RESOL. L.J. 363 (2013) (44% drop in suspensions after one year of introducing peer mediation).

[46] Under a utilitarian philosophy, punishment for wrongdoing should be designed to deter future wrongdoing, rehabilitate the offender, and provide a net benefit for the community. *See generally* Joel Meyer, *Reflections on Some Theories of Punishment*, 59 J. CRIM. L. & CRIMINOLOGY 595 (1969). Some studies illustrate how mediation changes not only student perspectives, but also administrator perspectives. For example, many administrators report less disputes and perceive an overall increase in a positive school environment after a mediation program begins. *See* HILARY CREMIN, PEER MEDIATION: CITIZENSHIP AND SOCIAL INCLUSION REVISITED (2007).

Take, for example, a football player who is accused of egging houses or smashing mailboxes. The school district, the student-athlete, and the community stand to gain more when he agrees to help paint the concession stand or plant flowers near the stadium entrance than when he serves a five-game suspension. Or consider the cheerleading captain who goes to a party where students drink and later drive home drunk. The school district, the student-athlete, and the community stand to gain more when she agrees to teach fifth graders about drugs and alcohol or tutor struggling middle-schoolers than when she's kicked off the cheer squad for the rest of the season.

Of course, in a few American cities, high school sports are just games played by fourteen-to-eighteen-year-olds. But elsewhere, sports matter much more.[47] In particular, small-town high school athletic contests are often the most visible and most popular events in the community, and the local teams are very important in the lives of the townspeople.[48]

The bottom line is that many communities rally around their high school athletic programs as a source of pride and collective identity.[49] Indeed, some sports are so popular that even athletes who've committed serious offenses (assaults, rapes, etc.) have received overwhelming community support.[50] At the end of the

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[47] Michael Oriard, *Football Town under Friday Night Lights: High School Football & American Dreams*, ROOTING FOR THE HOME TEAM: SPORT, COMMUNITY, & IDENTITY 68 (2013)

[48] In most small towns, high school sports establish ways of thinking about—and doing—things. JAY COAKLEY, SPORTS IN SOCIETY: ISSUES AND CONTROVERSIES 117 (10th ed. 2009).

[49] Residents receive "psychic income" when they identify with winning sports teams. Psychic income is the emotional and psychological benefit fans perceive, even if they do not physically attend games and aren't involved in organizing them.

[50] The town of Smithfield, a small farming community in Utah, was outraged when a member of the high school football team was taken naked from the shower by 10 of his teammates and put on display in front of the school. Interestingly, however, the outrage was directed at the victim rather than the abusers. In fact, high school sports were so popular in the community that when the victim reported how he was abused by 10 of his teammates, the townspeople

day, communities don't want school districts to suspend their star players or cut their championship seasons short because of controversy.[51] Mediation is an obvious first step.

Another good reason to mediate interscholastic athletic disputes is that high schools are often concerned about their reputations, and they risk jeopardizing community support with public controversies involving student-athletes. Confidentiality is a major benefit of mediation. For example, if suspended black athletes allege racial discrimination against school principals and athletic directors,[52] then publicizing the dispute might ignite support for the suspended students while significantly harming the school.[53] Mediation allows administrators and student-athletes to resolve their conflicts privately, away from direct public scrutiny.[54]

Some might argue that controversial disputes like discrimination should be publicized; if anti-discrimination laws exist to eliminate the scourge of racism in our society, then private mediation is just another part of the problem. But several cases indicate that public disclosure prompts long, brutal lawsuits by causing the parties to harden their positions.[55] With that in mind,

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started sending him death threats. MICHAEL SCARCE, MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA & SHAME 50 (1997).

[51] *E.g.*, Tracey Smith, *Community upset after basketball team has entire season suspended*, ABC NEWS RICHMOND (Jan. 11, 2017), http://wric.com/2017/01/11/community-upset-after-basketball-team-has-entire-season-suspended/ (school board canceled remaining basketball season when players fought in self-defense after tournament).

[52] This hypothetical is based on a real case. In Billings, Montana, high school administrators issued a 5-game suspension to a black basketball player after seeing "a picture of him at [a] party where alcohol was involved." The student-athlete was never shown the picture. As a result, his family filed a high-profile lawsuit, alleging that the "School District. . . knew non-minority [athletes] were present at the same party, but these students were not suspended from [sports]." Matt Hoffman, *West High athlete's suspension was motivated by race, lawsuit argues*, BILLINGS GAZETTE (Sept. 25, 2017), http://billingsgazette.com/news/local/west-high-athlete-s-suspension-was-motivated-by-race-lawsuit/article_05abae44-68de-500d-83ea-0f79893f6ed1.html.

[53] Gil Fried & Michael Hiller, *ADR in Youth & Intercollegiate Athletics*, 1997 B.Y.U. L. REV. 631, 636 (1997).

[54] *Id*.

[55] *Id.*

mediators are uniquely situated to help high schools and student-athletes discuss their issues in a non-intrusive manner and facilitate productive communication.[56]

Athletic associations might not be motivated by the inherent value of mediating high school sport disputes, maintaining a sense of community pride, or avoiding public controversy. Nevertheless, the financial incentive to avoid an increasing number of lawsuits—especially in difficult budgetary environments—should suffice.[57]

How Could the NFHS, State Athletic Associations, or Member High Schools Incorporate Mediation Clauses into Bylaws or Student Codes of Conduct?

Contracts are important mechanisms for moving disputing parties toward mediation.[58] And, at first glance, athletic codes of conduct or association bylaws seem like the perfect vehicles.[59] Schools craft rules and regulations that set forth formal requirements for continued participation and eligibility. In exchange for the privilege to participate, student-athletes (and/or their parents) review these guidelines and "agree" to them—often by signing a form and returning it to the athletic director or principal.

Codes of conduct not only set expectations for student-athletes and their parents, but also provide administrators with justifications for exercising their authority. Athletic codes and association bylaws are important documents; but they raise serious questions for member high schools who might want to use them as contractual underpinnings for mediation.[60]

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[56] *Id.*

[57] *See* Siegrist et al., *supra* note 6.

[58] Fried, *supra* note 53, at 642.

[59] For some examples of athletic codes of conduct, see *supra* notes 12 & 13.

[60] A contractual relationship establishing employment terms generally exists between schools and their coaches and administrators. Through these contracts, schools can, in theory, require coaches and administrators to pursue ADR before resorting to litigation. However, while coaches and administrators can be contractually bound to pursue ADR, student-athletes do not have the same contractual relationship. Fried, *supra* note 53, at 642.

First, it's unlikely that codes and bylaws can bind student-athletes.[61] According to the Restatement of Contracts, parties lack the capacity to form enforceable agreements—with few exceptions—until they are 18 years old.[62] Nearly every United States jurisdiction follows this rule.[63]

Most high school students won't turn 18 until some point during their senior year. And many of them (on the younger side of the spectrum) won't ever turn 18 during their high school athletic careers. In short, athletic codes of conduct are not effective contractual mechanisms for moving student-athletes to mediation because, as minors, student-athletes lack the capacity to form enforceable contracts with the high schools they play for. It's also unclear what effect—if any—parental consent might have on these agreements.[64]

Second, student-athletes have little to no influence on the codes of conduct or the association bylaws that govern them. Put another way, state associations and member high schools make the rules. Student-athletes just follow them. Perhaps the Indiana Supreme Court said it best:

> "[F]or a student athlete in public school, membership in [the state athletic association] is not voluntary, and actions of the [association] arguably should be held to a stricter standard of judicial review." (citation omitted). Therein lies what is for us a crucial distinction. . . : [the student] has not voluntarily subjected himself to the

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[61] To form a valid contract, the parties must be capable of contracting in the first place. Generally, "[n]o one can be bound by contract" if they don't have the "legal capacity to incur at least voidable contractual duties." RESTATEMENT (SECOND) OF CONTRACTS § 12 (AM. LAW INST. 1981).

[62] "Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person's *eighteenth birthday*." *Id.* at § 14 (emphasis added).

[63] 5 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 9:3 (4th ed. 1990).

[64] The extent to which parents are personally bound by the contracts that they make on a minor's behalf raises the same question. *Id.* at § 9:1.

> rules of the [association]; *he has no voice in its rules or leadership*.[65]

At most, a high school student spends only four years playing sports. This is a relatively short span of time compared to the many months or years often required to change institutional policies.[66]

But that doesn't necessarily mean that mediation clauses are doomed to fail. Generally, constitutions or bylaws entered into by an association and consenting parties are enforceable contracts between the association and its members.[67] And many courts have applied this rule to high school sports.[68] If state athletic associations and their member high schools can be bound by the rules that they write, then these documents may be effective mechanisms for advancing mediation after all.

The National Federation of State High School Associations (NFHS) must lead the way. Frequently, the NFHS issues bulletins, makes recommendations, and guides its member institutions through policy changes. Introducing a sports mediation program should not be an exception. To start, the organization should encourage state athletic associations to write mediation clauses into their bylaws.

If state associations lack the expertise to write these clauses, then the NFHS and its lawyers should guide them by providing model contract language. For example:

> The student-athletes and athletic department personnel of this high school represent the high school to the general public. Therefore, whenever a dispute arises regarding a violation of a student-athlete's personal rights by a high school employee or representative, the

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[65] Ind. High Sch. Athletic Ass'n, Inc. v. Carlberg by Carlberg, 694 N.E.2d 222, 230 (Ind. 1997).

[66] See *id*. ("We note as well the *relatively short span of time* a student spends in high school. . .") (emphasis added).

[67] Int'l Bhd. of Elec. Workers, Local Union No. 8 v. Gromnicki, 745 N.E.2d 449, 453 (Ohio Ct. App. 2000).

[68] *E.g*., Ulliman v. Ohio High Sch. Athletic Ass'n., 919 N.E.2d 763, 771 (Ohio Ct. App. 2009).

> student-athlete, administrators, and/or athletic director shall attempt to resolve the dispute through mediation prior to pursuing any other recourse.[69]

This language creates and defines a contractual underpinning for mediation[70] and, at the same time, provides a new layer of due process for student-athletes.[71] For safe measure, member high schools could ensure that coaches, athletic directors, and administrators comply with this mediation clause by including a provision in their employment contracts that requires them to honor it.[72]

However, no matter what contractual mechanism is used, a contract with a mediation clause is only the first step in the mediation process.[73] Once the parties are contractually obligated to use mediation, state governing bodies and their member institutions must develop and communicate effective mediation policies and procedures.[74]

What Would Interscholastic Athletic Mediation Look Like?

One state governing body—the Florida High School Athletic Association (FHSAA)—has made a serious effort to incorporate mediation principles into its bylaws. When Florida student-athletes are suspended by the FHSAA or one of its member high schools, they can request both eligibility (i.e., grade-related)[75] and

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[69] Professor Gil Fried recommends incorporating arbitration clauses into student-athlete codes of conduct at the collegiate level. This high school sport mediation clause is modeled after Professor Fried's recommendation. *See* Fried, *supra* note 53, at 648.

[70] *Id.*

[71] Athletic associations and member schools who provide student-athletes with a new layer of due process create an environment of fairness and consistency. That environment consequently weakens the merits of Fourteenth Amendment claims. Siegrist et al., *supra* note 6, at 21.

[72] Fried, *supra* note 53, at 649.

[73] *Id*. at 648.

[74] *See id*.

[75] When a student is deemed ineligible by a member school and/or is deemed ineligible by the FHSAA, the member school principal may appeal the ruling of the FHSAA if he/she or the student takes issue with it, and must do so at the student's request. FHSAA bylaw 10.4.1, *reprinted in* FLA. HIGH SCH.

infraction (i.e., conduct or rules-related)[76] appeals. In 2014, the FHSAA announced that it would "introduce a new layer of mediation to the appeals process, providing even greater due process opportunities for student-athletes and schools that wish to challenge sanctions."[77]

In an eligibility appeal, the Sectional Appeals Committee holds a hearing and decides the underlying dispute. Within five days of appearing before the Sectional Appeals Committee, the student-athlete—or her member high school—may file a request for mediation.[78] The request must include a "declaration of what the member school, as the representative of the student, is seeking as a successful mediation of the eligibility issue."[79] At this point, the FHSAA may accept or decline the student or school's request for mediation.[80]

If the Executive Director accepts the mediation request, he will schedule an eligibility mediation. The FHSAA will select a mediator from a "panel of experienced mediators"[81] designated by

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ATHLETIC ASS'N, 2017–18 FHSAA HANDBOOK 34 (2017) [hereinafter FHSAA HANDBOOK].

[76] FHSAA bylaw 10.4.2 governs rules violations appeals: Any student athlete, coach or member school who is found to be in violation of the rules of this Association may appeal the finding of the [FHSAA] if he/she takes issue with it, or may appeal the penalty imposed if he/she believes it to be too severe, and must be done at the student's request. *Id*.

[77] Florida High School Athletic Association, *supra* note 19, at para. 8.

[78] Under FHSAA bylaw 10.6.5.1, the student-athlete or member high school may request mediation in writing to the [FHSAA] on the form(s) provided by the Association. The request "must be signed by the member school principal or his/her designee and must be received in the office of this Association within five (5) business days following the date of the Appeals Committee hearing." FHSAA HANDBOOK, *supra* note 75, at 37.

[79] *Id*.

[80] *Id*. at 38.

[81] The Supreme Court of Florida, through the Florida Dispute Resolution Center, offers certification for mediators. As of August 2017, there were 5,674 individuals certified as mediators. The Florida Dispute Resolution Center, *About ADR & Medition*, FLORIDA COURTS, http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/about-adr-mediation.stml (last visited Nov. 8, 2017).

the organization.[82] Then, the mediator will meet with the FHSAA Executive Director, a representative from the member high school, and the student and/or the student's parents.[83] The mediation sessions are conducted in-person or via phone and last no longer than twenty minutes; but, "if the mediator determines that the mediation is proceeding toward a positive resolution, the mediation session may be extended."[84] Mediations are paid for "equally by both parties."[85]

If the parties reach an agreement at the mediation session, then the member high school and the student-athlete waive their rights to pursue the matter further.[86] If, however, the parties don't reach an agreement, then the member high school or student-athlete may proceed with an appeal, which is ultimately heard and decided by the FHSAA Board of Directors.[87]

The FHSAA program is a good start. However, there are both substantive[88] and procedural[89] flaws in the system. Many of the mediation bylaws are, at best, ambiguous. And additionally, there are still serious questions about the mediator and the mediator's neutrality. While state associations and their member institutions should be eager to adopt an approach like Florida's, there are plenty of opportunities to improve interscholastic athletic

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[82] FHSAA bylaw 10.6.5.2, *reprinted in* FHSAA HANDBOOK, *supra* note 75, at 38.

[83] FHSAA bylaw 10.6.5.3 describes who the parties to the mediation shall be. *Id*.

[84] FHSAA bylaw 10.6.5.5 sets the length and location of the mediation session. *Id*. It's not clear how much a mediator could accomplish in 20 minutes; however, the bylaw notes that—if necessary—the session may be extended when the parties are making progress.

[85] Under FHSAA bylaw 10.6.5.7, the parties must split the cost of mediation. *Id*.

[86] It's unclear what preclusive effect—if any—this clause would have on litigating the athletic dispute in court. For example, can student-athletes in Florida still attempt Fourteenth Amendment challenges when they're suspended on eligibility grounds?

[87] A notice of appeal must be in writing and received within five (5) business days following the mediation session under FHSAA bylaw 10.6.5.6., *reprinted in* FHSAA HANDBOOK, *supra* note 75, at 38.

[88] In other words, the *types* of disputes that will be mediated.

[89] Procedural flaws are problems with the structure of the mediation program. For example, questions about *when* disputes will be mediated.

mediation. The FHSAA bylaws illustrate what one dispute system might look like. But they don't go far enough.

The first issue with the FHSAA's mediation program is substantive. Student-athletes, the athletic association, and its member institutions may only mediate eligibility (or grade-related) infractions. Again, this is a good start. But eligibility infractions are only one type of controversy that the association deals with on a regular basis.[90] If the FHSAA and other state associations are serious about resolving disputes with efficiency and fairness, then the mediation process should apply to *all* disputes—not just eligibility questions. The solution is to require parties to mediate *both* eligibility and conduct (or rules-related) infractions.

The second issue with the FHSAA's mediation program is procedural. Student-athletes, the athletic association, and its member institutions can only request mediation *after* the Sectional Appeals Committee hears the underlying dispute.[91] This is a serious waste of time and resources. In almost every context, mediation is used as a condition precedent to other binding dispute resolution mechanisms,[92] such as arbitration, litigation, or, in this case, a hearing before a committee. One major benefit of mediation is its cost-effectiveness. Therefore, the solution is to require parties to mediate *before* they appeal.

There are also serious questions about the mediator and the mediator's neutrality. While the FHSAA bylaws say that the association will select from a "panel of experienced mediators,"[93] it's not clear who the mediators are or what credentials they have that make them "experienced." In Florida, this may not be particularly troubling because the state has cultivated a dispute resolution culture where certified mediators are readily available.[94]

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[90] FHSAA HANDBOOK, *supra* note 75, at 34.

[91] *Id*. at 37.

[92] Kristen M. Blankley, *Agreeing to Collaborate in Advance?,* 32 OHIO ST. J. ON DISP. RESOL. 559, 561 (2017).

[93] FHSAA HANDBOOK, *supra* note 75, at 38.

[94] The Florida Dispute Resolution Center, *supra* note 81.

However, many states are not this fortunate. Therefore, rather than selecting from a panel of mediators, athletic associations and their member high schools could consider hiring full-time mediators. Individual institutions—or private schools who are not sanctioned by the state governing body—might also consider pooling their resources and hiring full-time mediators who travel throughout the county to resolve interscholastic athletic disputes.

If state associations and their member high schools can't afford full-time mediators, then they could consider part-time or volunteer options. For example, schools could form relationships with community mediators. Schools could also consider athletic officials, like umpires or referees. After all, they're specifically trained to resolve on-the-field disputes in the most neutral way possible. This makes them ideal candidates for mediating interscholastic athletic disputes.

