DR Currents

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Contents

From the Incoming Chair 2
Mediation Confidentiality 3
New Models of Mediation 9
The Fast Developing ADR Process: 11
The Funnel of Conflict Resolution - Part One:
The Stages of Conflict and Opportunities for Resolution 13
From the Editor 15

From the Incoming Chair

by Joan Grafstein

I am delighted to serve as the Chair of the Georgia Bar Dispute Resolution Section for 2014. First I would like to recognize Taylor Daly for her exceptional leadership of the Section in 2013, and to thank her for sharing her experience and suggestions to help me begin this year. She will truly be a tough act to follow. I also want to thank my fellow officers and members of the Section's Board who showed their commitment by *all* (yes 100 percent) participating in our first meeting of 2014. This is an amazing group of attorneys who work very hard on behalf of the Section and the field of dispute resolution and who have lots of great ideas for programs and activities in the upcoming year.

As for my goals for the Section in 2014, I hope we can:

1. Take our excellent signature ICLE programs, the August Arbitration Institute (which will be our 8th Annual) and the December ADR Institute and Neutrals' Conference, to the next level by offering fresh and practical programs to a broad target audience including: dispute resolution practitioners– from those newest to the field to those most experienced, lawyers for parties (both advocates and in-house counsel), and parties (individuals and business and other organizations with disputes.) We are exploring including concurrent sessions and tracks to meet the needs of these many groups, along with exciting plenary sessions of interest to all. We also want these programs to include diverse views and perspectives of the dispute resolution process, such as the views from different participant roles (mediator, arbitrator, advocate, party), different groups (gender, age, experience, type of industry), and different cultural perspectives (ethnicity, race, nationality, geographic region and more) and effective communication among participants from all these groups. The Section Board is already collecting suggestions for these two signature programs and we ask all members of the Section to contact us with their suggestions for these programs.
2. Increase diversity in our Section's leadership, programs (as speakers, moderators and planners) and membership. I believe we have made progress in gender diversity in my ten years in the field, though we can still go further. But I would like to hear all suggestions for ways to improve our Section's diversity along racial, ethnic, national origin, age and other dimensions. I would like to set up a group within our Section to work on this and will be reaching out to people I know to get the ball rolling. Please send your ideas and suggested contacts, both individuals and groups, including other bar groups, to me at jgrafstein@jamsadr.com and please let me know if you would like to volunteer to part of the group working on this.
3. Continue and broaden our pro bono ADR services. Under Taylor Daly's leadership the Section's partnership with Atlanta Legal Aid is strong and active. This year we will continue our efforts to work with Georgia Legal Services to establish a new pro bono ADR program and will keep you updated through our Section newsletter, *DR Currents*.

And speaking of our newsletter, my goal is for all of us to continue to support Bob Berlin in his superb work as Editor of *DR Currents* by sending him letters, suggestions for topics, feedback on contents and manuscripts for possible publication as articles. This is an excellent publication and we appreciate Bob's hard work, exceptional skill and great enthusiasm in putting it together each quarter.

Thank you for the opportunity to serve as Chair and please keep in touch during the year.

Joan Grafstein is a full-time mediator, arbitrator and special master with JAMS in Atlanta, where she concentrates on complex high stakes disputes in the business/commercial, class action, employment, ERISA, financial, healthcare systems, higher education, personal injury, real property, securities and software development areas. She joined JAMS in 2003 after more than 20 years as in-house counsel for large public and private research universities where she managed litigation and mediation and handled a wide variety of claims and business disputes. Grafstein is a Fellow of the Chartered Institute of Arbitrators, secretary of the Atlanta International Arbitration Society, a member of the National Academy of Distinguished Neutrals, past Chair of the Women in the Profession Section of the Atlanta Bar Association, and was Program co-chair for the American Bar Association Section of Dispute Resolution Spring Annual Conferences from 2010 through 2012. She speaks and writes frequently on dispute resolution topics including e-discovery in arbitration, cost effective commercial arbitration, women in negotiation and mediation, arbitration and mediation/ conciliation in China, and recently co-authored the chapter on Arbitration in Georgia Business Litigation (Robert C. Port, Ed.) ALM Media Properties (2014.)

Mediation Confidentiality

by Steven J. Gold

Introduction

You're an early riser. You like to get to the office before business hours so you can ease into the day with a little mellow morning time. You're sitting at your desk with your morning cup of "joe," reading the latest edition of *The Daily Report*, as is your usual morning habit. There is a highlighted front-page story about a big-time personal injury case that resulted in a significant jury verdict. In its usual thorough coverage, the article details the specifics and the twists and turns leading up to the trial. This was a case of contested liability with significant damages. There was a mediation which did not result in a resolution. The plaintiff's attorney who triumphed at trial provided the reporter with a copy of the plaintiff's mediation statement. The plaintiff's attorney related to the reporter how the mediation went, plaintiff's last demand and defendant's last offer which led to the impasse. Plaintiff's attorney also told the reporter that during a caucus with the mediator, the mediator advised that plaintiff should accept the defendant's final offer because plaintiff would likely come out worse at trial. Defendant's attorney disputed the number provided by plaintiff's attorney as defendant's final offer. The mediator declined to comment. As you complete the article, a fleeting thought crosses your mind, "Aren't mediations supposed to be confidential"? You're interrupted by the morning's first phone call, and you don't give this much further thought.

By coincidence, a few weeks later, you are attending a CLE and the mediator identified in the above article is a featured speaker. You have heard of this mediator who is generally well regarded. You have read other articles in which attorney participants in specific cases described how the mediator handled difficult dynamics successfully, lauding the mediator for his skills. At the CLE, the mediator discusses the recent unsuccessful mediation and other specific case mediations, various issues and factors that came up in the sessions, how the parties and their attorneys handled themselves and how the mediator dealt with the issues. Again, the fleeting thought crosses your mind, "What about mediation confidentiality"? You shrug your shoulders and don't give it much more thought.

The Daily Report article and CLE session described above are fictitious, but as they sometimes say in the movies, "These are fictional accounts based upon some true facts." With some artistic license employed, they are composite stories incorporating the content from many articles and CLE's over the past few years without much embellishment.