Finally, schools could provide mediation training for guidance counselors or resource officers. These individuals don't usually have disciplinary discretion. And they're generally considered neutral confidants by students, parents, and school administrators.[95] Either way, there is plenty of room for creativity in selecting a cost-effective and neutral mediator.

CONCLUSION

It's been almost 100 years since the NFHS started leading interscholastic athletics and other extracurricular activities.[96] Besides the skyrocketing number of student-athletes participating in high school sports, not much has changed over 100 years. State athletic associations and their member institutions still lack uniform standards for how students should act off-the-field. Ambiguous or non-exist codes of conduct still give school

[95] A high percentage of high school students are aware of their school counselors and are, overall, satisfied with their interactions. *See generally* Dorinda Gallant & Jing Zhao, *High School Students' Perceptions of School Counseling Services: Awareness, Use, and Satisfaction*, 2 COUNS. OUTCOME RES. & EVALUATION 87 (2011).

[96] National Federation of State High School Associations, *About Us*, NFHS.ORG, https://www.nfhs.org/who-we-are/aboutus (last visited Nov. 8, 2017).

administrators almost unlimited amounts of disciplinary discretion. And, still, no one—with the exception of one state governing body—seems interested in applying ADR principles to interscholastic athletic disputes.

But one thing has changed over 100 years. Due process tides are rising, and high school sports are now significantly tangled up with education. This intertwining effect creates a much stronger argument[97] that high school sports are, in fact, part of the total educational process outlined in *Goss v. Lopez*.[98] At some point in the near future, student-athletes may have a protectable property interest in their athletic participation. The risk of losing money and community support as the result of controversial lawsuits should be enough for schools to take notice.

Schools need a mediation process that resolves athletic disputes with speed, efficiency, and fairness. Before suspending or expelling student-athletes who have violated rules or bylaws, schools should sit down with them at the table. Mediation fosters a collaborative environment where administrators and student-athletes can creatively resolve their disputes. The process is private. It keeps controversies away from public scrutiny, and it prevents parties from hardening their positions. But most importantly, mediation could help school districts avoid dangerous lawsuits by forming a much-needed layer of due process for student-athletes.

Mediation programs won't be implemented overnight. It will take months or years of careful planning. It will take community buy-in, effective contract language, and visible leadership from the NFHS. It will also take help from mediation practitioners and scholars alike.

At the end of the day, state athletic associations and their member institutions will need a lifeboat if they want to float above rising due process tides. Mediation, or some other form of alternative dispute resolution, is their safe harbor.

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[97] Siegrist et al., *supra* note 6.
[98] 419 U.S. 565 (1975).

Fellow Introduction

It is natural for any professional with decades of experience in their field to sometimes think that others process information the same way they do. I know that I have done so as a mediator. Hopefully not too often.

This well written article should remind us all that the world is a complex place made up of innumerable cultures each of which deals with the issue of authority in different ways. Ms. Zhang discusses in detail how mediation is practiced in China and how the people in China react to the authoritative role of mediators.

The greater our own insight into how those with whom we mediate make decisions only enhances our skill in bringing people together. I invite submissions to the Journal discussing how other cultures around the world negotiate their disputes.

John W. Salmon
Editorial Board, Chair
Distinguished Fellow ACCTM

WHY CHINESE PEOPLE TEND TO BE MEDIATED BY AUTHORITY

Hongye "Maple" Zhang*

Table of Contents

* LL.M. 2018, Harvard Law School. The author thanks her supervisor David A. Hoffman, Esq., for the guidance, advice and comments. Special thanks are also due to Chang Li, for the constant support and encouragement.

INTRODUCTION

It has been said that China is "the most heavily mediated nation on earth."[1] That is a fair statement. Mediation plays a remarkably important role in resolving disputes in China, sharing a roughly equivalent number of disputes with the judicial system. For the past several years, more than nine million civil disputes were resolved through mediation every year, while the annual number of first trial civil cases has been remaining in a range from seven million to ten million. [2] Needless to say, it is worth examining how mediation works in China.

Though having the same name as its western counterpart does, Chinese mediation differs significantly from western mediation in many ways. One of the unique characteristics of Chinese mediation is that, mediations in China are frequently conducted by people of authority. On the contrary, in western mediations, mediators are often third-party professionals who enjoy equal status as the disputants do. Throughout the Chinese history, most mediations have been carried out by government officials or local gentry. Even in the contemporary China, mediators are usually government officials, who work part-time to mediate, or village leaders. [3] It is very often to see that parties are inclined to choose a mediator with authority, formal or informal, over the community, even though this authority would mean undue pressure.[4] Generally, the higher authority a mediator has, the easier and faster a dispute can be resolved. [5]

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[1] James Wall & Michael Blum, *Community Mediation in the People's Republic of China*, 35 J. CONFLICT RESOL. 3, 4 (1991).
[2] National Bureau of Statistics of China, *National Data* (Apr. 9, 2018, 10:37 PM), http://data.stats.gov.cn/english/adv.htm?cn=C01.
[3] Wu Yuning, *People's Mediation Enters the 21st Century*, in MEDIATION IN CONTEMPORARY CHINA: CONTINUITY AND CHANGE 34, 42 (Fu Hualing & Michael Palmer eds., Wildly, Simmonds & Hill Publishing 2017).
[4] Chang Pei (常沛), *Lun Minjian Tiaojieren de Quanwei yu Xinyong* (论民间调解人的权威与信用)[The Authority and Credibility of Nongovernmental Mediators], LILUN YUEKAN (理论月刊) [Theory Monthly], Mar. 2013, at 128, 129.
[5] Wang Fuhua (王福华), *Zhongguo Tiaojie Tizhi Zhuanxing de Ruogan Weidu* (中国调解体制转型的若干维度)[Mediation System Transformation of China], 132 FAXUE LUNTAN (法学论坛) [Legal Forum] 31, 34 (2010).

Why do people in China tend to be mediated by mediators of authority? This is the question that my article tries to answer. The first part of this article gives an overview of the evolution of mediation in Chinese history. This part will be divided into three sections describing mediation in imperial China, mediation in the transition period between imperial China and Communist China, and mediation after the establishment of People's Republic of China. This first part aims to provide readers with a sense of the long-standing involvement of authority in Chinese mediation. The second part describes the role of mediators by breaking down the traditional techniques expected to be employed by the mediators, all of which suggests the implied authority of mediators. The third part tries to explain the necessity of authority in Chinese mediation from three perspectives, including the cultural reasons behind this mediation tradition, the political reasons which contribute to the top-down promotion of authority-led mediation, and the social reasons that necessitates the authority of mediators.

I. EVOLUTION OF CHINESE MEDIATION AND THE AGELONG INVOLVEMENT OF AUTHORITY

A. Evolution of Mediation in Imperial China

Mediation in China can be dated back to 2000 years ago, the dynasty of the Western Zhou. In Western Zhou (1046 – 771 BC), there was a type of government officials called "*Tiaoren*," which means mediator. According to the *Rites of the Zhou* (*Zhou Li*), *Tiaoren* was in charge of disputes and the harmonization of them. [6] There are few historic accounts about how *Tiaoren* actually worked, but it is still worth noting that mediators achieved such an official status at such an early time. In the Qin dynasty (221-207 BC), the headmen of towns, who were called as *Youzhi* or *Sefu* depending on the size of the town they governed, had the power to mediate. [7] Though the Qin dynasty only lasted for fourteen years, the administrative system that it set up, including the arrangement of giving town leaders the power of mediation, was largely

[6] The original text in Zhou Li is "調人掌司萬民之難而諧和之." LÜ YOUREN (吕友仁), ZHOU LI YI ZHU (周礼译注) [Translation and Annotation of Zhou Li] 177 (Xuan Sheng ed., Zhongzhou Guji Chubanshe 2004).
[7] Chang, *supra note* 4.

followed by dynasties afterwards. In the Han dynasty (202 BC – 220 AC), every town had an officer in charge of dispute resolution who was titled as *Sefu*. It was specifically stated that *Sefus* resolve disputes only through mediation, which means that they did not have the authority to adjudicate. [8] In the Tang dynasty (618-907 AC), before a dispute got into the court, it must first be mediated by the head of the community where the dispute took place. [9] By the time of the Song Dynasty (960-1279 AC), mediation had become very prevalent among ordinary people. Mediation by local authorities such as clan leaders, gentry and the elder was well established, and it was usually stipulated in clan regulations that disputes shall not be submitted to the court unless family mediation failed.[10] In the Yuan dynasty (1271-1368 AC), the most basic unit in the administrative division was called *she*, which consisted of fifty households. The government of Yuan highly promoted mediation, and entitled *shezhang*, the headman of the *she*, with the power to mediate minor civil disputes related to marriage, household property, land and houses, and debt. [11] During the early stage of the Ming dynasty (1368-1644 AC), a mediation institution called *Shenmingting* was set up in every town. In each *Shenmingting* were three to five mediators called *Lao* (the elderly) or *Lilao* (the elderly of the town). The *Laos* were supposed to be "fair and just" senior citizens elected by people in the town. It was a prerequisite that a case shall be mediated by the *Laos* in the *Shenmingting* before reaching the government. In the middle stage of the Ming dynasty, the *Shenmingting* gradually ceased to exist, the mediation function of which was taken over by *Xiangyue*, a type of non-administrative town-level association voluntarily

[8] KONG QINGMING (孔庆明), ZHONGGUO MINFA SHI (中国民法史) 171 (Jilin Renmin Chubanshe 1996).

[9] Liu Yanfang (刘艳芳), *Woguo Gudai Tiaojie Zhidu Jiexi* (我国古代调解制度解析) [An Analysis of the Ancient Mediation System in China], 30 ANHUI DAXUE XUEBAO (安徽大学学报) [Journal of Anhui University] 76, 77 (2006).

[10] Tan Jingyu, *Songdai Xiangcun Shehui de Duoyuan Quanwei — Yi Minjian Jiufen de Tiaojie Wei Li* (宋代乡村社会的多元权威——以民间纠纷的调解为例) [Multi-Authorities in the Rural Society of the Song Dynasty — Taking the Mediation of Civil Disputes as an Example], JIANGHUAI LUNTAN (江淮论坛) [Jianghuai Forum] Jan. 2007, at 137, 138–139.

[11] Yang Na (杨讷), *Yuandai Nongcun Shezhi Yanjiu* (元代农村社制研究)[A Study of the Institution of *She* in Yuan Dynasty], LISHI YANJIU (历史研究) [Historical Research] Apr. 1965, at 117, 128.

formed by local residents. The Xiangyue maintained the order of the town, promoted the common interests of the residents and mediated disputes in a timely manner. [12] In the Qing dynasty, mediation was very much favored by many of the emperors. Provisions about mediation were included in the decrees of Emperor *Shunzhi*, Emperor *Kangxi* and Emperor *Yongzheng*, the documents of which were called respectively the *Shengyu Six* (The Six Sacred Decrees), the *Shengyu Sixteen* (The Sixteen Sacred Decrees), and the *Shengyu Guangxun* (The Sacred Edict). [13] The process of mediation can also be found in the *Great Qing Legal Code*. According to the Code, most civil disputes, especially disputes relating to marriage or inheritance, shall be resolved within the clans where they arose by clan leaders.

After the overview of mediation in the feudal time of China, we can see that mediation existed throughout the feudal history, and mediators were always people with some kind of authority. The mediators could be government officials with administrative authority, or leaders of towns or clans, who had semi-administrative authority, or elder people who enjoyed high prestige and social status in the community. Despite the reason behind this phenomenon, it seems that letting people with authority to mediate is a tradition deeply rooted in the history and culture of China. This tradition may have shaped the public perception of mediation to the notion that mediators should be somebody with authority.

It is also worth noting that mediation was sometimes set up as a prerequisite for a case to enter the trial proceeding, as it was in the Ming and the Qing dynasty. Even when mediation was not mandatory, government officials still preferred to refer disputes to community mediations before handling the cases by themselves, as they did in the Song dynasty. There are mainly two reasons for this promotion of mediation. Firstly, Confucianism was the ideology behind the rule of nearly every feudal dynasty. Confucianism values harmony and promotes the notion of *Wusong*, meaning no litigation. According to the *Analects of Confucius*, Confucius once said that "I hear disputes not differently than how others do it, but

[12] Chang, *supra note* 4.

[13] ZHANG JINFAN (张晋藩), ZHONGGUO MINSHI SUSONG ZHIDU SHI (中国民事诉讼制度史) [History of China's Civil Litigation System] 199 (Bashu Shushe 1995).

my goal is to make people not conflict with each other."[14] The notion of *Wusong* shaped the ideology of dispute resolution in imperial China, which strongly discouraged litigation and favored mediation.[15] Secondly, mediation was a way of decentralization. Because of the authoritarian nature of the feudal dynasties, local governors were generally appointed by the central government, who may not necessarily come from the region where he governed. Therefore, the governors or other government officials needed local leaders, who had wide connection and prestige among the community, to help them resolve disputes and educate the disputants, thereby preventing conflicts and maintaining a stable social order. In my opinion, the governmental preference of mediation made courts not immediately accessible for most of the civil disputes and a portion of criminal disputes. Consequently, it was inevitable that mediators assumed some of the responsibilities of judges, by which I mean mediators frequently judged the behaviors of the disputants. In other words, mediation could to some extent be viewed as quasi-adjudication in imperial China. Bearing this notion in mind, it may not be hard for us to understand why mediators in pre-modern China always has some kind of authority.

B. Evolution of Modern Mediation Before People's Republic of China

The year 1912 marked the end of the imperial China and the beginning of the Republic of China ("ROC") under the leadership of the Nationalist Party (*Guomin Dang*). After coming into power, the ROC government initiated a legal reform to replace the feudal legal norms by promulgating a set of westernized laws, among which was the *Law on the Civil Mediation*. [16] This law, coupled

[14] The original text in *the Analects of Confucius* is "聽訟、吾猶人也。必也使無訟乎." YANG BOJUN (杨伯峻), LUNYU YIZHU (论语译注)[Translation and Annotation of the *Analects of Confucius*] 128 (Zhonghua Shuju 1982).

[15] Ren Zhian (任志安), *Wusong: Zhongguo Falü Chuantong Wenhua de Jiazhi Quxiang* (无讼:中国传统法律文化的价值取向) [*Wusong*: Value Orientation of China's Traditional Legal Culture], ZHENGZHI YU FALÜ (政治与法律) [Politics and Law] Jan. 2001, at 19, 23.

[16] ZHONGHUA MINGUO FAGUI DAQUAN (中华民国法规大全) [The Comprehensive Collection of Laws and Regulations of the Republic of China] Vol. 1, 665–666 (Xu Baiqi ed., 2d ed. Shanghai Shangwu Yinshuguan 1937).

with several regulations promulgated thereafter, attempted to build a modern mediation system consisting of institutionalized judicial mediation and administrative mediation. However, due to the domestic strife and foreign aggression faced by the ROC government at that time, the mediation laws could not be adequately implemented. Consequently, in many rural areas, the Qing mediation was still functioning. [17]Meanwhile, the Communist Party was gradually taking over rural places, implementing its own mediation policy. Since the Communist Party later overthrew the ROC government in mainland China, together with the legal system that the ROC government built, I will now focus on the evolution of mediation under the rule of the Communist Party, which will shed light on how the contemporary mediation system in China came into being.

The Communist Party was founded in July 1921. Following the Mass Line (*Qunzhong Lixian*), the Communists endeavored to unite peasants and workers by giving the peasant associations and the labor unions the power to administrate local affairs, including mediation. A number of mediation offices were set up under the institutions of peasant associations or labor unions. [18] The mediators were peasants or workers, with no prior training of law. However, the peasant associations and labor unions lasted not more than ten years until 1927; and after the Nationalists purged the Communists, the peasant associations and labor unions collapsed. During the decade from 1927 to 1937, the Communist Party quickly revived from the suppression from the ROC government and established its own revolutionary bases in multiple areas. In those revolutionary base areas, disputes were mainly resolved through judicial or administrative proceedings rather than mediation. It was not until the outbreak of the Sino-Japanese War (1937-1945) did mediation regain its popularity. [19]

[17] PHILIP HUANG, CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN THE QING 4 (Stan. U. Press, 1996).
[18] ZHANG JINFAN (张晋藩), ZHONGGUO FAZHI TONGSHI (中国法制通史) [The Comprehensive History of the Chinese Legal System] Vol. 10, 97–101 (Falü Chubanshe 1999).
[19] XU XIAOBING, MEDIATION IN CHINA AND THE UNITED STATES: TOWARD COMMON OUTCOME 55 (ProQuest Dissertation Publishing 2003).

In 1938, in order to cope with the boom of wartime disputes, the Communist Party promulgated a mediation law in the Shanxi-Chahar-Hebei Border Area, which was the main revolutionary base of the Communists. Largely referring to the ROC mediation law, the 1938 mediation law followed the three-tier administrative division created by the ROC government, set up different levels of mediation committees in districts, villages, and towns, and required that members of the mediation committees shall be elected by the local residents. However, the notion of democracy in the establishment of mediation institutions were significantly diminished when the *Provisional Regulations of the Shandong Province on the Organization of Mediation Committees* (hereinafter "the 1941 Regulations") was promulgated in 1941. [20]

According to the 1941 Regulations, members of the mediation committees shall not be elected by the residents but shall be selected by the local government from representatives of mass organizations and progressive gentry. [21]Also, heads of villages and districts, who were once explicitly excluded from serving on the mediation committees, could now serve as members or heads of the mediation committees.[22] The regulations also stipulated that a mediation record, which was created for successful mediations, had the same power as a judgement; and that mediation shall be free of charge. [23] Pursuant to the 1941 Regulations, mediation became quite formal and administrative, and the mediators had the formal authority delegated by the government to mediate. The disputants, however, had limited autonomy to select the mediators. Since the implementation of the 1941 Regulations, the contemporary mediation system in China started to take shape.

From 1941 to 1949 when the People's Republic of China was founded, numerous mediation regulations were carried out, which basically followed the framework established by the 1941 Regulations. The regulations formalized mediation into three categories: folk mediation, administrative mediation, and judicial

[20] Reprinted in RENMIN TIAOJIE ZILIAO XUANBIAN (人民调解资料选编) [Selected Materials on People's Mediation] 217–218 (Qunzhong Chubanshe 1980).
[21] *See id.* art. 3.
[22] *Id.*
[23] *See id.* art. 9, 12.

mediation; and delegated the power of mediation mainly to mediation offices in the government. It is worth noting that in 1944, an instruction letter was issued in the Shanxi-Gansu-Ningxia revolutionary base, which articulated that mediation shall be the primary method of dispute resolution. It was the first time for the Communist Party to announce a mediation-first policy, the notion of which is still dominant in the contemporary legal system in China.

Contrary to the poor implementation of mediation laws by the ROC government, mediations in the Communists-controlled areas were relatively successful. According to statistics provided by the government of some revolutionary base areas, more than sixty percent of the disputes were resolved through mediation. [24]

Despite the prevalence of mediation in revolutionary bases, mediation was not always a voluntary choice by the parties. Though not explicitly stated in the regulations, it was often assumed by government officials that mediation was a prerequisite for litigation. Therefore, before being admitted to the court, disputants were often forced to go through exhausting and time-consuming, sometimes repetitive, mediations in several administrative levels, which were generally conducted by government officials or members of mediation committees who enjoyed a semi-administrative position.

C. Evolution of Mediation after the Establishment of People's Republic of China

The People's Republic of China ("PRC") was founded in 1949. From 1949 to 1980, the legal system was not completely established, and mediation played a dominant role in dispute resolution. In 1954, the PRC government issued the *Provisional General Rules for the Organization of the People's Mediation Committee* (hereafter "the 1954 Rules"). [25]Pursuant to the 1954

[24] WANG KUIHUA, CHINA'S CIVIL MEDIATION SYSTEM: A PRECAUTION AGAINST CRIME 7 (China: Foreign Languages Press 1988).

[25]Renmin Tiaojie Weiyuanhui Zanxing Zuzhi Tiaoli (人民调解委员会暂行组织条例)[Provisional General Rules for the Organization of the People's Mediation Committee] (promulgated by the State Council, March 22, 1954, effective March 22, 1954; repealed 1989), CLI.2.64 (Lawinfochina).

Rules, one of the objectives of people's mediation is to propagate and educate the people with political policies. Under the 1954 Rules, each neighborhood shall establish a mediation committee and members of the committee shall be elected by the residents of the neighborhood. There were no strict requirements of the mediators as long as they were fair, just, close to the people, and passionate about mediation. No prior professional experience was required from the mediators. Shortly thereafter, the Supreme People's Court issued two opinions respectively in 1956 and 1963, incorporating mediation into the judicial system and obligating judges with the duty to mediate as much as possible. The set of mediation rules promulgated before 1980s reflected Mao Zedong's view towards mediation, which takes mediation as a political tool to "thrust totalitarian political institutions intrusively into Chinese society," to carry out political education, to control public disturbance, and to monitor and correct private thoughts. [26]

After the passing away of Mao Zedong and the end of the cultural revolution, Deng Xiaoping strived to restore the legal order of China. As part of this effort, mediation was reiterated and specifically regulated in numerous laws and regulations. The new laws changed mediation's status from a position superior to adjudication to a position coexisting with adjudication and under the supervision of courts or judicial offices of the administration. It is also worth noting that at this time mediation was officially written into the now effective 1982 Constitution, stipulating that "[t]he residents' and villagers' committees establish sub-committees for people's mediation, public security, public health and other matters in order to manage public affairs and social services in their areas, mediate civil disputes, help maintain public order and convey residents opinions and demands and make suggestions to the people's government." [27] Consistent with the prior trend, mediation is still regarded as something more than a dispute resolution method – i.e., a tool to maintain social order.

It seems that the balance between mediation and adjudication is hard to strike, and the policies have been moving back and forth. Two decades after Deng took away mediation's superiority over

[26] Stanley B. Lubman, *Dispute Resolution in China after Deng Xiaoping: Mao and Mediation Revisited*, 11 COLUM. J. ASIAN L. 229, 233 (1997).
[27] XIANFA art. 111, § 2 (1982) (China).

adjudication, a "Mediation First" policy came back to the stage.[28] This time, the policy was promoted by the Supreme People's Court during the presidency of Wang Shengjun (2008-2013), requiring judges to mediate all civil cases which are likely to be resolved through mediation. [29] Judges are expected to maintain a high mediation settlement rate, which in reality forced them to impose mandatory and never-ending mediation on disputants. Though the mediation settlement rates are unprecedentedly high in courts all over China, it turns out that the involuntary mediation does not ultimately solve the disputes, and that a significant portion (30 to 40 percent on average) of cases settled come back to courts as the parties refuse to fulfill the obligation under the mediation agreement. [30] Therefore, the "mediation first" policy is widely criticized, including by judges. [31] To respond to this criticism, the implementation of the "Mediation First" has been softened since Zhou Qiang, the current president of the Supreme People's Court, took office.[32] However, the judicial documents articulating the "Mediation First" Policy remain to be in effect.

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[28] *See generally*, Zuigao Renmin Fayuan Guanyu Yinfa Guanyu Jinyibu Guanche "Tiaojie Youxian Tiaopan Jiehe" Gongzuo Yuanze de Ruogan Yijian de Tongzhi (最高人民法院印发《关于进一步贯彻"调解优先、调判结合"工作原则的若干意见》的通知)[Notice of the Supreme People's Court on Issuing Several Opinions on Further Implementing the Work Principle of "Giving Priority to Mediation and Combining Mediation with Judgment"] (promulgated by the Sup. People's Ct., June 7, 2010, effective June 7, 2010), CLI.3.134416(EN) (Lawinfochina).

[29] Zuigao Renmin Fayuan Guanyu Renmin Fayuan Minshi Tiaojie Gongzuo Ruogan Wenti de Guiding(最高人民法院关于人民法院民事调解工作若干问题的规定)[Provisions of the Supreme People's Court on Several Issues concerning the Civil Mediation Work of the People's Courts] (promulgated by the Sup. People's Ct., December 16, 2008, effective December 31, 2008), CLI.3.214321(EN) (Lawinfochina), art. 2.

[30] Zhang Xianchu, *Rethinking the Mediation Campaign*, in MEDIATION IN CONTEMPORARY CHINA: CONTINUITY AND CHANGE 59, 76 (Fu Hualing & Michael Palmer eds., Wildly, Simmonds & Hill Publishing 2017).

[31] *Id.*

[32] PETER C.H. CHAN, MEDIATION IN CONTEMPORARY CHINESE CIVIL JUSTICE: A PROCEDURALIST DIACHRONIC PERSPECTIVE 53 (Leiden; Boston: Brill Nijhoff 2017).

II. AUTHORITATIVE ROLE OF MEDIATORS IN CHINESE MEDIATION

To figure out why the authority of mediators is attached with huge importance, we must first understand how mediators in China normally conduct mediations. Unlike the facilitative function of western mediators, mediators in China take a more active role in solving disputes. Specifically, Chinese mediators may try to investigate and decide on facts, propose solutions to the dispute, and give advisory opinions. [33] Mediators may also educate or criticize one or both of the parties and suggest punishment to the wrongdoers. To some extent, what mediators do when solving disputes resembles the role of a teacher. A further examination of the techniques employed by Chinese mediators may help us understand the role played by mediators.

A. Mediators to Educate and Persuade

Education has always been a function of Chinese mediation. In imperial China, mediators educated people about moral rules derived from Confucianism. In Mao's China, mediators educate the mass about political policies. Today, mediators educate people about law and socialist moral values. A technique of educating often comes with persuading the parties to abide by the general principles on which people are being educated. In fact, the method of persuasion is written down in the People's Mediation Law which was just enacted in 2010. In its second article, the People's Mediation Law defines mediation as a process where a mediator "persuade" the parties into reaching a mediation agreement. [34]

When using the technique of educating and persuading, mediators normally just tell the parties how they should think or behave, but they rarely give logical explanations on why the parties should think or behave in the way that they suggest. According to the field

[33] Robert Perkovich, *A Comparative Analysis of Community Mediation in the United States and the People's Republic of China*, 10 TEMP. INT'L & COMP. L.J. 313, 324 (1996).

[34] Zhonghua Renmin Gongheguo Renmin Tiaojie Fa (中华人民共和国人民调解法) [People's Mediation Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l. People's Cong., August 28, 2010, effective January 1, 2011), CLI.1.137087(EN) (Lawinfochina) art. 2.

research conducted by James Wall and Michael Blum on the techniques used by Chinese mediators (hereinafter "Wall & Blum Research"), educating is the most frequently used technique by Chinese mediators, with a rate of 0.55 times per case; whereas the frequency of mediators giving explanations on why the parties should think or behave in a certain manner is only 0.11 times per case. [35]

There are some real-life examples on how the mediators educate and persuade parties in mediation. A field research led by Robert Perkovicht has provided us with some examples of how mediation techniques are used by mediators in China. Under this field research, the mediation conducted by the Chang Zing People's Mediation Committee in Hangzhou reveals the mediation process of an assault case. In this mediation, the mediators, with the assistance of the police, educated the assaulter that beating a person infringes upon this person's human rights, and "helped the guilty party realize" that what she did was wrong. [36] In another case reported by this field research, a grandson was having a dispute with his grandmother regarding the grandmother's living arrangement. The mediators in this case educated the grandson that his grandmother did not have long to live and he should therefore sacrifice his own interest to make her happy.[37] Apparently, the Confucian principle of filial piety played a part in this mediation. Another instance of education appeared in a case officially named as an outstanding example of mediation case, where a construction company and its employee were involved in an occupational injury dispute. In this case, in order to secure a compensation for the injured worker, the mediator educated the person in charge of the construction company on the law and the moral principles, with emphasis on the financial hardship suffered by the worker. The construction company then was persuaded to pay for a specific amount of damage to the injured worker. [38]

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[35] Wall & Blum, *supra note* 1, at 4.
[36] Perkovich, *supra note* 33, at 326.
[37] *Id. at* 325–327.
[38] Zuigao Renmin Fayuan Guanyu Yinfa Quanguo Fayuan Youxiu Tiaojie Anli de Tongzhi(最高人民法院关于印发全国法院优秀调解案例的通知) [Notice of the Supreme People's Court on Issuing the Outstanding Examples of Mediation Cases in People's Courts Across the Nation] (promulgated by the Sup. People's Ct., March 31, 2012, effective March 31, 2012) CLI.3.185960(EN) (Lawinfochina), case 6.

B. Mediators to Criticize and Punish

Unlike the neutral and facilitative position assumed by western mediators, mediators in China feel the need to praise the behaviors they deemed good and criticize the party they view as having done something wrong. According to the Wall & Blum Research, mediators criticize 0.29 times per mediation and praise 0.05 times per case. Understandably, the technique of praise was not used very often as normally both parties in a dispute are partly liable for the conflict. [39] The use of criticism is worth examining, as the ability to condemn and criticize reflects the superior position of the mediator over the parties.

Because of the limitation of mediation records, we may hardly know how exactly mediators criticize the parties. However, a self-criticism essay is often included as part of the settlement of mediation, from which we can get a hint of the criticism delivered by the mediator. In a self-criticism essay, one should explain in detail what she had done wrong, why she committed the wrongful conduct, and how she is going to change to prevent making the same mistake again in the future. A self-criticism is usually an acknowledgement of wrongdoing and a form of punishment. Therefore, when a self-criticism essay is included in a mediation settlement, we can presume the existence of criticism delivered by the mediator in the mediation process. There are some examples which reveal under what circumstances a self-criticism essay may appear in a mediation settlement. In a case where a woman became pregnant without getting married, the woman agreed to write a self-criticism essay and pay a fine after the mediation. [40] In another instance, a woman who assaulted another party also agreed to write a self-criticism essay after mediation. [41]

Though self-criticism is deeply embedded in Chinese culture, originated from Confucianism, and reinforced by Maoism, a self-criticism essay is a form of punishment and, to some extent, humiliation. [42] In the contemporary Chinese society, a person will

[39] Wall & Blum, *supra note* 1, at 4.
[40] Perkovich, *supra note* 33, at 326.
[41] *Id.*
[42] For the analysis of how self-criticism can be traced back to Confucianism and Maoism, see *id.* at 315, 318.

be asked to write a self-criticism essay by his or her parent at home, teacher at school or superior in the workplace. Because of the humiliating nature of a self-criticism essay, it is rarely written voluntarily. Thus, we can infer the superiority of the mediator from the self-criticism essay agreed to write by the party in a mediation. One may think that the superiority of the mediators, especially their power of condemnation and punishment, is not something voluntarily sought by the parties, but an inevitable byproduct of the current semi-administrative and politically-intruded setting of mediation in China. However, records reveal that, even for private mediation that took place before the rule of the Communist party, where parties had the absolute autonomy to choose mediators, the superiority of mediators was still presumed and accepted by disputants. In the memoir of Zhang Gang, a private mediator living in the late Qing dynasty and the ROC period, he was constantly sought by disputants to mediate even though he frequently condemned parties in mediations with words such as "shameless" and "unscrupulous" and settled cases with light punishment.[43]

C. Mediators to Propose Solutions

It is the spirit of modern mediation that the parties themselves should take responsibility for resolving their dispute. [44] Therefore, in many countries including the US, mediators are not supposed to, or at least, not encouraged to propose solutions to the parties. [45] This has not been the case in China. In China, mediators normally are not restrained from proposing solutions to the parties. Despite the modernization of mediation after imperial China, it has remained to be common practice that mediators take the initiative to propose solutions based on their findings of facts and their own past experience and impose the solutions on the parties. [46] Even in

[43] Weiting Guo, *Living with Disputes: Zhang Gang Diary (1888–1942) and the Life of a Community Mediator in Late Qing and Republican China*, 24 J. CHA 218, 227-228 (2013).
[44] KLAUS J. HOPT & FELIX STEFFEK, MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 11 (Oxford U. Press 2013).
[45] *Id.*
[46] See, e.g., Roger Richman, *Civil Dispute Resolution in China During Reform*, 7 OHIO ST. J. DISP. RESOL. 83, 100 (1991); Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1226 (1966); MARTIN C. YANG, A CHINESE VILLAGE: TAITOU, SHANTUNG PROVINCE 165–166 (Colum. U. Press 1945).

the recently promulgated mediation law, proposing solutions is still stipulated as a technique that mediators may adopt during mediations. [47] Therefore, we can safely say that Chinese people perceive mediation as a process where a solution to their disputes will be provided by the mediator.

The aforementioned lack of autonomy in mediation proceedings does not seem to hinder people from actively seeking mediation to solve their problems. In practice, people tend to look for dispute resolutions from mediators with high reputation and authority over the community.[48] The more authority the mediator has, the more the disputants trust his or her proposed solutions, and the more likely the mediation settlement will be fulfilled.[49] The authority of a mediator could either be informal or formal, and it could be derived from the mediator's knowledge, reputation or official position in the government. Usually, people in China trust government officials more than they trust people in their community, as they assume that government officials know more about the law and are fair and just when handling disputes. A common phenomenon that reflects this assumption is that, parties may not accept the solution offered by a community mediator but may accept the same solution offered by a judge's assistant in a judicial mediation. [50]Even though sometimes the parties do not feel satisfied about the solution suggested by the mediator, or the parties feel embarrassed after being scolded by the mediator, they still abide by the decisions of the mediator considering the authority the mediator has. In other words, the fulfillment of a mediation agreement is ensured by the authority of the mediator.

[47] Article 22 of the People's Mediation Law states that "People's mediators may adopt various means to mediate disputes among the people in light of the actual circumstances of disputes, hear the statements of the parties concerned, explain the relevant laws, regulations and state policies, patiently persuade the parties concerned, propose solutions on the basis of equal negotiations and mutual understanding between the parties concerned, and help them reach a mediation agreement on free will." *See* Zhonghua Renmin Gongheguo Renmin Tiaojie Fa, *supra note* 34, art. 22 (China).
[48] Chang, *supra note* 4, at 129.
[49] *Id.*
[50] Aaron Halegua, *Reforming the People's Mediation System in Urban China*, 35 H. K. L. J. 715, 735 (2005).

III. REASONS FOR THE PREVALENCE OF AUTHORITY-LED MEDIATION

A. Authority-led Mediation as a Tradition

As is discussed in the first chapter of this article, mediation has existed in China for a long time (since two thousand years ago), and it has always been conducted by mediators with some kind of authority, which could either be administrative or non-administrative. When discussing the contemporary mediation in China, we cannot deny that the mediation tradition formed in the imperial time has contributed to the formation of the mediation principles and norms in contemporary China. Therefore, in order to answer why contemporary mediations in China are usually conducted by authorities, we have to answer why it has already been the case in imperial China.

As we all know, in nearly every dynasty, the imperial rule of China was guided by the ancient philosophy of Confucianism. Among the core values of Confucianism are social harmony and hierarchy, which shape the ideas of mediation.[51] Hereafter, I will analyze these two values and how they influence the traditional mediation one by one.

As mentioned before, from the pursuit of social harmony derives the idea of *Wusong* (No Litigation). Pursuant to the *Wusong* theory, litigation should be discouraged, as it stands for conflict, which is the opposite to harmony. This idea has a strong influence both on the administrative methods of the government and on the behaviors of the people. Interpreting the principle of *Wusong*, imperial governments believe that disputes shall be resolved outside of the court harmoniously, with each party making concessions (which echoes with the idea of *Rang*[52]) and developing empathy (which reflects the idea of *Ren*[53]). As a result, the government very

[51] For the value of harmony in Confucianism, see generally, LI CHENYANG, THE CONFUCIAN PHILOSOPHY OF HARMONY (Routledge 2014).
[52] *Rang* means to yield or to concede. See Şerban Toader, *Confucian Values and the Revival of Confucius' Thought in Contemporary China*, STUDIA UNIVERSITATIS BABES-BOLYAI-PHILOLOGIA Mar. 2010, at 127, 127.
[53] For a thorough analysis of the meaning of *Ren*, see Yuxian Zhu, *The Role of Qing (Positive Emotions) and Li 1 (Rationality) in Chinese Entrepreneurial*

frequently require that mediation, administrative or semi-administrative, shall be a prerequisite to trials, which makes court proceedings not easily accessible by the people.