So what about mediation confidentiality? Does it exist? Is it important? And if so, what about these articles and the CLE's in which mediation confidentiality appears to have been breached?

When the first of these articles appeared in *The Daily Report*, I was much like the fictional lawyer described above. I thought about breach of mediation confidentiality, wrote it off as an anomaly and gave it little further thought. But as more articles continued to appear, I began to have some concern about mediation confidentiality eroding. I felt someone with an authoritative voice should speak to this matter, so I turned to the Georgia Commission on Dispute Resolution (GCODR), as the prominent voice and standard-bearer for mediation in Georgia. My concerns were taken seriously and addressed first by the Ethics Committee of the Commission and later by the full Commission. What resulted during a nearly two-year odyssey was my involvement in writing a paper for and chairing a panel on confidentiality at the 19th Annual Alternative Dispute Resolution Institute and The 2012 Neutrals' Conference sponsored by the Dispute Resolution Section of the State Bar of Georgia, the GCODR, the Georgia Office of Dispute Resolution (GODR) and ICLE in Georgia; my involvement with a task force of the GCODR which assisted in drafting and revising a new Advisory Opinion 8 of the GCODR which was published in November 2013; and this current article. Advisory Opinion 8 is available online at www.godr.org and my much lengthier paper is available in the ICLE program materials, or you can contact me at gold711@aol.com if you would like a copy.

Due to length constraints, this current article is a mere summary of these lengthier documents, and I will not here provide citations to any authorities mentioned which citations you can find in the other documents. I do, however, need to acknowledge the great input from the other members of the task force drafting Advisory Opinion 8, Shinji Morokuma, Director of GODR and chief drafter; Dr. Timothy Hedeen, current GCODR member and Alan Granath, former GCODR and Ethics Committee member as well as the further assistance, encouragement and support of Judge Charles Auslander, former Chair of the GCODR Ethics Committee and current Chair of the GCODR and Hugh Bell, former member of the GCODR Ethics Committee and current Chair of the GCODR Ethics Committee. Input from the Executive Committee of the Dispute Resolution Section of the State Bar of Georgia was also obtained as part of the drafting process.

The Mediation Confidentiality Standard

The reasons for establishing and observing mediation confidentiality have been extensively discussed in multiple sources and is accepted here as a given without further elaboration. The principle of confidentiality has been one of the pillars of mediation standards recognized by Georgia case law even before it was incorporated by the Supreme Court of Georgia in the Alternative Dispute Resolution Rules it adopted in the 1990's. Additionally, mediation confidentiality has been recognized and incorporated into several nationally-recognized compendiums of standards as well by many states. The American Arbitration Association, the American Bar Association and the Association for Conflict Resolution jointly created and endorsed a "Model Standards of Conduct for Mediators" in 2005 which includes a Standard on Confidentiality. Several family and divorce mediation authorities created a "Model Standards of Practice for Family and Divorce Mediation" endorsed by the ABA and The Association of Family and Conciliation Courts in 2001, which includes a Standard on Confidentiality. The Uniform Mediation Act, adopted by several states, also incorporates confidentiality as a core principle. Guidelines for mediation or similar contracts or agreements signed at the commencement of mediation sessions is the common practice, whereby the parties agree in advance to the "ground rules," including agreeing to confidentiality. Most mediators, in their opening statements at the commencement of a mediation session, verbally re-state and highlight the principles contained in the guidelines, including the principle of confidentiality.

On its most simple terms, observing confidentiality can be summed up in a fairly bright line rule: anything said or done during a mediation session should not be disclosed to or discussed with anyone not in attendance at the mediation session. However, as with many things that may appear simple on the face, there always arise complications, gray areas and nuances. The definition and extent of confidentiality and exceptions to it have been addressed to various degrees by those who have grappled with the many issues that have arisen. The distinction between confidentiality as a privilege and as a duty has also been extensively addressed. The focus of this article is not to delve into the finer points of these issues that have been addressed elsewhere, but to highlight the basic principles that should not be in dispute for the overwhelming majority of case mediations. None of the breaches portrayed at the beginning of this article or in the actual breaches I have noticed over the years involve any of the gray-area nuanced intricacies that lie at the fringes. For some further illumination and discussion on the basic principles and issues, let's have a closer look at the composite hypothetical described above, based on real-life facts and objections that have been raised, questioning whether this is all a tempest in a teapot.

Issues Concerning Mediation Confidentiality

1. *Where's the harm in disclosing a few little tidbits, like last demands, last offers, or a few details of what led to the breaking of impasse and a successful resolution?* This raises the classic "slippery slope" issue: who is deciding what "little bit" is a harmless disclosure and what might pass the line of "no harm, no foul?" From the privilege point of view, the privilege is owned by the person who makes a communication, and that person is free to waive the privilege to that communication however and whenever they want. But that does not give that person the right to disclose what somebody else has said, as that privilege belongs to the other person. And from the duty point of view, all attendees owe a duty to each other not to disclose what any of them communicated. The hypothetical above portrayed a couple of instances from real life: attorney advocates disagreeing as to what was said at the mediation; an attendee misrepresenting what the mediator said. In the first instance, nothing productive can come out of a swearing match in the printed media, and in the second instance, a mediator who

chooses to honor confidentiality is left without recourse to defend his/her reputation by someone who is quoted in a paper misrepresenting what the mediator said, and we all know the value of professional reputations.

2. *Where's the harm in discussing facts that are a matter of public record, like the information contained in the plaintiff's mediation statement?* Many facts are discussed and evidence presented at a mediation that are a matter of public record, having been previously produced or disclosed in pleadings, discovery and depositions. But almost everyone is selective in what they choose to present and how they choose to present it at a mediation. Presenting information at a mediation that has already been disclosed outside the mediation, or is subject to disclosure outside the mediation, does not make it confidential, but the fact that it is not confidential outside the mediation does not mean that it is okay to disclose that it was discussed at the mediation. The rule is not to disclose what was communicated during the mediation. Talk about things that are a matter of public record all you want, but don't talk about the things you discussed or didn't discuss at the mediation. Everyone knows that one of the dangers of talking with the press under the best of circumstances is that they often misrepresent what was said and undoing the misrepresentation is pretty futile. Once it is disclosed to the press that a mediation occurred, you subject yourself to the press misrepresenting things that you said outside the mediation as if you said them during the mediation. This has occurred

3. *Where's the harm in an attendee later providing testimonial information as to the good job that the mediator did?* Issues have been raised that there is nothing wrong in saying that a mediator did a great job at a particular mediation. If the testimonial is limited to a very general statement like that, there may still be a technical breach of confidentiality, because the person speaking is conveying his mental impression and opinion about the mediator's conduct during the mediation session. However, even leaving this technical issue aside, it is likely a more common scenario that the laudatory statements are going to be accompanied by a few more specifics of how and why the mediator did such a great job. "S/he really kept at all of us and was very persistent, going from room to room, caucusing and sub-caucusing, etc. S/he was very sensitive to the dynamics of the strong personalities involved and managed it well." Once you get into any specifics, you start crossing that fine line of beginning to disclose conduct however innocent it may appear. The better rule of thumb is to keep testimonial statements general, without reference to any specific, identified or identifiable case.

4. *Where's the harm talking about a mediation after there has been a resolution, via settlement at the mediation or later, or via court judgment?* The principle of confidentiality includes that it lasts forever. All of the reasons for having confidentiality to begin with do not end once the matter is over. Attorney-client confidentiality does not end when the attorney-client relationship is over. Neither should mediation confidentiality.

5. *Can confidentiality be waived, for instance, involving information that is a matter of public interest or importance?* Waiver is an important issue that is addressed in Opinion 8. It provides for waiver, but warns that it should never be a default, boiler-plate provision in any mediation forms; rather, it should be carefully considered by the parties, and if there is going to be any waiver, the extent of the waiver and who is entitled to disclose what is agreed and under what circumstances, should all be memorialized and signed.

6. *How can I argue a motion to enforce a mediated agreement in court without getting into what occurred during the mediation?* I have personally observed motions to enforce mediation agreements argued in court where the parties, attorneys and judges all delve into what happened during the mediation that led to the agreement in issue, without giving any consideration to mediation confidentiality. In my opinion, unless there are extenuating circumstances involving some of the gray-area nuances referred to above, the court should limit its inquiry to whether the mediated agreement was in fact signed by the parties and whether the terms as exist in the four-corners of the document are adequate to be enforced. It is my earnest hope that more judges will become more sensitive to honoring mediation confidentiality and provide it great deference before they allow themselves or anyone to cross the line into the realm of confidentiality. A contrary argument can be made that the parties and counsel in such circumstances are by their very actions "waiving confidentiality on the fly," something discouraged by Opinion 8. Certainly, a judge should be sensitive to not initiating an inquiry as to what occurred during the mediation, placing the parties in the uncomfortable position of perhaps facing contempt if they refuse to breach confidentiality by not answering.

7. *What if a judge orders an attendee or mediator to testify about what occurred during a mediation*

session? The Georgia Rules are clear that mediators and observers cannot be required to testify, and Opinion 8 encourages them to resist any attempts to force them to testify and offers the assistance of the GODR to help quash any subpoenas issued. The rules, in not extending this protection to other mediation participants or attendees, leave open the door that they don't enjoy this same protection, although the spirit of confidentiality should apply to all attendees.

8. *Mediation confidentiality is the responsibility of the mediator, not of the other attendees. What repercussions or corrective jurisdiction does anyone have over breaches by an attendee other than a mediator?* Many rules focus the responsibility of confidentiality on the mediator because they are addressing standards for mediators to follow. However, as addressed above, the common agreements entered into at the beginning of a mediation session include an agreement to abide by confidentiality by all attending and signing (and all attending should sign). There can be an argument that this only creates a weak contractual obligation that for all practical purposes will be near impossible to enforce. This may be true in many circumstances, particularly concerning attendees who are not mediators or attorneys. However, there is at least one recorded federal case in which the disclosure by a plaintiff of confidential mediation information was so extensive and egregious that the plaintiff suffered the ultimate sanction of the court by having their case dismissed with prejudice. Courts could also fashion other sanctions/remedies against any mediation attendee in appropriate circumstances

Comment [5] to Bar Rule 2.4 states that "Lawyers who represent clients in alternative dispute resolution processes are governed by the Rules of Professional Conduct."

Along these same lines, it is important to bear in mind that the vast majority of cases mediated are matters that are already in litigation, and many are under the jurisdiction of court-connected programs or have been court-ordered or encouraged. It is likely that a court could therefore exercise jurisdiction over any mediation of a case filed in that court and could find any attendees in violation of any mediation rules in contempt or otherwise impose some kind of sanctions. Attorney mediators in Georgia who are not registered with the GODR are quick to point out that the GCODR has no corrective jurisdiction over them concerning violation of any of their standards. However, almost all of them sign off on the same agreements as the other attendees, which includes the confidentiality agreement, and under the above analysis they could be subject to court sanctions for their breach even if they are not subject to GCODR discipline. Furthermore, comment [2] to Bar Rule 2.4 includes a notation that "Lawyer neutrals may also be subject to various codes of ethics, such as … the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, [et al]." Such non-registered attorney mediators should further bear in mind that the GCODR rules and standards are all promulgated by the Georgia Supreme Court, which retains ultimate jurisdiction over all Georgia attorneys. It would not be a great stretch for the right case to come along which would apply the GCODR standards to non-registered attorney neutrals. In *Wilson v. Wilson*, 282 Ga. 728 (653 S.E.2d 702) (2007), the Supreme Court of Georgia looked to the standards contained in the Uniform Mediation Act for guidance, even though it is not enacted in Georgia, so it seems only reasonable that it would look toward rules it had enacted in applying standards, even if they technically did not apply to the non-registered attorney neutral through the GCODR disciplinary mechanism.

Another issue here is that many of the breaches noted in the composite hypothetical above were committed not by attorneys serving as mediators, but by attorneys serving as advocates. This again raises the jurisdiction issue. However, the same analysis would apply to attorney advocates as to the party who was sanctioned by the court and to attorney mediators discussed above. Comment [5] to Bar Rule 2.4 states that "Lawyers who represent clients in alternative dispute resolution processes are governed by the Rules of Professional Conduct." Around a year ago, the Executive Committee of the State Bar Dispute Resolution Section declined to consider drafting revisions to the Bar Rules which would more definitely and in detail clarify the standards of

conduct for both attorney neutrals and attorney advocates in ADR settings. I hope the time will come when the Bar Dispute Resolution Section will revisit this issue and seriously consider proposing to incorporate some or all of the GCODR ethical standards to all attorney neutrals and advocates within ADR settings.