As for the people, they spontaneously try to avoid conflict as much as they can, for many reasons. Firstly, under the influence of Confucianism, they believe that a compromise made at the moment of dispute is a necessary sacrifice for the long-term harmony, and that continuous litigation for a dispute is unworthy considering its profound impact on the harmonious relationship between people.[54] In other words, they think winning on one dispute in the court would make both parties enemies forever. Secondly, people also do not want to litigate as they believe that demonstrating their disputes publicly is shameful and face-losing. Thirdly, for some minor criminal cases, people are reluctant to go to court as the legal codes in imperial China often consist of brutal corporal punishments, such as beating people with a lash or a bludgeon.[55] Even for some serious criminal offenses such as manslaughter, people sometimes believe that since a dead people cannot come back to life, fierce revenge or punishment on the offender is futile. Thus, people are more inclined to solve the criminal cases through mediation which usually result in a lighter punishment than the one ordered by the court, such as monetary compensation or feasts. Consequently, ordinary people in imperial China tend to avoid litigation.

Because of the discouragement of litigation from the government and the avoidance of litigation by the people, adjudication is largely excluded from dispute resolution. However, the function of

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Decision Making: A Confucian Ren-Yi Wisdom Perspective, 126 J. BUS. ETHICS 133, 134–135 (2012).

[54] As a proverb goes: "Ren Yishi Fengping Langjing, Tui Yibu Haikuo Tiankong (忍一时风平浪静，退一步海阔天空)," which means that endure for a while, and it will become uneventful; take a step back, and you will find a boundless world. ZHU YONGWEN (朱永文), ZENG GUANG XIAN WEN (增广贤文), in ZENG GUANG XIAN WEN (Zhou Xitao et al. eds., Anhui Wenyi Chubanshe 2004).

[55] Du Bingqian (杜冰倩), *Zhongguo Gudai Xingfa de Lishi Fenxi* (中国古代笞杖刑罚的历史分析) [Historical Analysis of Chinese Ancient Punishments of Whipping and Flogging], 101 HEILONGJIANG SHENG ZHENGFA GUANLI GANBU XUEYUAN XUEBAO (黑龙江省政法管理干部学院学报) [Journal of Heilongjiang Admin. Cadre C. Pol. & L.] 32 (2013).

adjudication cannot totally be eliminated out of the society. When adjudicating, the court explains the law, which could either be natural law or statutory law, promotes fairness and safeguards social justice. These functions of adjudication are crucial to maintaining social order and have to be realized in one way or another. Hence, when the judicial process is generally excluded from the means of dispute resolution, whichever dispute resolution mechanism that replaces the judicial system has to take on some of the characteristics of adjudication so as to make up for the absence of the court. That is to say, mediators have to, to some extent, act like a judge to investigate, to evaluate, to offer solutions and to punish. And that is indeed what they do. Consequently, the mediation process becomes a quasi-adjudication process.

In the realm of adjudication, the adjudicators, or judges, must have authority delegated by the law or by the government; and judges are superior to the disputants as they stand for justice and order. Therefore, when mediators take over some of the responsibilities of judges, they are also expected to have some sort of authority recognized by the disputants. This partly explains why people generally want to be mediated by authorities, without regard to the type of the case. Moreover, for criminal cases that are submitted to mediators, punishment to the culprits, albeit light, is inevitable. But a settlement including punishment can hardly be reached voluntarily by both parties, as compared to monetary compensations, punitive measures can hardly be viewed as an ideal trade-off by the party who allegedly engages in criminal conduct, especially when it is still disputable whether the conduct accused of actually constitutes a criminal offense. One can only be punished when he or she is wrong, which requires the adjudication by the dispute resolver, hence the authority of the mediator implied. Also, the unpleasant nature of punishment requires an authority to enforce it. Since mediation serves as a form of quasi-adjudication in the imperial time, mediators must have some form of authority over the parties and the whole community.

Confucianism also strongly emphasizes *Li* (rites), from which derives a sense of hierarchy. [56]This sense of hierarchy requires

[56] Henry Rosemont Jr., *Two Loci of Authority: Autonomous Individuals and Related Persons*, in CONFUCIAN CULTURES OF AUTHORITY 1, 11 (Peter D. Hershock & Roger T. Ames eds., St. U. N. Y. Press 2006).

people to identify their superiors in any circumstance and defer to them. Nearly in every scenario, an evaluating rule of deference or superiority can be found: a son shall defer to his father, a wife shall defer to her husband, the young shall defer to the old, a teacher is superior to his students even when the teaching is over, a peasant is superior to a businessman, etc.[57] This constant effort of identifying the social hierarchy allows people to find their appropriate position and prevent them from doing things that they are not supposed to do.[58] Only in this way, as Confucians believe, a stable social order can be achieved and maintained. Following this mindset, people may be inclined to identify mediators as superior to the disputants, or people may assume that a mediator should be someone with a higher social status than the parties so as to be qualified for the superior position that he or she enjoys over the parties. Considering the adjudicative characteristics of mediation discussed above, it is not surprising that the people may have reached this conclusion. Therefore, when seeking candidates for a position that will be superior to the one of himself or herself, the seeker may want a candidate who is already superior to him or her in the social hierarchy, so that the power inherent in this position will not be abused. In other words, people have to find someone with authority to solve their disputes in mediation.

The educational attainment of ordinary people is also a key factor to the selection of mediators. The society under the imperial rule is an agricultural society, with peasants taking up most of the population. The literacy rate among peasants is very low. On the other hand, the literary language is in Classical Chinese, which is obscure and totally different from the spoken language.[59] Thus, most peasants have little access to Confucian literature, which defines and explains the social rules, or imperial decrees and legal codes. Despite the fact that Confucianism has developed into a set of social norms widely acknowledged, when disputes arise, people still need someone with adequate educational attainment to

[57] Xing Fan, *The Chinese Cultural System: Implications for Cross-Cultural Management*, 60 S.A.M. ADVANCED MANAGEMENT J. 14, 16 (1995).
[58] Jia Wenshan, *The Wei (Positioning)-Ming (Naming)-Lianmian (Face)-Guanxi (Relationship)-Renqing (Humanized Feelings) Complex in Contemporary Chinese Culture*, in CONFUCIAN CULTURES OF AUTHORITY 49, 51 (Peter D. Hershock & Roger T. Ames eds., St. U. N. Y. Press 2006).
[59] It was not until the New Cultural Movement in the 1910s did written language be reformed from Classical Chinese to vernacular.

interpret the Confucian rules or the law and apply those interpretations to the problem at hand. The individuals who have adequate educational attainment, or whose families can afford the education required when they are young, are often the ones who enjoy high social status in the community, such as an elder in the family of a landlord. In other words, it may sometimes be inevitable that mediators are people who enjoy a form of authority, as only they are equipped with the knowledge and potential skills to mediate. This may still be the case in some rural areas in contemporary China.

Because of the reasons discussed above, the tradition that mediators are people with authority has been long established. As is described in the second section of this article, after Qing Dynasty, Nationalists tried to build a modern mediation system, but the implementation of it was very poor. Therefore, the traditional mediation was not thoroughly reformed. When the Communists came into power in some areas, they first took the nationalist approach of mediation, but shortly thereafter, they went back to the traditional approach which actually fit the peasant society more. Therefore, the tradition is to a large extent preserved and shapes the contemporary mediation norms in China.

B. Authority-led mediation as a Top-Down Policy

The contemporary mediation system in China is not formed spontaneously. Rather, it is deliberately established by the central government. Ever since the establishment of the first revolutionary base of the Communist Party, several rounds of mediation campaign have been carried out. Through the campaigns, a mediation system with unique Chinese characteristics is built, adjusted and reinforced. During each mediation campaign, there are policies, laws or regulations regarding the promotion and reform of mediation being promulgated. Not only do they regulate administrative and judicial mediation, but they also regulate community mediation in detail, with mandatory rules about the mediation institutions, mediators, and mediation agreements.

Pursuant to laws on People's Mediation, a People's Mediation Commission must be established in every neighborhood, and the

mediators must offer free mediation service to the community.[60] People's Mediators have an authoritative role, as they are appointed by the People's Mediation Commissions, serve the people for free, receive political direction from the government, and are given the responsibility to promote public security.[61] Because of the prevalence of the semi-administrative community mediation institutions offering free service, there does not seem to be sufficient demand for additional mediation service that may be offered by a private entity. Moreover, the validity of the agreement reached after a people's mediation is specifically recognized and is entitled with a more favorable protection than that of a private mediation agreement. According to the People's Mediation Law, parties may apply for judicial confirmation within 30 days after an agreement is reached upon mediation by a people's mediation commission; and when one party refuses to fulfill the mediation agreement, the other party may directly file a judicial enforcement action to the court.[62] As I have discussed, Chinese people have an aversion to litigation. Thus, a mere contract does not provide the parties with sufficient safety, because even if it is breached, the parties may still not resort to litigation out of concerns of money, time and face. Consequently, the actual effect of a contract is less than it legally is. Under this circumstance, a judicial confirmation of the enforceability of the mediation agreement is highly valued by the parties as it offers security and excuse the parties from the hassle of litigation.

Because of the prevalence of peoples' mediation and its advantages over private mediation, private mediation is not fully developed in China. Consequently, it may not always be the case that parties are actively seeking mediation led by an authority; the reason why they end up in a mediation proceeding with authority involved may simply be that there is no other form of mediation available or affordable. Furthermore, it is also questioned that whether the people voluntarily submit their disputes to people's

[60] *See* Zhonghua Renmin Gongheguo Tiaojie Fa, *supra note* 34, art. 4, 8; *see also*, Renmin Tiaojie Weiyuanhui Zuzhi Tiaoli (人民调解委员会组织条例) (General Rules on People's Mediation Committees) (promulgated by the St. Council, June 17, 1989, effective on June 17, 1989) CLI.2.4331 (Lawinfochina), art. 11.
[61] *See* Zhonghua Renmin Gongheguo Tiaojie Fa, *supra note* 34, art 1, 4, 5, 13.
[62] *Id.* art 33.

mediation. A phenomenon in the urban area has been reported that some people try to give gifts to people's mediators to curry favor from them.[63] This phenomenon sheds light on whether the people's mediation is voluntarily requested or not.

To further examine this issue, we may need to answer why the government builds the mediation system in an authority-centered way. For the Chinese government, mediation is not just a dispute resolution mechanism to alleviate the pressure received by the court, it is mainly a political tool that facilitates a stable rule of the Party. Firstly, the government uses mediation to monitor people's thoughts. The rule of the Party is guided by Maoism. The *Mass Line* is one of the political methods developed by Mao Zedong, which requires the political leaders to understand the needs of the mass and adjust the relevant policies accordingly.[64] Mediation helps the Party understand how the mass think and what the main sources of disputes and complaints are in the society, so that the Party can adjust policies to suit the society or take measures to solve problems before they become serious threats to the social stability. Secondly, the Party uses mediation to educate the people about political ideas of the Party and the socialist core values that the Party promotes, in order to maintain the people's support of the government. Mediators view the politically correct ideas as criteria to be relied on when making judgements or suggestions in a mediation. They will spare no effort to educate the party what is right and to persuade the parties to follow the suggestions which are consistent with politically correct principles. Thirdly, the Party uses mediation as a method of decentralization. China is too big, and the central government may not function very well locally. Even though the court is always available, people's legal awareness is not always sufficient. When there is a lack of legal awareness of the disputants, the enforcement of a court ruling might meet resistance, which can lead to social instability. Therefore, the Party needs local authorities to act as their agents to approach the people, who can utilize their understanding of the

[63] Niel J. Diamant, *Conflict and Conflict Resolution in China: Beyond Mediation-Centered Approach*, 44 J. CONFLICT RESOL. 523, 532 (2000).
[64] Tian Xinming (田心铭), *Qunzhong Luxian: Cong Mao Zedong dao Dang de Shiba Da* (群众路线：从毛泽东到党的十八大) [Mass Line: From Mao Zedong to the Eighteenth National Congress of the Communist Party of China], 175 SIXIANG LILUN JIAOYU DAOKAN (思想理论教育导刊) 22, 23 (2013).

local people to ease the tension and, in the meantime, serve for the will of the Party. In sum, the political goals expected from mediation requires the mediators to have some sort of authority to represent the government and fulfill their political responsibilities.

C. Authority-led Mediation as a Societal Need

As discussed before, the functions of mediators in a Chinese style mediation include educating, persuading, criticizing, punishing, and proposing solutions. Considering the long tradition of Chinese mediation, it is fair to say that these functions have been incorporated into the public perception and expectation of mediation. The combination of these functions can only be effectively realized by the facilitation of authority. Therefore, to understand why authority is needed in Chinese mediation, we need to figure out why these functions are necessary.

Despite the long tradition of mediation, "mediation" is a quite modern word. In the old times, people use "*ping li*" to describe the process of mediation.[65] Literally, "*ping li*" means to judge between right and wrong, or to reason things out. From the use of the term "*ping li*," we can see that what people expect from mediation is a judgement from a third party. When seeking mediation, individuals are eager to have a third party evaluate who did right and who did wrong. To cope with this psychology, mediators may scold both parties for each of their contribution to the dispute, so as to deliver moral judgements sought by the parties without closing the door for concessions. After blames are placed, parties are easier to be persuaded to adjust their behaviors, pay compensation or receive punishment. On the contrary, in western mediation, the mediator should refrain from making moral judgements or impose her political or moral beliefs on the parties. The respect to diversity and the endeavor to promote mutual understanding is emphasized in western mediation theory and the western culture. However, in a homogeneous society like China, diversity is not something that should be maintained or promoted; and it is sometimes viewed as the source of social instability. In China, there is only one set of moral principles, and it should be strictly observed by everyone. In

[65] FEI XIAOTONG (费孝通), XIANGTU ZHONGGUO (乡土中国) [From the Soil] 56 (Shenghuo Dushu Xinzhi Sanlian Shudian 1985).

imperial China, the moral standard was Confucianism. In contemporary China, it is a mix of Confucianism and Communism (with Chinese characteristics), an essential part of which has been summarized as the *Eight Honors and Eight Disgraces*. [66] Since the whole nation follows a universal morality, moral evaluations made accordingly will be accepted by every member of the society. Thus, in mediation, when a disputant is convinced by the mediator that his or her conduct violates the universal moral principles, he or she will voluntarily adjust the unwarranted behaviors or accept punishment for the wrongdoing, hence the resolution of the dispute. Consequently, the evaluative function of mediators plays a pivotal role in Chinese mediation and is sought and expected by the people. That is why we see mediation frequently conducted by local authorities whose moral judgements are widely respected.

Sometimes, the disputants do not voluntarily seek for mediation, but are forced to present their case to a mediator by their relatives or neighbors. One may think that neighbors or relatives have no right to interfere in a person's own business. However, in a collectivist society like China, an individual's personal life belongs to the group, the community and the whole society. A public dispute that an individual has with another, is an embarrassment of his or her family and a disturbance of the harmony in the community. Therefore, in order to eliminate such embarrassment and disturbance, people in the community want the disputes to be effectively resolved by an authority, whose authoritative power expedites the mediation process and ensures the adherence of his or her proposed solutions. Furthermore, it is in the interest of the community that the disputants be disciplined by an authoritative mediator. In an ideal Confucian society, everyone is brought up with the education of Confucian rites, which is a reflection of Confucius morality, and proper upbringing incorporates the obedience of Confucian rites into one's habits, which enables an adult to automatically do the right things without supervision or

[66] The *Eight Honors and Eight Disgraces*: "Love the country; do it no harm. Serve the people; never betray them. Follow science; discard ignorance. Be diligent; not indolent. Be united, help each other; make no gains at others' expense. Be honest and trustworthy; do not sacrifice ethics for profit. Be disciplined and law-abiding; not chaotic and lawless. Live plainly, work hard; do not wallow in luxuries and pleasures." Liu Dan, *New Moral Yardstick: 8 Honors, 8 Disgraces*, Gov.cn (April 27, 2018, 5:18 PM), http://www.gov.cn/english/2006-04/05/content_245361.htm.

guidance from others, leading to a harmonious society with no personal conflicts. [67] It is a traditional view that conflicts arise from violation of social norms by at least one of the disputants, which poses a threat to the public order. Therefore, such violators should be educated, criticized, or punished.

As discussed earlier, mediation served as quasi-adjudication in imperial China. This is still the case in some remote and rural areas in China. Though the judicial system is available to every citizen, its accessibility requires a certain level of legal awareness and economic capability. Therefore, for people living in some remote and rural areas where legal education is poor, the court may seem distant and formidable. In contrast, mediation is free, with mediators living in the community and speaking the same language as other community members. Under this circumstance, people use mediation as an alternative of litigation, not for its autonomy, but for its accessibility. Inevitably, mediation is perceived as quasi-adjudication, and is expected to be conducted by a local authority who can offer widely respected judgement and solution.

CONCLUSION

Why do Chinese people tend to be mediated by authority? There are many reasons underlying this phenomenon. The Confucian culture, the political ideology, and the societal needs have all contributed to the formation of the current authority-led mediation system in China.

From a cultural point of view, the authority-led mediation is a result of two Confucian values —harmony and hierarchy. Since Confucianism prioritizes social harmony, people tend to avoid public display of conflict, i.e. litigation, and seek mediation which is virtually regarded as quasi-adjudication. The adjudicative feature of mediation perceived by people determines that the mediator should have some kind of pre-existing authority over the disputants. The deeply-rooted sense of hierarchy created by Confucianism makes people constantly trying to identify their position in the social hierarchy in different situation. Mediators, as dispute

[67] FEI XIAOTONG, supra note 65, at 55–56.

resolvers, are identified as superior over the disputants, therefore the pre-existing authority of mediators is required.

From a political perspective, mediators serve as the connection between the central government and the local people, helping the government to maintain social order. The government needs local authorities to propagate political ideas, monitor thoughts of the mass, and timely discover and solve disputes and dissatisfaction. All these goals can be achieved through mediation. Therefore, the government has established a nationwide community mediation system, where mediators have semi-administrative authority. In other words, the dominance of authority-led mediation in China is a result of top-down mediation campaigns.