A warning to GODR neutrals who think they are conducting "private" or "opt-out" mediations not subject to GCODR jurisdiction: In the Fall of 2013, the GCODR revised its rules concerning its ethical standards jurisdiction over registered mediators. The new rules provide that the GCODR has jurisdiction over registered neutrals under all circumstances, times and places where they are conducting mediations. There may still be times when a session is opted out of a specific court-administered program, but such opt-out of the court program does not opt the mediator out of GCODR jurisdiction. It would also appear from these rule changes that there is no such thing for a Georgia registered neutral as a "private" mediation which would not be subject to GCODR jurisdiction.

One subset of their findings is that a significant amount of the cases involving litigation about mediation specifically involve issues about confidentiality,

9. *So a presenter at a mediation training or seminar can't make reference to real life case situations as learning material?* Many who regularly train or conduct seminars are sensitive to the concerns about confidentiality while at the same time anxious to use anecdotal information from real-life cases as material for their presentations. As we all know, life is stranger than fiction and provides more interesting scenarios than we can ever dream up in our wildest imaginations. And trainers want what they present to be relevant. What better way to make it real than to utilize examples from real-life situations? Trainers deal with balancing these competing interests by constructing role playing and conveying hypothetical situations based upon real life scenarios, but with enough alterations that they approximate, but do not fully portray, any actual real life situations. There is an understanding that an experienced trainer or conductor of seminars is never going to discuss the details of any real life case or identify it by name. There is always a danger that a peculiar set of circumstances anonymously presented may nevertheless end up identifying an actual case to someone knowledgeable of it in the audience and adequate vigilance needs to be exercised in this regard. Attorneys have mastered the fine art of discussing cases on an anonymous or hypothetical basis to protect the identity of their clients and preserve attorney-client confidentiality, while still engaging in the entertaining and enlightening past-time of conveying war stories. Those in the field of mediation training do likewise.

10. What about court decisions whereby the parties have disclosed, and the judges have repeated mediation information without any consideration about confidentiality? What about court decisions that expressly have created case law exceptions to mediation confidentiality? James R. Coben and Peter N. Thompson of Hamline University School of Law have conducted rather exhaustive research analyzing court-reported cases throughout the United States involving mediation-related issues. They have reported their findings in two articles, the first in *The Harvard Negotiation Law Review* titled "Disputing Irony: A Systematic Look at Litigation About Mediation" and a follow-up in *World Arbitration & Mediation Review*, Penn State University, The Dickinson School of Law entitled "Mediation Litigation Trends." One alarmist conclusion they draw, as conveyed in the title of their first article, is that mediation, a system intended to simplify case resolution and reduce extensive litigation, may end up backfiring and complicating case resolution. They conclude their follow-up study with the statement, "One thing is certain – the irony of litigation about mediation is with us to stay."

One subset of their findings is that a significant amount of the cases involving litigation about mediation specifically involve issues about confidentiality, with courts regularly establishing case law exceptions to confidentiality. The Supreme Court of Georgia case of *Wilson v. Wilson* cited earlier in this article would have been one of the cases in their database if it was decided in one of the years included in their studies. Another subset of their findings is that there are a significant number of cases in which mediation communications were disclosed and discussed in the court filings and opinions without anyone, attorneys or judges, raising any issues about mediation confidentiality having been breached. Based upon these findings, they come to further alarmist conclusions such as,

"In sum, the walls of the mediation room are remarkably transparent," "…the walls of the mediation room are largely transparent…," and "the walls of the mediation room remain porous." The fallacy in their alarmist conclusions which they fail to adequately acknowledge, is that although the raw numbers may seem alarming, considering that these are exhaustive nationwide numbers and considering measuring the raw numbers against any conservative estimate of the total number of cases mediated nationwide, the percentage of these troubling cases is in the vicinity of 0.1 percent to 0.2 percent of the total and is likely trending downward and not upward.

Educating courts to make them more sensitive about respecting mediation confidentiality before carving out exceptions would be helpful to keep the trend going down. Although it is an unlikely pipe dream, it would be extremely helpful to the ADR community nationwide if courts requested amicus briefs from local or national ADR experts when considering issuing opinions that would impact ADR. But based upon my review of the Coben and Thompson studies, at least for now, it does not appear that there is a danger that judicially-imposed exceptions might swallow up the rule.

Conclusion

What should be kept in mind in all of these discussions is that there are good reasons for respecting the principle of mediation confidentiality by all attendees in cases where gray-area issues are not involved. The focus is not on identifying and disciplining those who breach the obligation of confidentiality. Rather, it is a matter of encouraging all involved in the process to respect and preserve the integrity of the process for the benefit of all who utilize the process, often to great success. It is especially troublesome that most of the breaches of mediation confidentiality that have occurred in Daily Report articles have been by attorney advocates. We are not here talking about the party in a bitter divorce going to his/her local watering-hole after a tough day of mediation and venting to whoever will listen. We are talking about professionals who are quite familiar with the sanctity and seriousness of attorney-client confidentiality being quoted in print with breaches of mediation confidentiality in the local trade paper. We hope they will afford the same respect for the sanctity of mediation confidentiality as they do for attorney-client confidentiality. If the erosion of mediation confidentiality continues, the integrity and the value of the process will continue to be undermined, and we may all end up regretting it.

It is not difficult in most circumstances to follow some simple rules of thumb: "What happens in mediation stays in mediation," and "Mediation confidentiality is forever."

Waiver of mediation confidentiality should only be done with careful, thoughtful consideration.

Steven J. Gold is a Member of the Georgia Commission on Dispute Resolution Task-force Drafting Advisory Opinion 8 Advisor to the Liaison Committee of the Georgia Commission on Dispute Resolution. Steven J. Gold, Esq. Mediation Services, LLC.

New Models of Mediation

by Robert Bordett

When I got trained in mediation, we were told that you either did solo mediation (one mediator) or co-mediation (two mediators). Co-mediation is simply a form of mediation is which two mediators are present to help facilitate a mutually beneficial resolution. Having a second mediator present can be helpful for a number of reasons:

- Each mediator may have a different skill set.
  - This can be important if there are several different types of issues that must be resolved. For example, depending on the circumstances, a couple may want one mediator who is an expert in real estate transactions and one mediator who is experienced in resolving child custody issues.
- Each party may feel more comfortable with a certain mediator
  - In a divorce in which one spouse is 20-years older than the other, it might make both sides feel more at ease to have two mediators who are different ages. Also, some people may feel that only a mediator of their own gender will truly be able to understand their point of view about certain issues during the process.

Sometimes it simply helps to have two mediators because it brings different perspectives into the process. The two mediators may complement each other and one may come up with possible solutions that the other one might not especially if certain issues appear to be at a standstill during the process. Having a broader range of different points of view in the room can be a good thing.

Co-mediation is one way to go, but of course it is not right for all.

I have watched mediation change in the private sector from the solo or co-mediation model to several other models through the years.

Presently there are many models of mediation in place. In this article I am going to address three with which I am familiar. They all share similarities and differences. The most important aspect, however, is does the particular model help the parties reach resolution and accomplish their objective.

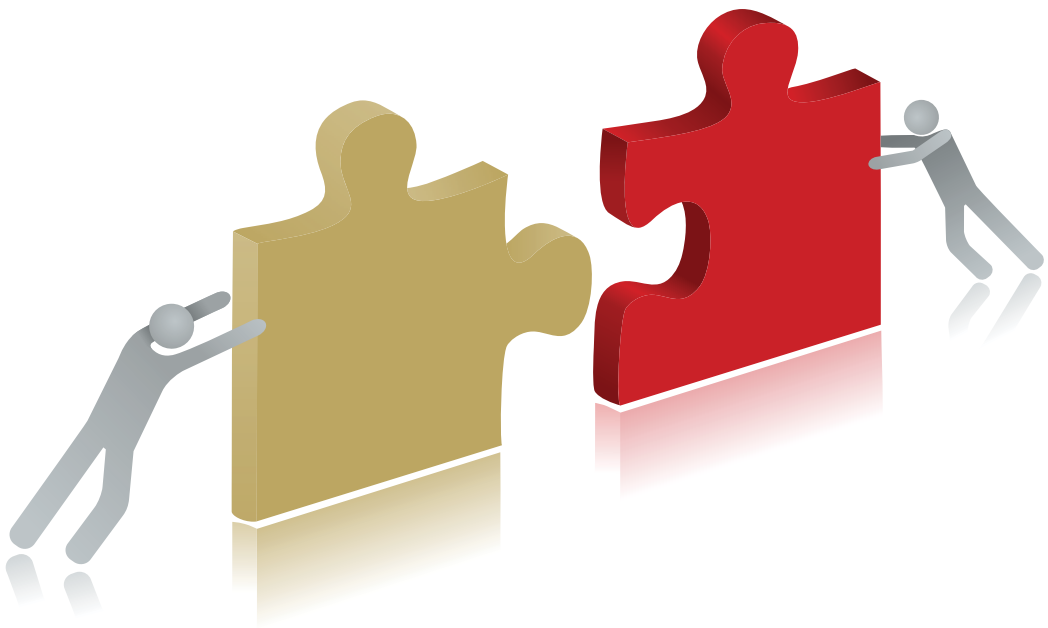
Détente Mediation.

Détente Mediation offers a fresh, innovative approach. One neutral family lawyer and a counseling professional skillfully guide a couple over legal, financial and emotional hurdles to reach well-informed private agreements that work for everyone.

How does the Détente Mediation model work?

They use a team that consists of a neutral family lawyer and a couple's counselor to help gather information, explore options and negotiate equitable agreements.

They use a dynamic communication technique that will empower the couple to talk and hear each other.



Team Mediation

Team Mediation is a structured process carefully designed by the Center for Mediation and Training, Inc. This process allows individuals to reap the benefits of mediation while, at the same time, affording both parties the protection and guidance of their own attorney. In addition, it is a process that takes full advantage of

specialists such as financial planners creating a better life post-divorce.

How does the Team Mediation model work?

At the start of a Team Mediation, the parties involved agree to work with attorneys who are committed to this process. Each party can choose either to select a lawyer from the Center's Team Mediation panel, or to propose Team Mediation to their own lawyer who must agree to follow the Team Mediation Principles.

As mediation proceeds, each party, with his or her own attorney, decides the need and extent of his or her attorney's involvement. The attorney is part of the process from the beginning to insure that rights are protected. Attorney involvement may follow any of several models. For example, each party may choose to have their attorney:

1. Be present during every session.
2. Be present at the first session and thereafter decide which sessions their attorney will attend.
3. Not attend the first session and thereafter assess the need to attend any particular session(s).
4. Never attend sessions but be available for phone consultation during or after sessions.
5. Never attend sessions but advise the client as requested during the course of mediation.

Each party must tell the other party in advance whether his or her attorney will be attending the next session.

Individuals starting in "traditional" mediation may switch mid-process to Team Mediation.

Integrated Mediation

Integrated Mediation is the model developed at Divorce Innovations. It evolved from an experience with the interdisciplinary team approach used in Collaborative Divorce. In the Integrated Mediation model, we use two separate mediators - *A credentialed financial specialist who mediates the financial issues and a licensed mental health professional who mediates Parenting Plan issues.*

Both mediators are committed to an effective outcome and work directly with the clients and their attorneys to help them maintain control over the process. *The tools of collaborative practice are used as needed in the mediation sessions.* What the clients (and their attorneys) get are specialists in the areas that they need for a thorough exploration of the issues.

How does the Integrated Mediation model work?

The individuals may start with either the Financial Mediator or the Parenting Mediator.

Separate Financial and Parent Plan sessions typically run on a parallel timeline determined by the clients. The mediators continually update progress with each other. When useful, the mediators will co-mediate a session.

The Financial Mediator helps the clients explore ways to divide marital assets, minimize tax consequences and determine levels of child and spousal support. The Parenting Plan mediator helps the couple to effectively communicate with each other, manage emotions and develop a child or children centered co-parenting plan to begin following their divorce.