Authority-led mediation meets the needs of the society. The Chinese society is homogeneous and guided by a single set of moral principles. The universal morality calls for mediators who make authoritative moral judgements to solve disputes, so as to ensure the observance of social norms. The authoritative moral judgement is sometimes sought by the disputants motivated by a psychology of *ping li*, and sometimes sought by the relatives or neighbors of the disputants who have an interest of eliminating embarrassment and restoring the harmony of the community. Moreover, in some remote areas, because of the lack of legal awareness and economic capability, the courts are far less accessible than authority-led community mediation.

The authority-led mediation is a special product of the unique Chinese culture, politics and social environment. It has been entrenched in the Chinese dispute resolution system for a long time and working reasonably well both for the government and for the people, as it is tailored to the needs of them both. It is unclear whether the dominance of authority-led mediation will continue to exist in the future. In my opinion, it is determined by how political policies and the society will evolve.

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Fellow Introduction

I began mediating cases in the 1990s. I remember my very first mediation. The attorneys for each respective side convened in my office and we used several conference rooms. After ordering lunch, the matter was successfully resolved, and the parties left with briefcases in hand. Last week, I mediated a case. The attorneys for each respective side convened in my office and we used several conference rooms. After ordering lunch, the matter was resolved, and the parties left with briefcases in hand. It seems like the mediation process has not evolved much over the past 25 years. For these reasons, I found the article written by YUXIAN ZHAO from Harvard Law School to be particularly interesting and worthy of inclusion in this year's publication.

In this forward-thinking article, *Rethinking the Limitations of Online Mediation,* Zhao introduces the idea of a "Fourth Party" as an enhancement to the traditional approach in mediating disputes. While reading about the unique features of online mediation, I was fascinated by the conflict resolution possibilities that exist today because of our advanced technology. I hope you enjoy this article as much as I did – giving you renewed energy to explore all the wonderful opportunities that 2019 may provide in supplementing our current approaches to resolving disputes.

As a new member to the Editorial Board, I would like to recognize Editor Larry Watson who is leaving. Larry has been an incredible leader as evidenced by the success of the Journal. Thanks, Larry, for all the hard work and dedication from all of us in the College.

J. Allen Schreiber
Editorial Board
Fellow ACCTM

RETHINKING THE LIMITATIONS OF ONLINE MEDIATION

Yuxian Zhao

"I'm concerned about the internal struggles that are developing within the mediation community about what mediation is and what it is not… We need to be more open and eclectic and recognize that there are many different kinds of mediation that are appropriate in different settings."

- Frank E.A. Sander[1]

I. INTRODUCTION

To date, online mediation has been widely adopted in resolving a variety type of disputes, in particular, monetary disputes. For example, e-commerce websites like TaoBao (the Chinese counterpart of eBay) offers an online platform for consumers to resolve their disputes with suppliers in relation to online purchases. The mobile phone platform, called Public Adjudication, accepts disputes between consumers and suppliers and allows other users to vote for either side based on the parties' arguments and evidence. Other websites from the United States like Cybersettle, SettlementOnline, and ClickNsettle[2] allow dispute parties to exchange settlement offers, which the software will compare and let the parties know if there is a ZOPA (i.e., zone of potential agreement). Ebay, Paypal, and Square Trade are also considered leaders in the area of online dispute resolution.[3]

Despite its obvious advantages like convenience, scholars and practitioners have argued that the impersonal and asynchronous natures of online mediation have restricted its use to resolving only limited types of disputes, such as commercial disputes. It seems to be commonly accepted that a great deal of information (e.g., psychological and emotional signals) will be lost in online mediation,[4] thereby limiting online mediation's capability

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[1] Frank E. A. Sander, *Future of ADR - The Earl F. Nelson Memorial Lecture*, 2000 J. DISP. RESOL. 3, 7 (2000).

[2] A recent online search shows that these three websites are no longer active.

[3] *See* DAVID HOFFMAN, MEDIATION: A PRACTICE GUIDE FOR MEDIATORS, LAWYERS, AND OTHER PROFESSIONALS 1-10 (2013).

[4] *See*, *e.g.*, DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST 243 (2010) ("Email

to resolve non-commercial disputes.[5] In particular, it has been argued that "[e]lectronic communication is no substitute for the ability of face-to-face conversations to foster important process values of mediation"[6] because "cyberspace is not a 'mirror image' of the physical world."[7] As a result, certain mediation techniques like venting and expressions reading, which are are considered

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doesn't convey tone of voice, facial expressions, or body language – all of which help us make sense of the sender's intensions."); *see also Using E-Mediation and Online Mediation Techniques for Conflict Resolution*, PROGRAM ON NEGOTIATION, January 8, 2018, https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/ ("Disputants who engage in talks primarily via e-mail will miss out on the cues they would receive from body language, facial expressions, and other in-person signals."); *see also* Janice Nadler, *Rapport in Legal Negotiation: How Small Talk can Facilitate E-Mail Dealmaking*, 9 HARV. NEGOT. L. REV. 223, 239-45 (2004).

[5] *See* Ethan Katsh, *Online Dispute Resolution: The Next Phase* (2002) LEX ELECTRONICA, *available at* http://www.lex-electronica.org/files/sites/103/7-2_katsh.pdf ("Text is often inefficient compared to the spoken word and text can be inefficient compared to various forms of visual communication… Phase one began with great concern that ODR would not succeed because the richness of offline communication would be missing… We will, during phase two, undoubtedly find additional contexts in which fairly simple online interventions or interactions will of considerable value."); *see also* Colin Rule, *Technology and the Future of Dispute Resolution*, DISPUTE RESOLUTION MAGAZINE (2015), *available at* http://law.scu.edu/wp-content/uploads/Rule-Technology-and-the-Future-of-Dispute-Resolution-copy.pdf ("Many mediators initially resisted the encroachment of technology into dispute resolution, concerned that technology-based communication was not rich or robust enough to enable the kind of open, honest interaction that most mediators feel is essential to achieving effective resolutions."); scholars claim that even some of the disputes that arise online would be better resolved offline. *see* ETHAN KATSH, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES 115 (2017) ("Many cases of cyberbullying involving students and schools, for example, are as much physical-world bullying as online bullying and would be best resolved through a serious face-to-face intervention.").

[6] Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?* 1998 BYU L. REV. 1305, 1308 (1998).

[7] *See* Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber- Mediation Websites*, DUKE. REV., *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1073&context=dltr.

indispensable or critical for mediation, seem difficult to implement in an impersonal setting.[8]

Typical responses from online mediation proponents focus on the point that the limitations can be eliminated to a certain extent by the development of technology (e.g., video conferencing),[9] without digging much into the unique features of the online mediation, [10] e.g., text-based and asynchrony, and

[8] *See* Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?* 1998 BYU L. REV. 1305, 1308 (1998) ("Given the profession's current orientation to listening and processing oral information, mediators would find it largely impossible to translate their skills to the online setting."); *see also* COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, E-COMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS 2-29 (2002). Notable exceptions include Andrea M. Braeutigam's article on online mediation, which argues that "cyberspace is superior to face-to- face mediation for parties of unequal negotiating power, for family disputes, and for employment disputes." Andrea M. Braeutigam, *Fusses That Fit Online: Online Mediation in Non-Commercial Contexts*, 5 APPALACHIAN J.L. 275, 276 (2006).

[9] *See*, *e.g.,* Ethan Katsh, *Online Dispute Resolution: The Next Phase* (2002) LEX ELECTRONICA, *available at* http://www.lex-electronica.org/files/sites/103/7-2_katsh.pdf ("Many inefficiencies caused by the parties being apart might be labeled "tolerated inefficiencies". We are accustomed to them and have accepted many of them as inevitable. The network, however, changes significantly our ability to overcome these "tolerated inefficiencies"… we have new tools for communicating with parties in between face to face sessions…the new tools we are acquiring that allow us to change how long interactions with parties might take and where they might take place."); *see also* Deborah Hope Wayne, *Mediation in the Digital Age*, FAMILY LAW MATTERS BLOG, October 10, 2013, https://www.familylawmatters-blog.com/2013/10/mediation-in-the-digital-age.html.

[10] Notable exceptions include Colin's article on online mediation, which maintains that online mediation can help eliminate bias based on race, age, gender or disability. *See* Colin Rule, *Online Mediation: The Next Frontier for Dispute Resolution*, 23 SPIDR NEWS 10 (1999); *see also* Colin Rule, *Technology and the Future of Dispute Resolution*, DISP. RESOL. MAG. 4, 6 (2014-2015) ("ODR can support text-based, asynchronous conversations that help parties be more reflective in their communications while enabling them to access information relevant to their dispute in real time."); Colin Rule in his article *Online Dispute Resolution and Ombuds: Bringing Technology to the Table* maintains that the asynchronous nature of ODR allows the mediation participants to conduct "concurrent caucusing", where the mediator conducts caucusing with the two parties simultaneously. *See* Colin Rule, *Online Dispute Resolution and Ombuds: Bringing Technology to the Table*, JOURNAL OF THE INTERNATIONAL OMBUDSMAN ASSOCIATION (Jan. 1, 2015), *available at* https://www.ombudsassociation.org/IOA_Main/media/SiteFiles/docs/JIOA-15-V8-1-Rule_Sen.pdf.

analyzing how they may further the goals of mediation.[11] This article encourages a rethinking of the unique features and limitations of online mediation: Can online mediation only be able to efficiently resolve people's non-monetary disputes when cyberspace is a "mirror image" of the physical world? [12] Specifically, does mediation have to be conducted in a personal and synchronous environment so that techniques like venting or expressions reading can work? Compared with prior discussions

[11] People may argue that offline mediation can also be text-based and asynchronous so these features should not be unique features of online mediation. This is true, but it should be less disputed that online mediation, given its special setting, is more likely to be text-based and asynchronous. *See* Karolina Mania, *Online dispute resolution: The future of justic*e, INTERNATIONAL COMPARATIVE JURISPRUDENCE (Nov. 2015), *available at* https://ac.els-cdn.com/S2351667415000074/1-s2.0-S2351667415000074-main.pdf?_tid=1dc2840f-c494-4033-a573-6c7d1e7e7904&acdnat=1522983132_d83753a8fb133ebfbd7c22dfb7dd2d83 ("ODR systems may be divided according to the forms of synchronous and asynchronous communication used… Research by Suquet, Poblet, Noriega and Gabarró has shown that the second form constitutes the most frequently used solution (42%)… In accordance with quoted research, asynchronous online mediation is the most popular form, allowing greater flexibility because of 24-h access to the platform."); *see also Using E-Mediation and Online Mediation Techniques for Conflict Resolution*, PROGRAM ON NEGOTIATION, January 8, 2018, https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/ ("The 'platform' that mediators and service providers use varies, but the process is generally conducted via e-mail and telephone, while videoconferencing and real-time chats are less commonly used."); *see also* Derric Yeoh, *Is Online Dispute Resolution The Future of Alternative Dispute Resolution?*, KLUWER ARBITRATION BLOG, March 29, 2018, http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/ ("Asynchronous online mediation has been shown to be the most popular form of online mediation as it allows parties flexibility and faster resolution of the matter compared to offline mediation.").

[12] Scholars hold and experience shows negative in this regard. *See* Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C. L. REV. 329, 330 (2016) ("Approximately twenty years of experience has taught us that ODR is no more "Online ADR" than the online versions of banking, education, or gaming are simply the offline versions of those systems moved online. Once a process moves online, its very nature begins to change…but the goal of ODR is not simply to digitize inefficient offline processes. Technology changes the nature of the interaction between the parties and introduces new possibilities for helping them achieve resolution.").

that simply list pros and cons for online mediation,[13] this article approaches these issues by conducting a more structured and updated analysis. The article digs into the fundamental goals of mediation, and takes into account recent studies on human communications, psychology, and technological developments such as artificial intelligence ("AI"), data analytics, and emotion recognition.

Part II reviews the fundamental goals and principles of mediation. Part III explores the unique features of online mediation and discusses how they may further the goals of mediation without violating the principles. Part IV summarizes the article with emphasis on its position and purpose.

In sum, this article maintains that online mediation, by its unique features, may result in at least the same level of the efficiency with conventional offline mediation. Specifically, the text-based and asynchronous natures of online mediation, together with its easy access to technology, help mediation participants better process information, handle emotions, manage processes, and generate settlement options.

II. OVERVIEW OF THE GOALS AND PRINCIPLES OF MEDIATION

1. Goals of Mediation

To discuss the functions and limitations of online mediation, we must understand what online mediation is expected to achieve. The goals of mediation have been considered to include the followings:

- Encourage the exchange of information,
- Provide new information,
- Help the parties to understand each other's views,

[13] *See*, *e.g.*, Sarah Rudolph Cole & Kristen M Blankley, *Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be*, 38 U. TOL. L. REV. 193, 202-210 (2006-2007); *see also* Andrea M. Braeutigam, *Fusses That Fit Online: Online Mediation in Non-Commercial Contexts*, 5 APPALACHIAN J.L. 275 (2006); *See also* Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber- Mediation Websites*, DUKE. REV., *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1073&context=dltr; *see also* Negeen Rivani, *Online Mediation: If the Shoe Fits*, Mediate.com, May 2013, https://www.mediate.com/articles/RivaniN1.cfm.

- Let them know that their concerns are understood,
- Promote a productive level of emotional expression,
- Deal with differences in perceptions and interests between negotiators and constituents (including lawyer and client),
- Help negotiators realistically assess alternatives to settlement,
- Encourage flexibility,
- Shift the focus from the past to the future,
- Stimulate the parties to suggest creative settlements,
- Learn (often in separate sessions with each party) about those interests the parties are reluctant to disclose to each other, and
- Invent solutions that meet the fundamental interests of all parties.[14]

The list is hardly an exclusive one. Indeed, the goals of a mediation depend on the dispute settings, the parties' interests, resources, objectives, as well as mediators' understandings, preferences, skills, and styles (e.g., evaluative,[15] facilitative,[16] transformative,[17] and narrative[18]). For the purpose of a structured analysis, this article categorizes the above-mentioned goals as follows:

[14] FRANK SANDER, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION AND OTHER PROCESSES 198-199 (2012).

[15] *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24-32, 34-38 (1996).

[16] *Id*.

[17] *See* DAVID HOFFMAN, MEDIATION: A PRACTICE GUIDE FOR MEDIATORS, LAWYERS, AND OTHER PROFESSIONALS 1-15 (2013).

[18] *See Narrative Mediation: A New Approach to Conflict Resolution*, CONFLICT RESOLUTION RESEARCH CONSORTIUM, https://www.colorado.edu/conflict/peace/example/narrativemediation.htm (last visited May 2, 2018).

Information	• Encourage the exchange of information • Provide new information • Help the parties to understand each other's views • Learn (often in separate sessions with each party) about those interests the parties are reluctant to disclose to each other
Emotion	• Promote a productive level of emotional expression
Process	• Encourage flexibility
Settlement	• Deal with differences in perceptions and interests between negotiators and constituents (including lawyer and client) • Help negotiators realistically assess alternatives to settlement • Stimulate the parties to suggest creative settlements • Invent solutions that meet the fundamental interests of all parties • Shift the focus from the past to the future

The matrix categorizes the goals of mediation into four dimensions: information, emotion, process, and settlement.[19] Under this framework, the article will examine whether the features of online mediation and the goals match each other in the corresponding dimensions. It appears that the alleged limitations of online mediation mainly concern the information and emotion dimensions. Therefore, the discussions in Part III will begin with these two goals. Considering that the four dimensions are intricately interwoven and interrelated (e.g., emotion can also be regarded as a kind of information), the article will also discuss the other two dimensions (i.e., process and settlement) for the purpose of a comprehensive analysis.

[19] The "settlement" here refers to the need to reach a conclusion on something, i.e., bridging the differences, solving problems, and satisfying interest. Realizing that no agreement can be reached is also a settlement. *See* DAVID HOFFMAN, MEDIATION: A PRACTICE GUIDE FOR MEDIATORS, LAWYERS, AND OTHER PROFESSIONALS 7-22 (2013) ("getting to 'yes,' or getting to 'no,' are equally acceptable results, so long as the mediation has helped the parties achieve clarity about their goals and the options available for achieving them.").

2. Principles of Mediation Ethics

The principles for mediation help us examine if a mediation approach, e.g., online mediation, is appropriate and advisable. It is believed that there are ten commonly accepted principles:

- Avoidance of conflict of interest;
- Knowledge of competence/professional role boundaries;
- Impartiality;
- Voluntariness;
- Confidentiality;
- Do no harm;
- Self-determination;
- Informed consent;
- Duties to third parties; and
- Honesty.[20]

In addition, requirements such as safety (i.e., conducting the mediation in physically safe environment where parties can "can freely talk and can trust the integrity of the mediator and the process"[21]), quality (i.e., avoiding judgments and assumptions that negatively affect the mediation process), being future-oriented[22] are also regarded as the principles of mediation. With these principles in mind, this article will examine the extent to which online mediation may further the goals of mediation without violating its principles.

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[20] *See* David Hoffman, *Ten Principles of Mediation Ethics*, 18 ALTERNATIVES 147 (September 2000), reprinted in Mediation: Approaches and Insights (Juris Publishing 2003) (a summary of basic principles), *available at* https://blc.law/wp-content/uploads/2016/12/2005-07-mediation-ethics-branchmainlanguagedefault.pdf.

[21] Claudia Maffettone, *110 Years of Mediation: Principles, Opportunities, and Challenges*, MEDIATE.COM, May 2016, https://www.mediate.com/articles/MaffetoneC1.cfm.

[22] Senyo M. Adjabeng, *Mediation and The Principle Of Neutrality*, MEDIATE.COM, April 2016, https://www.mediate.com/articles/adjabengS1.cfm?nl=101.

III. CYBERSPACE AND ONLINE MEDIATION

1. The Cyberspace Era and the Origin of Online Dispute Resolution

To understand the unique features of online mediation and how it may advance the purposes of mediation, we need to know where it came from. The occurrence and growth of the use of online dispute resolution ("ODR"), including online mediation, partly responded to the "the rapid growth of Internet-based markets for goods and services"[23] and the trend for people to move from the reality to the "virtual reality"[24] – i.e., the cyberspace. As people are spending more and more time living in the cyberspace,[25] it should be safe to predict that ODR will be applied to areas other than e-commerce in the future.[26] The efficiency of online mediation is to a large extent determined by how well it responds to the needs in the cyberspace era, under the four-dimension framework mentioned above.