When sessions are concluded, the Mediators summarize the understandings and agreements for the respective attorneys who then work together to craft a settlement agreement. What we have found is that couples who thoroughly explore issues and reach a mediated agreement are more likely to comply with its terms.

Divorce professionals now recognize divorce is a complex mixture of legal, financial, emotional, communication and parenting issues. Couples often cannot communicate, but they do not want to go to court to fight it out. They are trying to decide if they want to sell their home or keep it. They have credit card debt and two children.

Integrated Mediation brings together clients with mediators that are knowledgeable experts in the various aspects of divorce and possess the "tools" that will help them move through the stress and complexities in order to reach agreements that they and their children can live with.

Integrated Mediation was created in response to current economic realities and has the potential for faster resolution and significantly lowers overall costs. It can provide a framework to resolve issues that may arise following the divorce (adjustments to child support, parenting time and schedules). Most importantly it is conducted privately.

Remember that when it comes to mediation, the control over the process is in the client's hands. Both parties need to feel comfortable with the agreed upon resolutions. Our slogan at the end of the day is, "These are your decisions, your agreements and your divorce."

Robert Bordett is the founder of Collaborative Practice and Mediation Services, Inc. He is also the Sr. Vice President of Consolidated Planning Corporation. He is a financial neutral working with couples, families and business. He also serves as a mediator and arbitrator. He is registered with the Georgia Commission on Dispute Resolution as a mediator and arbitrator. Bordett is registered with the Georgia Commission on Dispute Resolution as a mediator and arbitrator. He is a Certified Financial Planner (CFP) and a Certified Divorce Financial Analyst (CDFA). He is the past president of the Collaborative Law Institute of Georgia, Inc. He is a past board member of the International Academy of Collaborative Professionals. He is a founding member of the Atlanta Collaborative Divorce Alliance.

The Fast Developing ADR Process:

Conflict Management Coaching

by Cinnie Noble

The field of coaching has grown exponentially since the 90s and it is quickly finding its way into the ADR field. There are different types of coaching, such as organizational (including executive/leadership), life, and business coaching, and within these overall types there are many coaching specialities. Conflict management coaching – also known as conflict coaching – has taken hold in the conflict management and coaching fields and this article provides an overview about this particular niche.

Coaching

Coaching, in general, is about helping people optimize their potential in whatever areas of life they want to improve. It is a one-on-one process in which a trained coach supports clients in their efforts to bridge the gap between where they are and where they want to be. Coaches use a range of techniques to do so and operate on a basic philosophy that clients are creative, resourceful and whole (according to the International Coach Federation, www.coachfederation.org).

Part of the coach's role in assisting clients to achieve their objectives is to help them gain increased self-awareness and different perspectives on themselves and their situations. Ultimately, this enables each client to develop and implement a plan of action for moving forward in ways that align with what they want to achieve and how they want to be.

Conflict Management Coaching

As a specialty and consistent with the overall concept just described, those trained as conflict management coaches help individuals gain increased competence and confidence to manage and engage in specific interpersonal conflicts and disputes. It is a goal-oriented and future-focused process that also helps people who want to prevent unnecessary conflict or to generally strengthen their specific conflict management skills.

The process of conflict management coaching is growing in workplaces as an additional option for employees and management to address conflict, whether or not there is an integrated or informal conflict management system or program. Within organizations, it is also employed as a technique that may be used by leaders and others who aim to manage their disputes independently, without the assistance of a third party facilitator. More specifically, objectives in these cases often include the desire to gain and learn better and more effective methods for communicating and engaging in conflict situations.

Also, in organizations – and other contexts as well – this form of coaching is sometimes used with one of the disputants when the other party does not show up for mediation or prefers not to participate. Some people also retain coaches to help them be better prepared for mediation or other conflict process – including arbitration and negotiations - in which they want to interact with increased confidence and proficiency to deliver and receive difficult messages.

There are similarities in the skills of mediators and conflict management coaches and some principles of the mediation process are reflected in coaching, too. For instance, self-determination is one of the

cornerstones of the coaching field. There are, however, a number of differences, the main one being that coaching is an individualized process tailor-made to meet each client's specific goals. Rather than acting as a "neutral," a coach is a champion of the individual and coaches partner with the client to co-create an effective coaching relationship that facilitates goal attainment.

Applications of Conflict Management Coaching

- Several applications of this technique then – some of which have been referred to – include:
- Helping clients who aim to self-manage a specific situation – to prevent its escalation, to better engage in it, and/or to resolve it.
- Coaching clients who aim to become more conflict competent in general.
- Pre-mediation coaching—to help individuals anticipate and prepare for possible challenges, and actively participate in the process with increased confidence.
- Preparing people to participate in collaborative law meetings or other ADR processes.
- Post-mediation coaching—to help individuals with the aftermath of unresolved matters and to manage ongoing interactions.
- Helping managers, supervisors, and other leaders improve aspects of conflict engagement and management between themselves and their staff and between/among others.
- Helping managers and others to more effectively conduct performance appraisals and initiate other challenging conversations and meetings.
- Helping people in any context to enhance their communication and negotiation skills.
- Coaching lawyers, ADR practitioners and others who aim to develop a self-reflective practice and improve their own conflict intelligence.
- Coaching after conflict management, mediation, or other training – to facilitate ongoing application of participants' learning.

The CINERGY® Model of Conflict Management Coaching

In 1999, the **CINERGY®** model of conflict management coaching was developed after extensive research. It is a 7-stage process that incorporates conflict management, coaching and neuroscience principles. The basic intentions of each stage of this model are as follows:

- ***C*larify the goal** - to determine what the client wants to accomplish in coaching
- ***I*nquire about the Situation** - to find out what led the client to want or be referred to coaching
- ***N*ame the Elements** - to help the client deconstruct and analyze what happened in the conflict
- ***E*xplore the Situation** - to consider what optional plans of action may suit the situation and conflict dynamic
- ***R*econstruct the Situation** - to make the plan a reality by visioning, practicing, etc. - depending on the outcome desired
- ***G*round the challenges** - to consider what barriers preclude goal achievement
- ***Y*es, the Commitment** - to commit to when and where the client will proceed

The number of coaching sessions and duration depends on many variables. For instance, it may take some clients up to eight one-hour sessions to go through the whole **CINERGY®** model and be able to finalize and proceed with a plan of action. Conflict management coaching takes a longer period of time when clients are working on shifting unproductive conflict habits as opposed to managing a specific dispute. In any case, coaching is an intensive process requiring specific coach training for the practitioner. It also requires clients' commitment, effort and motivation to increase self-awareness and make changes in their usual way of handling conflict.