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[23] DAVID HOFFMAN, MEDIATION: A PRACTICE GUIDE FOR MEDIATORS, LAWYERS, AND OTHER PROFESSIONALS 1-10 (2013); *see* Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C. L. REV. 329 (2016) ("ODR originally emerged in the mid-1990s as a response to disputes arising from the expansion of eCommerce.").

[24] This is hardly a new phenomenon. Human beings are, after all, "virtual" animals. We were born in a given virtual reality where there were fictional entities like nations, religions, money, and law, and we have been constructing our own virtual realities ever since then. Therefore, another way to describe the trend towards cyberspace is that people are concretizing the pre-existing virtual realities.

[25] *See* Ethan Katsh, *Online Dispute Resolution: The Next Phase* (2002) LEX ELECTRONICA, *available at* http://www.lex-electronica.org/files/sites/103/7-2_katsh.pdf ("Much of phase two will concern "what happens when the digital world merges with the physical world") *cf*. NEIL GERSHENFELD, WHEN THINGS START TO THINK (1999).

[26] *See* ETHAN KATSH & ORNA RABINOVICH-ENY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES xiv (2017) ("the second highlights five areas that are argued to be in particular need of ODR - e-commerce, healthcare, social media, employment, and the courts"); *see also* Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C. L. REV. 329 (2016) ("Now, some twenty years later, ODR is the fastest growing area of dispute resolution, and it is increasingly being applied to other areas, including offline and higher value disputes.").

2. The Magic of Online Mediation in a Cyberspace Setting

As discussed in Section II, the goals of mediation can be divided into four categories: information, process, emotion, and settlement. To summarize, the article concludes that:

- Online mediation, with its unique features, furthers all those goals.
- Although levering technologies may not be an inherent feature of online mediation, mediating in an online setting does provide better access to relevant technologies.[27]
- Risks and ethical concerns associated with online mediation are anticipated but not dispositive.

a. Information

Dispute resolution "revolves around the communication, processing and management of information." [28] In particular, parties and the mediator in a mediation seek information about the parties' perspectives and interests, their interactions, dealings, and transactions, related context, rules, and criteria. The cyberspace is "a place where powerful tools were being developed for communicating, storing, and processing information." [29] Most interactions and communications are automatically recorded and can be used in further fact-finding. Information is the core for both mediation and cyberspace. Therefore, it should be apparent that online mediation, conducted in a cyberspace setting, is naturally suitable for resolving disputes arising from that setting, which could mean most, if not all, settings in a cyberspace era.

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[27] *See* Sarah Rudolph Cole & Kristen M Blankley, *Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be*, 38 U. TOL. L. REV. 193, 205 (2006-2007) ("Although increased technology may potentially advance the field of mediation, these advances will not be available to those who do not have access to a computer and the Internet. This may be especially true for online resolution of disputes occurring in the physical-rather than the virtual-world.").

[28] Ethan Katsh, *Technology and the Future of Dispute Systems Design*, 17 HARV. NEGOT. L. REV. 151, 153 (2012).

[29] Ethan Katsh, *Online Dispute Resolution: The Next Phase* (2002) LEX ELECTRONICA, *available at* http://www.lex-electronica.org/files/sites/103/7-2_katsh.pdf.

Colin Rule in his article *Technology and the Future of Dispute Resolution* contends that the text-based and asynchronous natures of online dispute resolution help disputants better access information and correct misunderstandings:

> ODR can support text-based, asynchronous conversations that help parties be more reflective in their communications while enabling them to access information relevant to their dispute in real time. It can enable participation from individuals anywhere in the world or support real-time joint single-text negotiation with collaborative editing. ODR can offer "wizards," software tools to help parties explore their options or to provide early resolution for issues, sometimes before the complainant even has informed the respondent about his or her concerns. It can quickly address simple misunderstandings before they escalate or offer a library of creative possibilities to help parties craft their ideal solution. It can even use software algorithms to keep communication focused on key issues that need to be addressed while structuring negotiations to keep them moving toward resolution. [30]

Rule also, in his article *New Mediator Capabilities in Online Dispute Resolution*, argues that the online and asynchronous natures of online mediation offer the mediator more options to reframe the parties' statements so that they can better communicate with each other:

> Online, a mediator has a variety of options. If one party posts a comment that is very accusatory in tone, or violates ground rules about slinging insults, a mediator can discuss the sentiments expressed with the poster and help them to re-frame the posting before the other side has seen it. A mediator can even take the comment off of the live site and discuss it in caucus with the author before jointly posting a re-framed version. In the extreme case, a mediator can even set the system to require mediator approval of each posting between parties, allowing the mediator to re-frame each communication in a system along the lines of shuttle diplomacy.
>
> These options allow the mediator to re-frame communications transparent to the intended recipient, so that the initial unproductive outburst and the resistance to re-framing can be

[30] Colin Rule, *Technology and the Future of Dispute Resolution*, DISP. RESOL. MAG. 4, 6 (2014-2015).

> dealt with behind the scenes and only the re-framed comment actually makes it to the listener.[31]

Not only the parties but also the mediator seek information. For example, the mediator needs to understand the parties' interests and motivations in order to help the parties generate options. Rule, in the same article, maintains that in an online mediation, the mediator can better do this by conducting "concurrent caucusing":

> Caucusing can be a crude tool in face-to-face mediation sessions, however. The mediator usually has to call the joint discussion to a stop, and then has to decide which of the parties should caucus first. The other party is then sent into the hallway to wait while the mediator caucuses… Hopefully the delay hasn't derailed the progress that was being made before the caucus; often, mediators only call caucuses when the discussions hit a stalemate because they don't want to disrupt productive discussions.
>
> Online, caucusing can be much more flexible. In Online Resolution's "Resolution Room" environment, mediators can caucus with parties at the same time the joint discussion is going on. In the joint discussion, postings reach all participants, but in caucus discussions the mediator interacts with one side or the other. This allows the mediator to caucus through the entire mediation, even when the discussion is progressing well. It also prevents the other side from having to wait during caucusing, or to wonder what secrets are being passed while they are out of the room.[32]

Other scholars and practitioners hold similar views.[33] In short, as to information, the arguments supporting online mediation

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[31] Colin Rule, *New Mediator Capabilities in Online Dispute Resolution*, MEDIATE.COM, December 20, https://www.mediate.com/articles/rule.cfm

[32] *Id*. ("Some mediators are against caucusing and argue that parties can better communicate and work with each other in joint session."); *see*, *e.g.*, David Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 NEGOT. J. 263 (2011).

[33] *See* Using E-Mediation and Online Mediation Techniques for Conflict Resolution, PROGRAM ON NEGOTIATION, January 8, 2018, https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/ ("Early studies of online mediation have found it to be an effective means of resolving disputes, Ebner writes. It offers convenience, allowing parties to participate when they have the time. The slower pace of e-mail talks (relative to real-time conversations) allows mediators to carefully craft their

seem to be based on a "more is more" logic – the goal of information seeking is advanced by online mediation because it offers *more* access to information, *more* time for the parties to reflect and craft statements, *more* options for mediator to caucus, and *more* technological assistance. These arguments, while emphasizing the advantages associated with asynchrony, have not adequately responded to an unavoidable allegation related to the text-based nature of mediation – i.e., text can only carry *limited* information. Proponents of online mediation may still have to show, sometimes for communications, *less is more*.

To do this, we need to distinguish two concepts that could easily confuse with each other: *information* and *message*. Message (e.g., thought and idea) is what people want to convey; while information (e.g., text, body language, pictures, and video) is what carries the message. By seeking *more* information, people are actually asking for *clearer* messages. For example, by asking whether someone leaves his fingerprint on the weapon, people want to know if he is the killer; by observing a witness' expressions and body language, people want to know if he is telling the truth. What really matters is whether the message is clear, not how much information is provided. More information could lead to confusion and distraction. We are living a world of "information dump": people are providing and receiving more and more information, with the same brains and the 24 hours.

responses and strategy rather than needing to react in the moment to disputants' statements."); *see also* Jim Melamed, *The Internet and Divorce Mediation*, MEDIATE.COM, January 2002, http://www.mediate.com/articles/melamed9.cfm ("Experienced mediators are well aware of the benefits of asynchrony. This is a big part of the reason that many mediators 'caucus' (meet separately) with participants. Mediators want to slow the process down and assist participants to craft more capable contributions. This concept of slowing the process down and allowing participants to safely craft their contributions is at the heart of caucusing. Surely, the Internet works capably as an extension of individual party caucus and is remarkably convenient and affordable. Internet communications take less time to read and clients do not hear a professional fee meter clicking. When the Internet is utilized for caucus, the 'non-caucusing participant' does not need to sit in the waiting room or library reading Time magazine or growing resentful at being ignored."); *see also* Derric Yeoh, *Is Online Dispute Resolution The Future of Alternative Dispute Resolution?*, KLUWER ARBITRATION BLOG, March 29, 2018, http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/ ("It would also allow parties time to fashion their response, as one's immediate response at a mediation is not always one's best response.").

Excessive information would not only consume our energies but also prevents us from seeing the message. Therefore, Twitter only allows people to tweet 140 characters one time and most courts have page limit for briefs. As often said by lawyers, "If I had more time, I would have written a shorter brief."[34]

In an offline mediation, it could easily be the case where one person is too talkative,[35] the parties are interrupting each other, the parties are "dumping" too much information via their words, tones, expressions, gestures, with no one really catching the messages behind. In contrast, in an online mediation, the technologies-embedded platform can better enforce rules on the time, order, and length of communications. Interruption is hardly possible. The text-based approach controlled by a system not only allows people to better absorb and process information but also force them to be concise – e.g., the text-based approach forces people to communicate what is behind face, gesture, voice, and tone clearly in the text.[36] For example, SquareTrade provides forms with yes-or-no questions to the parties and limits the length of the text. So users "had to be very concise about what you were doing… Once that happened, these disputes were fairly easy to resolve."[37] If a message cannot be translated into text, there is usually a risk that the message, while being conveyed by body language, is too subtle or ambiguous and could easily be open to endless interpretation or guessing.[38] Under such circumstance, the

[34] This was originally from the quote "If I Had More Time, I Would Have Written a Shorter Letter" given by French mathematician and philosopher Blaise Pascal.

[35] *See* David Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 NEGOT. J. 263, 282 (2011).

[36] Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 CARDOZO J. CONFLICT RESOL. 717, 740 (2016-2017) ("these and other such anonymizing features of text-based communication can increase the chances that disputes will be resolved on the basis of what is said, rather than how it is said, or who says it.").

[37] Ethan Katsh, *The Evolution of ODR Mediator*, COURTS AND TRIBUNALS JUDICIARY, February 16, 2015, https://www.judiciary.gov.uk/wp-content/uploads/2015/02/ethan_katsh_int2_evo_of_odr.pdf.

[38] *See* Negeen Rivani, *Online Mediation: If the Shoe Fits*, MEDIATE.COM, May 2013, https://www.mediate.com/articles/RivaniN1.cfm ("Body language and nonverbal cues may be misconstrued and unintentionally result in impasse during the live mediation. Simple cues, such as crossed arms or rolling of the

party should probably try to restructure her message rather than dumping more information.[39] Opponents may argue that a text-based mediation creates an imbalance between those who are well-educated and those who are not. There are three responses. First, some people are good at writing while the others are good at speaking, and education affects both writing and speaking skills; second, there have already been many writing programs that help people improve their writings in various aspects – e.g., Grammarly (grammar), [40] Heiminway Editor (readability), [41] Stylewriter (readability), [42] and Judicata (persuasiveness). [43] Many of the

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eyes can turn a successful settlement into a game of revenge and impasse. Additionally, because tone is not naturally conveyed through textual communication, antagonistic or aggressive conduct, including shouting or negative gestures, will not be communicated without the party thinking about it beforehand. When nonverbal communication is removed from the dialogue, the parties are forced to focus on the content of the message, rather than the potentially distracting gestures that may replace the substantive issues."); *see also* Andrea M. Braeutigam, *Fusses That Fit Online: Online Mediation in Non-Commercial Contexts*, 5 APPALACHIAN J.L. 275, 293 (2006) ("Body language can be misinterpreted, or worse, can be negative. If, for example, a person has crossed arms, they may be perceived as angry, closed off, or simply cold. When a party perceives negative behavior, whether or not it is a misinterpretation, they tend to focus on negative content and will react to it, increasing the likelihood of retaliatory behavior and impasse.").

[39] See *Id*. In fact, people could be overconfident in their ability to detect clues from expressions. *See* Bella DePaulo, *If You Watch 'Lie to Me,' Will You Become More Successful at Detecting Lies?*, PSYCHOLOGY TODY, Jun 13, 2011, https://www.psychologytoday.com/us/blog/living-single/201106/if-you-watch-lie-me-will-you-become-more-successful-detecting-lies ("In our review of hundreds of studies of skill at detecting deception, we found an average accuracy rate of only 54% (when a chance level would have been 50%). One of the papers in that collection is a study in which my colleagues and I compared the lie-detection judgments of experienced law enforcement officers to those of college students. The law enforcement officers were no more accurate - they only thought they were."); *see also* Tom Jacobs, *In Truth, 'Lie to Me' Breeds Misconceptions*, PACIFIC STANDARD, July 8, 2010, https://psmag.com/social-justice/in-truth-lie-to-me-breeds-misconceptions-18677 ("the most recent research casts doubt on the accuracy and effectiveness of lie-detection methods presented on the series as unfailingly successful.").

[40] Grammarly, https://app.grammarly.com (last visited May 2, 2018).

[41] Hemingway Editor, http://www.hemingwayapp.com (last visited May 2, 2018).

[42] Style Writer, http://www.editorsoftware.com/StyleWriter.html (last visited May 2, 2018).

functions are free and can help disputants improve their written statements in online mediation. Similar programs can also be incorporated into the mediation platform given its good access to technology; third, there are plenty of well-developed speech-to-text transcription programs [44] which have been widely used in litigations and arbitrations and can empower those who are not good at writing with the capability to prepare written statements.

In short, online mediation not only allows the parties and the mediator to have better access to information, more options to communicate but also "force" them to better convey messages by controlling the communication process and setting limitations on information output. The text-based "disadvantage" of online mediation is actually a significant advantage in another sense, as less could sometimes be more for communications. People may argue that the benefits from controlled communications should be attributed to the technologies used to manage communications, not online mediation. However, it should be apparent that incorporating the technologies is easier in online mediation as the parties are already using an online platform, where applications and programs can be easily embedded, and the communication rules can thereby be easily enforced.

b. Emotion

The feeling that accompanies our cognitive activities "is what gives life its color, and shapes what we know."[45] Oftentimes our perceptions of only make sense when reading with emotions. Psychologists also discovered that emotion is a crucial part of the decision-making process and a people without the ability to feel

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[43] Judicata, https://www.judicata.com (last visited May 2, 2018).

[44] *See* Nicole Black, *Speech-To-Text Dictation For Lawyers: What You Need To Know*, ABOVE THE LAW, January 16, 2017, https://abovethelaw.com/2017/01/speech-to-text-dictation-for-lawyers-what-you-need-to-know; *see also Speech Recognition and Dictation Solutions for Today's Lawyer*, LEGAL TALK NETWORK, March 10, 2015, https://legaltalknetwork.com/podcasts/digital-edge/2015/03/speech-recognition-dictation-solutions-todays-lawyer/ ("These speech solutions… can greatly help lawyers with disabilities, those who type slowly, and can even help younger lawyers improve oral argument abilities.").

[45] DAVID HOFFMAN, MEDIATION: A PRACTICE GUIDE FOR MEDIATORS, LAWYERS, AND OTHER PROFESSIONALS 7-8 (2013).

would have difficulties making decisions.[46] Therefore, reading and handing emotions have long been recognized indispensable for an effective mediation as emotions help us understand the parties', interests, motivations, and decisions.[47]

Rule in his article *New Mediator Capabilities in Online Dispute Resolution* contends that the asynchronous nature of online mediation allows the parties to better handle their emotions and mediators to better deal with their own biases:

> As some online dispute resolution writers have observed, this ability to interact asynchronously can help parties to "be at their best" in a mediation. Instead of reacting emotionally to a new development or escalating a discussion out of surprise, parties can consider an issue and communicate in a considered way. They can still react emotionally, but they have the option of stepping back and reflecting before they respond.
>
> This asynchronous communication can also be a valuable tool for mediators and facilitators. Just as disputants can react emotionally to new developments, neutrals can get caught up in the immediacy of a face-to-face session. Third parties can benefit from the cooling distance provided by asynchronous interaction, allowing them to pay greater attention to their own biases and perhaps enabling them to become more reflective practitioners.[48]

In short, Rule maintains that the asynchronous nature can improve the efficiency of mediation by claiming down the parities and freeing the mediator from unnecessary interferences.[49] This is often the case considering the odds that "the parties have already been negotiating with each other for a very long time and they've probably reached impasse and they're very frustrated with each

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[46] *Id*.

[47] *See* Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?* 1998 BYU L. REV. 1305, 1323-1325 (1998).

[48] Colin, *supra* note 31.

[49] This has been supported by empirical studies and experiments. *See* Anne-Marie B. Hammond, *How Do You Write "Yes"?: A Study on the Effectiveness of Online Dispute Resolution*, 20 CONFLICT RESOL. Q. 261, 277 (2003); *see also* Elaine M. Landry, *Scrolling Around the New Organization: The Potential for Conflict in the On-Line Environment*, 16 NEGOT. J. 133, 139 (2000).

other"[50] when they decide to turn to a third-party mediator.[51] This "cool off" argument is widely held by the proponents of online mediation,[52] including those who contend that online mediation is specifically suitable for divorce disputes[53] or other disputes where there is an imbalance of powers.[54] The logic behind the "cool off"

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[50] Colin Rule, Modria - The Operating System for ODR, COURTS AND TRIBUNALS JUDICIARY, February 16, 2015, https://www.judiciary.gov.uk/wp-content/uploads/2015/02/colin_rule_modria_os_for_odr.pdf.