Summary

Conflict management coaching is fast emerging in the ADR field as mediators, lawyers, group facilitators, and others are seeing the value of providing increased options for helping clients find their way through conflict. Practitioners are realizing the applications in private and public sectors workplaces, in court-connected mediation programs, and also in personal contexts including relationship disputes such as familial matters, collaborative law, and estate situations. It is expected that many applications will continue to develop, and I look forward to the ongoing dialogue with you.

Cinnie Noble is a lawyer (LL.M. (ADR)), certified mediator (member of the Academy of Advanced Practitioners of ACR), and coach (PCC). She is founder of the CINERGY® model of conflict management coaching and is the author of "Conflict Management Coaching: The CINERGY™ Model" - http://www.cinergycoaching.com/conflict-management-coaching-book/. More articles and information on this process may be found at www.cinergycoaching.com.

The Funnel of Conflict Resolution - Part One: The Stages of Conflict and Opportunities for Resolution

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by Lee Jay Berman

The Stages of a Conflict:

The world of conflict can act like a funnel in that disputes can enter from any of a variety of areas of life and can take all forms (arguments, disputes, accidents, cultural trends). As a society, and as a mediation community, we can address these disputes at many different stages.

Early intervention of conflict resolution requires that either the people in dispute are aware of mediation, or that mediators can find them early in their process. The best way to reach people early in the dispute is through generalized public education about mediation, increasing public awareness, and making it generally accessible and available to them. This can best be done in schools, as we try to teach youngsters about conflict resolution. It can also be approached through public policy measures, promoting and funding dispute resolution centers.

Most disputes that continue beyond this early stage become more serious and formalized in that they can begin to affect additional people (in businesses or organizations) and can require intervention through systems, including human resources, management and sometimes organizational consultants. Disputes at this stage can often be resolved in face to face negotiation without the advent of additional parties.

Disputes that are not resolved at the system-level generally require more formal intervention, if not even a push or a mandate to seek out dispute resolution. This level often requires mandatory intervention, either through contractual requirements or public policy or a court order to attempt mediation before parties can take the next step in the escalation of the conflict (often arbitration, litigation, or administrative hearings). This is often what mediators call "the last rational moment," meaning that it is the last opportunity for the disputants to engage in conflict resolution or problem solving before they have engaged in the polarizing activities of an adversarial process.

It is never too late to attempt to resolve a conflict. Often in the middle of the litigation process, even just on the eve of trial, parties can still engages in a form of conflict resolution either through a late voluntary mediation or a settlement conference (either voluntary or mandatory). Seasoned mediators have even seen cases during trial, post-verdict and upon and during an appeal. By this time, a compromise for the sake of avoiding risk is generally the best case scenario.

Finally, while self-determined resolution can happen at most any phase, some disputes (and some disputants) simply require a third-party determination. In this case, an arbitrator or judge decides the case for them.

How Conflicts Get Resolved at These Stages:

When a conflict begins, it is often about the people involved. The conflict at this stage is often driven by, "I don't like the way you treated me," or "You stopped returning my phone calls, so you left me no choice," or "I'll show you…" Resolutions at this early stage of the conflict can often take the form of correcting misunderstandings, better managing expectations, apologies and forgiveness, and reconciliation of the parties. The primary dispute resolution methods in this early phase often involve mutual dialogue, collaboration, creative problem solving and brainstorming.

As disputes remain unresolved and enter the next stage of the conflict, they can begin to center around the secondary effects of the dispute. This is where people act upon their assumptions about the motives they ascribe to the other person and begin to take retaliatory steps on what they perceive to be an uneven score between the parties. It sounds like, "Well, he did this to me, so I did that to him because he deserved it." In complex organizations, it can take the form of passive-aggressive behavior such as torpedoing a project headed by that person or of more direct action like asking for a transfer. If it hasn't been exposed by this time, this can be where the underlying conflict surfaces – the conflict that is driving the dispute. It can sound like, "You don't like people like me; I've heard you say it before, so that's why I know it was you who told so-and-so that I did this."

By the more compressed stages of the conflict, it has generally been stated out loud, denied, and remains unresolved. The parties now clearly know what they are fighting about and have refused or been unable to have the kind of dialogue that can resolve the dispute. The

parties' stubbornness has been triggered, their competitive juices are flowing and each refuses to "back down," and they both see a settlement as backing down. Each is now showing their bravado by escalating the fight, whether it is in a formal way by increasing the temerity of their discovery demands, or less formal by back-stabbing the other with friends and playing "social politics." In this stage, they often need to be sent into a mandatory dispute resolution process where the intervention is much more involuntary and must be done with more strength. Sometimes conflict resolution can occur at this level, but often times, resolving the instant dispute is the best that we can hope for. Sometimes kindness and transformative mediation methods can work at this level, but more often, compromise, distributive negotiation and risk assessment are the prevalent dispute resolution techniques at this stage.

Finally, in the late mediations and settlement conferences, the only reasons that people will tell a story is to vent and get it off of their chests, and to attempt to justify their demands. They rarely tell a story at this stage because they are interested in reconciling the events or in restoring a relationship. Here, the dispute resolution method generally more closely resembles getting a settlement done and bringing an end to an otherwise distasteful experience.

What Happens to the Dispute (and the Disputants):

One reason for the shape of the funnel is that disputes are being resolved at every stage of the process, so by definition, fewer and fewer of them filter down to the next level. And at each declining level, the disputants become more hardened and more of the juice gets squeezed out, where the juice is the flavor, the seasoning, the softness of a dispute (and disputant), so much so that by the time it gets to the bottom and has been through the litigation process and is ready to be adjudicated, it has become so much about "just the facts" that the human element is almost removed.