[51] *See* Harry T Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668, 678 (1985-1986) (mentions a widely accepted "broken-telephone" theory, which suggests that "disputes are simply 'failures to communicate' and will therefore yield to 'repair service by the expert 'facilitator.'"").

[52] *See*, *e.g.*, Ethan Katsh, *The Evolution of ODR Mediator*, COURTS AND TRIBUNALS JUDICIARY, February 16, 2015 https://www.judiciary.gov.uk/wp-content/uploads/2015/02/ethan_katsh_int2_evo_of_odr.pdf ("Well, the system has to be programmed, obviously, in a certain way. The goal is to encourage the parties to communicate with each other seriously or without yelling at each other."); *see also* Negeen Rivani, *Online Mediation: If the Shoe Fits*, MEDIATE.COM, May 2013, https://www.mediate.com/articles/RivaniN1.cfm ("During highly emotional moments of mediation, a participant may make a regretful statement in the heat of the moment, disrupting the entire mediation process. On the other hand, online mediation allows each party to cool off before responding. The participants may use the time period to reflect on the state of affairs and on how to appropriately respond. Subsequently, each response can be more carefully constructed and rid of unnecessary emotional attachments… The mediator may also benefit from blocks of time between each response because she is dealing with focused statements from the disputants and is given the opportunity to reflect on the statements on her own time as well."); *see also* Andrea M. Braeutigam, *Fusses That Fit Online: Online Mediation in Non-Commercial Contexts*, 5 APPALACHIAN J.L. 275, 295-296 (2006).

[53] *See*, *e.g.*, Martin Gramatikov & Laura Klaming, *Getting Divorced Online: Procedural and Outcome Justice in Online Divorce Mediation*, 14 J.L. & FAM. STUD. 97 (2012) (A study of the experiences of 126 individuals who participated in online divorce suggests that "online divorce mediation is a viable alternative to both offline mediation and other more traditional modes of dispute resolution in divorce"); *see also* Rebecca Brennan, *Mismatch.com: Online Dispute Resolution and Divorce*, 13 CARDOZO J. CONFLICT RESOL. 197 (2011-2012); *see also* Rebecca Brennan, *Match or Mismatch.com - Online Dispute Resolution and Divorce*, 21 DISP. RESOL. MAG. 15 (2014-2015); *see also* Susan L. Brooks, *Online Dispute Resolution and Divorce: A Commentary*, 21 DISP. RESOL. MAG. 18 (2014-2015).

[54] *See*, *e.g.*, Sarah Rogers, *Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence*, 24 OHIO ST. J. ON DISP. RESOL. 349, 351 (2008-2009) ("Furthermore, the unique psychological characteristics of the

argument, however, still seems to be that online mediation helps to better handle emotions by *avoiding* them, not *addressing* them. A question that naturally follows is could online mediation help to address the emotions, although in a text-based and asynchronous setting where a great deal of information (e.g., facial expressions) have probably been missing? This article maintains that the answer is yes: first, people are not necessarily getting *less* information as to emotions in an online setting; second, *less* information does not necessarily make emotional communication less efficient – the "less is more" logic also works in this regard.

First, we are not necessarily getting less information about emotions in an online setting. In an era of cyberspace, people are spending more and more time communicating online via emails and chat applications and have developed a vast amount of symbols (e.g., emoticons), phases, and norms in communicating emotions.[55] Empirical studies show there is no indication that communication of emotions is more difficult in computer-mediated communication than in face-to-face communication.[56] Research even "show[s] more frequent and explicit emotion communication in CMC [computer-mediated communication] than in F2F [face-to-face communication]."[57] Therefore, the instinct that there is less

victim-offender relationship may make a face-to-face, intimate meeting between the two parties more damaging than healing.") *cf*. Kathleen Daly & Julie Stubbs, *Feminist Engagement with Restorative Justice*, 10 THEORETICAL CRIMINOLOGY 9, 17 (2006).

[55] *See* Andrea M. Braeutigam, *Fusses That Fit Online: Online Mediation in Non-Commercial Contexts*, 5 APPALACHIAN J.L. 275, 291 (2006) ("Emoticons, such as 'Smileys' (☺), have become a useful way of communicating emotion online. Simple typing techniques operate similarly. For example, 'SHOUTING' or an 'angry email' is accomplished by using ALL CAPS. Abbreviations have also become a common way for online communicators to convey tone and emotion in their messages. The abbreviations IMHO (in my humble opinion) and LOL (laugh out loud) are descriptors used to temper a direct statement, and to underscore humorous statements. Additionally, online communicators will often mark a statement with the desired tone and meaning. To illustrate: 'Today is a beautiful day! I'm so lucky to be inside working!'").

[56] *See* Daantje Derks, Agneta H. Fischer & Arjan E.R. Bos, *The Role of Emotion in Computer-Mediated Communication: A review* (May 2008) COMPUTERS IN HUMAN BEHAVIOR, *available at* https://ac.els-cdn.com/S0747563207000866/1-s2.0-S0747563207000866-main.pdf?_tid=8fe6982a-7af2-4121-902e-a2f0babd83ca&acdnat=1523666096_eb64b0ccc677b4a1d4387ba1c86a00d7.

[57] *Id*.

information *output* in an online mediation does not seem to be true. How about *input*? Are we able to adequately receive and process the emotional information online? The above-mentioned discovery indicates yes otherwise people would not have been that willing to express emotional information online. In addition, research further shows that computers, with assistance from technologies such as big data analytics and artificial intelligence, may help (or even outperform) humans in reading emotions.[58] In the marketing industry, "[a] handful of companies are developing algorithms that can read the human emotions behind nuanced and fleeting facial expressions to maximize advertising and market research campaigns. Major corporations including Procter & Gamble, PepsiCo, Unilever, Nokia and eBay have already used the services." [59] Emotion-detecting technologies like these are expected to be incorporated into the online mediation platform and help secure the input of emotional information.

Second, less information does not necessarily make emotional communication less efficient. As discussed above, for information, what really matters is the message behind. Same as emotions. When we are *addressing* emotions, we need to take a step back and understand what we are really dealing with. Law professor Roger Fisher[60] and psychologist Daniel Shapiro in their

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[58] *See* Melia Robinson, *Two Students from MIT and Stanford Created an Algorithm that Detects Human Emotion*, BUSINESS INSIDER, Jun 6, 2016, http://www.businessinsider.com/simple-emotion-stanford-mit-students-2016-6 ("The Simple Emotion algorithm works by monitoring acoustic features in speech — such as voice frequency, volume, and changes in tone over time — and comparing them to a library of sounds and tones. It identifies an emotion by finding the closest match in the catalog… Today, it understands between 30 and 40 emotions…"); *see also* Adam Conner-Simons & Rachel Gordon, *Detecting Emotions with Wireless Signals Measuring Your Heartbeat and Breath: Device Can Tell If You're Excited, Happy, Angry, or Sad*, MIT NEWS, September 20, 2016, http://news.mit.edu/2016/detecting-emotions-with-wireless-signals-0920 ("By measuring subtle changes in breathing and heart rhythms, EQ-Radio is 87 percent accurate at detecting if a person is excited, happy, angry or sad — and can do so without on-body sensors.").

[59] Cameron Scott, *With Emotion Recognition Algorithms, Computers Know What You're Thinking*, SINGULARITY HUB, January 19, 2014, https://singularityhub.com/2014/01/19/with-emotion-recognition-algorithms-computers-know-what-youre-thinking/#sm.00001n2mntsmbdfmktdvt87nngnm3.

[60] Prof. Fisher is also the the co-author (with William Ury) of the book *Getting to Yes*.

book *Beyond Reason: Using Emotions as You Negotiate* encourage us to switch our attention from emotions to the underlying *concerns* that generate them:

> Rather than getting caught up in every emotion you and others are feeling, turn your attention to what generates these emotions.
>
> *Core concerns* are human wants that are important to almost everyone in virtually every negotiation…
>
> Core concerns offer you a power framework to deal with emotions without getting overwhelmed by them…
>
> Those core concerns are *appreciation*, *affiliation*, *autonomy*, *status*, and *role*.[61]

In particular, Fisher and Shapiro explain how those concerns may be ignored or met[62] and the corresponding risks and powers that result.[63] Regardless of whether we accept Fisher and Shapiro's classification or not, their studies shed valuable lights on dealing with emotions - *addressing* emotions means *identifying* and *meeting* the underlying concerns. So the next question is what is stopping people from identifying the concerns (much less meeting them)? Research shows that "venting of intense emotions by one party often produces an equal and opposite reaction by the other parties" and "[n]euroscience tells us that when someone is angry with us, this emotion may make rational discourse difficult."[64] To avoid this, mediators sometimes "use separate 'caucus' sessions to create a safe place for venting, thereby avoiding a situation in which the other parties' reactions to the venting escalate the conflict."[65] As mentioned above, caucusing is easier to manage in an online mediation as it allows a mediator to conduct concurrent caucusing without creating much disruption. Leading mediation practitioner and law lecturer David A. Hoffman

[61] ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE 15 (2006).

[62] *Id*. at 17.

[63] *Id*. at 19.

[64] David A. Hoffman, *Mediation, Multiple Minds, and the Negotiation Within*, 16 HARV. NEGOT. L. REV. 297, 303 (2011).

[65] *Id*. at 304-305.

in his article *Mediation, Multiple Minds, and the Negotiation Within* mentions an Internal Family Systems approach to conducting "reflective practice" with a party (including the mediator) to explore her emotions and motivations.[66] As mentioned above, the text-based and asynchronous natures of online mediation allow (or force) the mediation participants to be more reflective.

After we have overcome the emotional barriers and identify the concerns, the next question is how to meet them. Research indicates that acknowledgment is the key. Negotiation lecturers and consultants Douglas Stone, Bruce Patton, and Sheila Heen in their book *Difficult Conversations: How to Discuss What Matters Most* contend that the reason why the parties are stuck in emotions and not meeting the underlying concerns (which then generates more emotions) is that oftentimes people are "not saying to each other" what they are feelings.[67] In fact, they are *venting* it, not *expressing* it.[68] To overcome this, they provide the following guidelines for describing or expressing feelings:

- Frame feelings back into the problem[69]
- Express the full spectrum of your feelings (e.g., not just anger, but also potential appreciation, and reassurance)[70]
- Don't evaluate – share without judging, attributing, or blaming[71]

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[66] *Id.* at 322, 326.

[67] DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST 22 (2010); *see also Id*., at 24 ("In fact, the gap between what you're really thinking and what you're saying is part of what makes a conversation difficult. You're distracted by all that's going on inside. You're uncertain about what's Okay to share, and what's better left unsaid. And you know that just saying what you're thinking would probably *not* make the conversation any easier.").

[68] *Id.* at 101 ("Too often we confuse being emotional with expressing emotions clearly. They are different. You can express emotion well without being emotional, and you can be extremely emotional without expressing much of anything at all. Sharing feelings well and clearly requires thoughtfulness.").

[69] *Id*. at 102.

[70] *Id*.

[71] *Id*.

In particular, the authors highlight the importance of acknowledgment of feelings – i.e., "letting the other person know that what they have said has made an impression on you, that their feelings matter to you, and that you are working to understand them." [72] Fisher and Shapiro's studies break down the acknowledgment of feelings into 1) for *appreciation*: acknowledging the merit of feelings, 2) for *affiliation*: treating the a party as a colleague, 3) for *autonomy*: respecting the freedom to decide important matters, 4) for *status*: recognizing the a party deserves her standing, and 5) for *role*: let a party feel that her current role and activities are personally-fulfilling.[73]

In short, as to *addressing* emotions, scholars and practitioners have already provided valuable guidelines on *identifying* and *meeting* the concerns underlying the emotions. While a text-based and asynchronous online mediation cannot prevent people from not following these guidelines, it could still provide guidance next to each text box (e.g., describe all your feelings without blaming the other party) assisting users in making statements. Moreover, the online platform can require the parties to fill out a preparation form or checklist in order to better explore their emotions in a structured way (see Appendix I for example). Future technology may allow the online platform to store and analyze data from the cases and help to recognize patterns of emotions and concerns and provide relevant advice. Notice that this could raise ethical issues on confidentiality and data privacy as data misuse has always been a concern in the world of cyberspace. For example, it was recently discovered that "the personal data of up to 87 million Facebook users was improperly harvested by the consulting firm Cambridge Analytica."[74] Similar risks also exist in online mediation, where users may have no idea of whether and how their data might be used:

> ODR providers may store sensitive communications and records, such as personally identifying information; opinions

[72] *Id*. at 105.

[73] *See* ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE 17 (2006).

[74] Nellie Bowles, *After Cambridge Analytica, Privacy Experts Get to Say 'I Told You So'*, THE NEW YORK TIMES, April 12, 2018, https://www.nytimes.com/2018/04/12/technology/privacy-researchers-facebook.html.

> and communications made to other disputants or neutrals with the expectation that they would not be shared; and records relating to health, education, and employment. This privacy interest is two-pronged: (1) disputants may want protection against unauthorized *access* of data, in the form of technical and physical security, and (2) disputants may want protection against unauthorized and unexpected (or otherwise unconsented to) *use* of data.[75]

The concern, however, is associated with offline mediation as well. Information has to be kept somewhere, either at the mediator's notebook, personal computer, or a cloud drive. There is always a risk that information is leaked, no matter where it is stored. The advantage of storing information an online platform is that the custodians would be cybersecurity specialists, who, compared with mediators, seem to be better equipped to secure data privacy. This is like saving money in a bank could be safer than putting it under the bed. In any event, there seems to always be a trade-off between benefits and privacy in the foreseeable future. In an online mediation, we could at least guarantee that the users are making the trade-off themselves by providing fair warnings and full disclosure of the potential use of data.

c. Process

To recap, as to process for mediation, Sander emphasizes the goal of encouraging flexibility.[76] It should be apparent that online mediation, with good access to technology, is naturally suitable for furthering this goal. In an asynchronous online mediation, the participants do not need to stay with each other full days and can choose to respond to each other at their convenience. Moreover, with assistance from video conference technology (and probably mature virtual reality technology in the future), none of them need to travel to attend the mediation in person. As mentioned above, a mediator can also conduct concurrent caucusing without significantly disrupting or delaying the process.

Recognized ODR pioneer Ethan Katsh in his book *Digital Justice: Technology and the Internet of Disputes* also contends that

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[75] Suzanne Van Arsdale, *User Protection in Online Dispute Resolution*, 21 HARV. NEGOT. L. REV. 107, 130 (2015-2016).

[76] *See* FRANK SANDER, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION AND OTHER PROCESSES 198-199 (2012).

a technology-assisted mediation could provide a facilitator with significant assistance in process management:

> By substituting so ware for a human, and breaking down the mediation process into small components, technology-assisted negotiation could perform many of the tasks previously performed by a human facilitator and could easily scale to an extraordinarily large numbers of cases. These component tasks included: identifying dispute types; exposing parties' interests; asking questions about positions; reframing demands; suggesting options for solutions; allowing some venting; establishing a time frame; keeping parties informed; disaggregating issues; matching solutions to problems; and drafting agreements.[77]

Online working platforms like Yammer allow users to freely create and manage workflows. It is expected that similar technology will at some pointed be incorporated into online mediation and allows participants to do the same[78] – e.g., turning the above-mentioned steps[79] into an easily managed workflow. Such technology also allows the participants to be creative in designing tailor-made processes such as "anonymous brainstorming"[80] and "yes-or-no proposal."[81] The idea behind this

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[77] ETHAN KATSH & ORNA RABINOVICH-ENY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES 34 (2017).

[78] Indeed, there are already platforms in this regard in China. *See*, *e.g.*, Yuandian (元典), https://www.legalmind.cn (last visited May 2, 2018).

[79] See more detailed description of mediation stages in DAVID HOFFMAN, MEDIATION: A PRACTICE GUIDE FOR MEDIATORS, LAWYERS, AND OTHER PROFESSIONALS Ch. 4 (2013).

[80] *See* ETHAN KATSH & ORNA RABINOVICH-ENY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES 64 (2017) ("The online brainstorming tool not only added real efficiency in terms of time, costs, and the administration of the process from the mediators' viewpoint, it also improved the process by empowering parties (especially on the employee side) to voice their opinions—anonymously if they chose. Anonymous input can help to level the playing field among speakers by preventing 'group think' dynamics; however, it also comes at a cost to the other functions performed by mediators while brainstorming face to face, namely, the ability to gauge participation levels and address group dynamics and power imbalances within and among groups of stakeholders. Anonymous channel also undercut efforts to present a unified front (problematic in particular for labor unions) by allowing for fragmentation and individual preferences to be voiced.").

is "decomposition of work," which legal technology and "futurist" Richard Susskind discussed in his book *Tomorrow's Lawyers: An Introduction to Your Future*:

> … namely, that for any deal or dispute, no matter how small or large, it is possible to break it down, to 'decompose' the work, into a set of constituent tasks.
>
> … we can decompose (others would say 'disaggregate' or 'unbundle') work into various tasks and should undertake each, I propose, in as efficient a manner as possible.[82]

Decomposing work not only allows participants to conduct better project management[83] but also creates the possibility of legal process outsourcing ("LPO") – i.e., outsourcing a particular task from the whole process to an outside vendor who can better handle it.[84] For example, in an online mediation where a party needs psychological therapy, a specialist can easily get engaged by logging on the online platform; fact-findings would also be much more convenient as potential witnesses or stakeholders can participate in the process without incurring significant traveling expense.

As discussed above, the asynchronous nature of online mediation helps the participants better process information. Another way to put it, in the discussion about process, is that the distinction between synchronous and asynchronous is a false dichotomy – every mediation is asynchronous. There can only be

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[81] *See* David Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 NEGOT. J. 263, 285 (2011) ("The conventional ground rules for such a mediator's proposal are simple: the mediator makes the same proposal to each party, and each responds confidentially only to the mediator with either a 'yes' or a 'no.' The mediator then reports to the parties either a settlement (because each side said 'yes') or no settlement (because one or more parties said 'no'). Using this mediator's proposal process, each side can take the risk of saying 'yes' without the other party or parties knowing, unless they too said 'yes.'").

[82] RICHARD SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE 37 (2017).

[83] *See Id*. at 39.

[84] *See Legal Outsourcing*, WIKIPEDIA, https://en.wikipedia.org/wiki/Legal_outsourcing (last visited May 2, 2018); *see also* RICHARD SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE 41-44 (2017).

one person speaking each time, and there are always time lags between statements from different persons (if the communication is synchronous the parties must be interrupting each other). In other words, every efficient communication should always be asynchronous, which can only be achieved when the participants strictly follow a procedure. A technology-assisted (or technology-controlled) mediation platform can provide significant assistance in making sure that all participants comply with a given process. Managing the process of offline mediation, by contrast, could be a challenge as a participant can easily make disruptions.[85]

In short, online mediation, with its easy access to technology, is suitable for achieving the goal of process by enhancing flexibility and securing compliance with rules and procedures.

d. Settlement

As mentioned above, the goal of settlement consists of:

- Deal with differences in perceptions and interests between negotiators and constituents (including lawyer and client)
- Help negotiators realistically assess alternatives to settlement
- Stimulate the parties to suggest creative settlements
- Invent solutions that meet the fundamental interests of all parties
- Shift the focus from the past to the future[86]

In general, the goal of settlement concerns generating settlement options, including spotting issues and differences, discovering and mapping interests, and designing proposals that maximize the interests. It should be apparent that this would be advanced by the above-mentioned advantages that further the goals

[85] *See* David Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 NEGOT. J. 263, 282-284 (2011) ("Fortunately, very few lawyers or clients are as unmanageable as Jane. But where such problem personalities are found, managing the mediation properly may require not only separating the parties but also creating a time structure to manage talkative parties so that each side has equal, or approximately equal, time with the mediator.").

[86] *See* FRANK SANDER, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION AND OTHER PROCESSES 198-199 (2012).

of information, emotion, and process: seeing the *messages* behind the *information* from each other allows the participants to make more thoughtful decisions; understanding the *concerns* underlying *emotions* helps the parties better create options meeting their interests; a process that is not only flexible be able to secure the parties' compliance with procedures increases the odds of getting from dispute to settlement smoothly and efficiently.

Spotting issues, mapping interests, and designing options require solid analytical capability, which is an area where computers have begin manifesting significant advantages, as shown by IBM Watson[87] and AlphaGo.[88] Similar technologies are expected to be utilized in online mediation. Katsh claims that technology functions as a "Fourth Party"[89] in an online mediation, assisting the participants in handling a variety type of tasks:

> The Fourth Party may, in less complex disputes (such as many eCommerce disputes), replace the human third party by helping the parties identify common interests and mutually acceptable outcomes. Templates and structured forms can be employed that allow users to choose from various options and, by comparing the choices made by the parties, can highlight potential areas of agreement. More commonly, the Fourth Party assists, enhances, or complements the mediator or arbitrator. For example, consider the specific informational tasks performed by third party neutrals. These might include brainstorming, evaluating, explaining, discussing, identifying, defining, organizing, clarifying, listing, caucusing, collecting, aggregating, assigning meaning, simulating, measuring, calculating, linking, proposing, arranging, creating, publishing, circulating and exchanging, charting, reminding, scheduling, monitoring, etc. Some of these are simple or clerical but some

[87] *See Watson*, WIKIPEDIA, https://en.wikipedia.org/wiki/Watson_(computer) (last visited May 2, 2018) ("Watson is a question-answering computer system capable of answering questions posed in natural language… On July 29, 2016, IBM and Manipal Hospitals (a leading hospital chain in India), announced launch of IBM Watson for Oncology, for cancer patients. This product provides information and insights to physicians and cancer patients to help them identify personalized, evidence-based cancer care options.").

[88] *See AlphaGo*, WIKIPEDIA, https://en.wikipedia.org/wiki/AlphaGo (last visited May 2, 2018) ("AlphaGo is a computer program that plays the board game Go… At the 2017 Future of Go Summit, AlphaGo beat Ke Jie, the world No.1 ranked player at the time, in a three-game match.").

[89] *See* ETHAN KATSH & JANET RIFKIN, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE 93 (2001).

> involve making decisions at appropriate times and in appropriate ways. Technology can assist with all of these efforts.[90]

Katsh in *Digital Justice: Technology and the Internet of Disputes* also contends that the collection of data through ODR may further the development of dispute resolution algorithms:

> The collection of data through ODR also provides the means for developing and refining algorithms that can identify patterns on the sources of disputes (for example, sellers' ambiguous shipping policies) or effectiveness of various strategies for the resolution of disputes (for example, the stage in which dispute resolution is offered), which can then be employed to prevent disputes and improve dispute resolution processes.[91]

In short, although it remains to be seen to what extent online mediation may leverage the power of technology to enhance its effectiveness, considering that a certain part of the work in mediation could be standardized and that online mediation naturally has good access to technology, it should be safe to predict that relevant technologies (or the "Fourth Party") will be utilized in online mediation to equip humans with better analytical capability in designing and reaching settlements. For example, research showed that machine learning could improve judges' decision-making in deciding whether to jail a defendant.[92]

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[90] *See* Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C. L. REV. 329, 330 (2016).

[91] ETHAN KATSH & ORNA RABINOVICH-ENY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES 64 (2017); *see also* Ethan Katsh, *ODR: A Look at History*, MEDIATE.COM, https://www.mediate.com/pdf/katsh.pdf (last visited May 2, 2018) ("[w]hen a negotiation problem is modeled, a computer can act as an intelligent agent using optimization algorithms that seek the best solution...Optimization algorithms utilize detailed and highly accurate information from all parties, information that they would never provide each other and in some cases not entrust to a human mediator. With anything other than the very simplest of cases, this optimization is beyond the capabilities of any unassisted human.").

[92] *See* Jon Kleinberg, Himabindu Lakkaraju, Jure Leskovec, Jens Ludwig, Sendhil Mullainathan, *Human Decisions and Machine Predictions*, NBER WORKING PAPER (February 2017), *available at* http://www.nber.org/papers/w23180.pdf; *see also* Tom Simonite, *How to Upgrade Judges with Machine Learning*, MIT TECHNOLOGY REVIEW, March 6, 2017, https://www.technologyreview.com/s/603763/how-to-upgrade-judges-

In addition to analytical capability, a critical issue that may affect the effectiveness of settlement is trust building – the parties need to have faith in the settlement, believing that it is impartial and serves their interests. The conventional approach to addressing this concern is engaging an independent third party (i.e., a mediator) to facilitate the resolution.[93] A mediator with a good reputation and no conflict of interest helps establish trust. Online mediation offers a commentary (not alternative) approach to addressing the issue - engaging a "Fourth Party". Unlike human beings, the Fourth Party is more neutral[94] and is less likely to accept bribes, form bias over a party from past dealings, or make self-serving recommendations (e.g., pushing a settlement in order to maintain a high settlement rate). Compared with mediators, the Fourth Party is more of a repeat player – it helps mediate all the cases on one platform. Therefore, it is putting its reputation on the line, which provides strong incentives to the engineers behind to ensure the quality of the Fourth Party. In addition, research has also found that the mediator's ability to manage process also affect trust-building.[95] As disused in the prior section, a mediator can better manage the process (i.e., securing both flexibility and compliance) in online mediation with its easy access to technology. Therefore, online mediation has its unique advantages in building the parties' trust.

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with-machine-learning/ ("In a new study from the National Bureau of Economic Research, economists and computer scientists trained an algorithm to predict whether defendants were a flight risk from their rap sheet and court records using data from hundreds of thousands of cases in New York City. When tested on over a hundred thousand more cases that it hadn't seen before, the algorithm proved better at predicting what defendants will do after release than judges.").

[93] *See* Jean Poitras, *What Makes Parties Trust Mediators?*, NEGOT. J. 307, 308 (2009) ("According to Morton Deutsch (1958), individuals are more likely to trust someone if they believe that person has nothing to gain from untrustworthy behavior. It is therefore important for the mediator to show the parties that he or she has no interest in favoring one party over another.").

[94] *See* Sarah Rudolph Cole & Kristen M Blankley, *Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be*, 38 U. TOL. L. REV. 193, 204 (2006-2007) ("The Internet is also a neutral platform for negotiation because, unlike an attorney's office or other setting, neither party controls it.").

[95] *See* Jean Poitras, *What Makes Parties Trust Mediators?*, NEGOT. J. 307, 309 (2009) ("Parties develop trust in the mediator when they trust his or her ability to manage the process.").

Concerns may come from two respects: 1) the "Fourth Party" could also be biased, and 2) it could be difficult for the "Fourth Party" to make an understandable self-explanation of its reasoning. Data/algorithmic bias has long been recognized as a critical barrier to improving data analytics technology. Some experts have warned that algorithms with hidden bias are "everywhere"[96] and "already routinely used to make vital financial and legal decisions."[97] "Examples of algorithmic bias that have come to light lately, they say, include flawed and misrepresentative systems used to rank teachers, and gender-biased models for natural language processing."[98] ProPublica, a Pulitzer Prize–winning nonprofit news organization, discovered that COMPAS, a risk assessment software used to predict future criminals, was biased against blacks.[99] A related issue, which is also a barrier to overcome data/algorithmic bias, is the so-called "Black Box Problem." "The black box is an abstraction representing a class of concrete open system which can be viewed solely in terms of its stimuli inputs and output reactions."[100] The problem, in the setting concerning algorithms, means that "[n]o one really knows how the most advanced algorithms do what they do."[101] Take a self-driving car for example, due to the complexity of the car's decision-making algorithm, even the engineers how made the car could not

[96] Will Knight, *Biased Algorithms Are Everywhere, and No One Seems to Care*, MIT TECHNOLOGY REVIEW, July 12, 2017, https://www.technologyreview.com/s/608248/biased-algorithms-are-everywhere-and-no-one-seems-to-care.

[97] *Id*.

[98] *Id*.

[99] *See* Matthias Spielkamp, *Inspecting Algorithms for Bias*, MIT TECHNOLOGY REVIEW, June 12, 2017, https://www.technologyreview.com/s/607955/inspecting-algorithms-for-bias/ ("Specifically, 'blacks are almost twice as likely as whites to be labeled a higher risk but not actually re-offend.' And COMPAS tended to make the opposite mistake with whites: 'They are much more likely than blacks to be labeled lower risk but go on to commit other crimes.'").

[100] *Block box*, WIKIPEDIA, https://en.wikipedia.org/wiki/Black_box (last visited May 2, 2018).

[101] Will Knight, *The Dark Secret at the Heart of AI*, MIT TECHNOLOGY REVIEW, April 11, 2017, https://www.technologyreview.com/s/604087/the-dark-secret-at-the-heart-of-ai.

fully understand how it made decisions.[102] Even worse, unlike a human decision-maker, a car would not be able to explain itself or testify. If, in an online mediation, the Fourth Party makes a recommendation which it cannot explain the reasoning behind, how can the parties trust such a recommendation? Similar problems have already occurred in the real life. For example, a Wisconsin convict has challenged a COMPAS-assisted judge decision which determined that his right to due process be violated "because the workings of the system were opaque to the defendant."[103] Scholars have also argued that "a system of public dispute resolution must be based on substantive standards and procedural rules that are transparent and known equally to all. The conception of fair outcome underlying public dispute resolution cannot be private."[104]

Moreover, data/algorithmic bias and the "block box" problem raise ethical issues concerning the principle of self-determination, according to which a facilitator should support and encourage "the parties in a mediation to make their own decisions (both individually and collectively) about the resolution of the dispute, rather than imposing the ideas of the mediator or others."[105] If the Fourth Party's analytical capability becomes too strong so that the parties would heavily rely on it, and unexplainable so that the parties do not understand its

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[102] *See Id*.; *see also* Finale Doshi-Velez and Mason Kortz, *How do we hold AI accountable?*, ROYAL GAZETTE, March 21, 2018, http://www.royalgazette.com/opinion/article/20180321/how-do-we-hold-ai-accountable ("Unlike a human, though, AI isn't necessarily able to explain its internal processes to an outsider — unless we build in the capacity to do so. Entrusting important decisions to a system that can't explain itself presents obvious dangers.").

[103] Matthias Spielkamp, *Inspecting Algorithms for Bias*, MIT TECHNOLOGY REVIEW, June 12, 2017, https://www.technologyreview.com/s/607955/inspecting-algorithms-for-bias.

[104] Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 CARDOZO J. CONFLICT RESOL. 717, 745 (2016-2017).

[105] *See* David Hoffman, *Ten Principles of Mediation Ethics*, 18 ALTERNATIVES 147 (September 2000), reprinted in Mediation: Approaches and Insights (Juris Publishing 2003) (a summary of basic principles), *available at* https://blc.law/wp-content/uploads/2016/12/2005-07-mediation-ethics-branchmainlanguagedefault.pdf.

recommendations, it could have the effects of imposing ideas on parties.

The above are all legitimate concerns over engaging a Fourth Party in an online mediation. There are four potential responses. First, apart from a smart AI Fourth Party, online mediation still has relatively easy access to other types of technologies, such as process management software whose benefits are undeniable; we can hold on incorporating complicated algorithmic technologies until they become understandable; second, algorithmic technologies are developing rapidly and progresses have been made on letting algorithms explain themselves;[106] third, human brains are also like black boxes, the way how they work have not yet been fully deciphered yet; mediators, like any human decision makers, could also have unconscious biases[107] and as a result, their decision-makings would not be fully explainable or predictable, and fourth, having the Fourth Party and the mediator work together (with the mediator still leading the process) may help them overcome each other's shortcomings.

In sum, the unique features of online mediation can help parties better make decisions and generate settlement options. Online mediation also helps build the parties' trust in the settlement by engaging a technology-assisted Fourth Party to assist in the decision-making process. Data/algorithmic bias and the

[106] *See* Will Knight, *The Dark Secret at the Heart of AI*, MIT TECHNOLOGY REVIEW, April 11, 2017, https://www.technologyreview.com/s/604087/the-dark-secret-at-the-heart-of-ai/ ("Regina Barzilay, an MIT professor… and her students are also developing a deep-learning algorithm capable of finding early signs of breast cancer in mammogram images, and they aim to give this system some ability to explain its reasoning, too."); *see also* Dong Huk Park, Lisa Anne Hendricks, Zeynep Akata, Anna Rohrbach, Bernt Schiele, Trevor Darrell1 & Marcus Rohrbach, *Multimodal Explanations: Justifying Decisions and Pointing to the Evidence*, ARXIV.ORG (Feb. 15, 2018), *available at* https://arxiv.org/pdf/1802.08129.pdf ("We propose a multimodal approach to explanation, and argue that the two modalities provide complementary explanatory strengths… We quantitatively show that training with the textual explanations not only yields better textual justification models, but also better localizes the evidence that supports the decision.").

[107] *See* Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J. L. & POL'Y 71 (2010); *see also* Christopher Honeyman, *Patterns of Bias in Mediation*, 1985 J. DISP. RESOL. (1985).

"block box" problem do raise concerns over the trustworthiness of the Fourth Party and ethical issues concerning the parties' self-determination. The issues, however, are hardly dispositive and expected to be overcome by appropriate procedural design and further technology developments.

IV. CONCLUSION

This article addresses the common concerns over online mediation and encourages a rethinking of its limitations. By looking into the fundamental goals of mediation and the unique features of online mediation, this article maintains that the power of online mediation may be stronger than people normally thought it was – i.e., online mediation, with its unique advantages on information, emotions, process, and settlement, is not only suitable for handling commercial disputes but also capable of resolving a lot more types of disputes where money is not the main issue.

This article does not hold a "one-size-fits-all" position, claiming that online mediation is better than offline mediation for every dispute. Indeed, it would be difficult to imagine that a divorce dispute, where the wife complains that the husband is not spending enough time with her and the kids, is to be resolved purely online, without the stakeholders meeting with each other at all. As Sander had said, "there are many different kinds of mediation that are appropriate in different settings."[108] In a world of "process pluralism,"[109] it is most likely to be the case that an online-offline hybrid approach will be adopted for many disputes. What this article does propose is we can (and should) expect more from online mediation. We need to consider not only *what it is* and but also *what it could be* in a cyberspace era where technologies are reshaping people's behaviors and at the same time exploring the potentials of the inherent features (e.g., text-based, asynchronous, and easy access to technologies) of online mediation. What critiques of online mediation do is not preventing us from using and exploring online mediation. Instead, it reminds

[108] *Supra* note 1.

[109] Carrie Menkel-Meadow, *Are There Systemic Ethics Issues in Dispute System Design - And What We Should [Not] Do About It: Lessons from International and Domestic*, 14 HARV. NEGOT. L. REV. 195, 213 (2009).

us to carefully study the stakeholders' interests in every dispute and design the most appropriate resolution system for them, keeping in mind the goals and principles of mediation, and utilizing all the tools that we have to meet the goals and maximize the stakeholders' interests.

Appendix I – Difficult Conversation Checklist[110]

1. **The Feelings Conversation**
   - 1.1. My feelings
     - 1.1.1. How do I feel about this situation?
     - 1.1.2. Which feelings make sense to share?
   - 1.2. Their feelings
     - 1.2.1. What might they be feeling?
2. **The Identity Conversation**
   - 2.1. My self-image
     - 2.1.1. What do I fear this situation says to me?
     - 2.1.2. What's true about this?
     - 2.1.3. What's not?
   - 2.2. Their self-image
     - 2.2.1. What might be the situation say about them that would be upsetting to them?
3. **What Happen Conversation**
   - 3.1. My story
     - 3.1.1. What is the problem from my point of view?
     - 3.1.2. Data?
   - 3.2. Their story
     - 3.2.1. What is the problem from their point of view?
     - 3.2.2. Data?
   - 3.3. Contributions
     - 3.3.1. Their contributions
       - 3.3.1.1. How have they contributed to the current situation?
     - 3.3.2. My contributions
       - 3.3.2.1. How have I contributed to the current situation?
   - 3.4. Impact and Intent
     - 3.4.1. Impact on me
       - 3.4.1.1. What impact has his situation had on me?
     - 3.4.2. My intentions
       - 3.4.2.1. What were my intentions?
     - 3.4.3. Their intentions
       - 3.4.3.1. What might their intentions have been?

[110] This checklist was re-created from the Difficult Conversation Preparation Worksheet used in the Harvard Negotiation Workshop.

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