By the end stage, the lawyers and jury consultants have sometimes squeezed all of what matters to the disputant out of the story, and reduced it to the most relevant and compelling facts. "Why" doesn't matter any longer, only "What" does. The stories have been told so many times, that they don't carry any feeling with them any longer, and to the extent that they do, it's more the aggravation of the process they have been through (or perceive the other as having put them through) than their real outrage or hurt over the original event.

The Disputants are no longer in it to heal, and most aren't in it to right a wrong at this stage; they are mostly still in it because they want what they think is fair (in the form of a resource – money or some other thing), or because at this stage, they are simply resigned to winning at all costs.

Simply put, the earlier in a dispute it can be resolved, the better it is for all involved. Outcomes tend to be more creative, collaborative and restorative. People work together to resolve a problem, rather than oppositionally. And the mediator can be creative and can be involved in building something, rather than surgically removing two people for once and for all.

How We Grow Mediation:

Because mediators who work at all of these differing levels of the funnel understand this, and assuming that while it may make logical sense to a person if it is explained to them, the reality is that when involved in a dispute of their own, they will abandon all such understanding and act as anyone does who is involved in a dispute – emotionally.

In many markets in the United States and abroad, mediation of litigated cases has hit a point of saturation. Like ants to a picnic, mediators ran to the courts first in an effort to demonstrate the value of mediation in a litigated setting. Like when the reporter once asked Willie Sutton, the famous bank robber, why he robbed banks and he answered, "Because that's where the money is," mediators will answer, "because that's where the disputes are." Truth be told, though, like money, disputes are everywhere. What Sutton meant is that banks were the place where the most money was consolidated together in one place. The same goes for disputes, while the courts certainly hold a consolidated mass of them, they actually only hold a very small percentage of them. Think about every dispute in your life – does it rise to the level of litigating? Only a small percentage of them really do. And if we're following Warren Berger's advice, we're only using the courts as our last resort.

Building on this logic, if mediators everywhere are running to the courts to find disputes to mediate, and given that at least in California, civil filings are down, that means two things. First, it means that we are intervening into disputes at the latest and toughest stages, often allowing mediators to utilize a small portion of their skill set to hammer out compromises (or, worse yet, causing mediators to only develop those skills that they need for that purpose). Second, it means that there is a limited number of matters available to be mediated, as there is a fixed number of litigated cases filed each year, and in some mature mediation markets, if you divide those cases by the number of mediators, there is not much of a career there.

The latest studies say that of all of the cases filed these days, only 1.5% of them actually go through trial. That means that 98.5% of all cases are disposed of at some time between filing and trial. I believe that the same proportion applies to disputes – that of all of the disputes that happen in the world, only about 1.5% of them end

up being filed as lawsuits. The rest, like the lawsuits, are resolved somehow, or people just walk away from them. When two basketball players get into a fight on the court, or a teenage boyfriend and girlfriend have an argument, or a parent gets upset with a child, the public rarely hears about it. So, if only 1.5% (or some number like that) of all disputes make it to the court house, that would imply that the overwhelming majority of disputes live outside of the courthouse, or upstream in our funnel.

In order for mediation to grow as a profession, it has to push back up the funnel closer and closer to the top. If what comes out the bottom of the funnel, after it had been through litigation as well as all of the processes along the way, is a juice-less, hardened, dried out, densely compressed disk like a hockey puck, then for every one of those there are dozens or hundreds or thousands coming into the top of the funnel. They enter the funnel fluffy and pliable like cotton candy, and that is when mediators should want to get to them.

For mediators, this means connecting with (from the bottom, up) insurance adjusters for claims that haven't yet reached litigation, human resource professionals, leaders of religious congregations, non-profit boards and organizations. Also they should be connecting with the mass media, volunteering in schools and working with public policy and non-profit dispute resolution providers to help spread awareness of the availability of mediation and mediators.

In the end, while a small number of disputes will always be headed on a bee-line right for the bottom as they enter the funnel, the majority can be resolved much earlier if mediators can intervene earlier and educate the public more broadly, both by empowering them with conflict resolution skills and by making them aware of the availability of mediation early in the dispute.

Lee Jay Berman is a mediator based in Los Angeles. He founded the American Institute of Mediation in 2009, after leaving his position as Director of Pepperdine's flagship "Mediating the Litigated Case" program from 2002-2009. He can be reached at 310-203-0700 or leejay@mediationtools.com. *The American Institute of Mediation (AIM Institute) can be found at* www.AIM-Institute.com.

From the Editor

by Bob Berlin, dma-adr@mindspring.com

Those of you who know me, know that I often times seek out the humor in situations. Like a blessing, it's always there. So, just to lighten the mood, I've gotten permission to share a few mediation jokes from John Kenyon. You can find him on Mediate.com.

- What's the difference between negotiating and mediation? Negotiation is where people get emotional about the money and mediation is where people get the money after becoming emotional.
- Judge Roberts chipped out of the bunker for the fifth time and grumbled "I don't know how you managed to get your handicap down again. I don't have any time to practice with all the cases I have on my docket." "Well I've got a full docket as well, but I don't actually try them all. I send every case to volunteer mediators and that reduces my work load by two thirds. And the best bit is it doesn't cost a penny!" said Judge Fowler lining up a 15 foot putt. Judge Roberts looked confused "Why would anyone volunteer to mediate court cases for free?" "Oh its simple." replied Judge Fowler beaming as the putt went in. "Thirty years ago we told them it would provide social justice, improve community relations, provide the underprivileged better access to the legal system, and be the first step towards world peace. Don't you just love it when the socially responsible forget they live in a capitalist system?"
- William Hanna and Joseph Barbera once called in a mediator because Tom and Jerry refused to fight.
- How many mediators does it take to change a light bulb? Trick question: mediators must not make decisions about whether the bulb needs changing.

I'm always looking for new ideas and new thinking when it comes to neutral work. Please share your thoughts and desires. If you wish to contribute an article, please contact me.

As president of The New Decision Management Associates, Inc., Robert A. "Bob" Berlin has primary responsibility for Mediation, Negotiation and Arbitration services as well as Lead Trainer. He is a graduate of the Walter F. George School of Law, Mercer University, receiving the LLB (J.D.) and was a senior partner in the law firm of Berlin and Hodges, P.C., and was a municipal court judge and in the Georgia House of Representatives.