Musings on Mediation, Kleenex, and (Smudged) White Hats

Nancy A. Welsh
Texas A&M University School of Law, nwelsh@law.tamu.edu

Follow this and additional works at: https://scholarship.law.tamu.edu/facscholar

Part of the Dispute Resolution and Arbitration Commons, and the Legal Ethics and Professional Responsibility Commons

Recommended Citation
Nancy A. Welsh, Musings on Mediation, Kleenex, and (Smudged) White Hats, 33 U. La Verne L. Rev. 5 (2011).
Available at: https://scholarship.law.tamu.edu/facscholar/952

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.
MUSINGS ON MEDIATION, KLEENEX, AND (SMUDGED) WHITE HATS

NANCY A. WELSH*

It is an extraordinary privilege to be asked to speculate on the future of mediation. It is a challenge as well, of course, and inevitably invites retrospection. This Essay, therefore, will look back before it looks forward and will reflect on both mediation’s successes and the problems that have arisen.

Perhaps surprisingly, mediation’s problems relate directly to its many successes. Simply, the process is now so popular that I fear it has come to mean little more than a “process for achieving settlement.” Such lack of clarity invites problems. Most fundamentally, however, mediation’s promises of confidentiality and privileged communications may be making the process attractive to some actors for the wrong reasons. Indeed, a process designed to help people may, at least on occasion, be doing harm.

This Essay, therefore, will represent a call to action to mediation proponents as we consider the past, present, and future of our process. The Essay asks that we acknowledge the problems that are beginning to surface¹ and choose now to take the concrete steps that are within our

---

* Professor of Law, Penn State University, Dickinson School of Law. My thanks to Lacy Hayes, John Lande, Bobbi McAdoo, Michael Moffitt, Herb Nurick, Richard Reuben, Leonard Riskin, Jean Sternlight, Donna Stienstra, and Wayne Thorpe for their feedback on a draft of this Essay. My thanks as well to David Brown and Justin Blake for their research assistance. The opinions expressed, as well as any mistakes, are my own. Finally, special thanks to my friend and colleague Bobbi McAdoo who has always been a mediation proponent and yet was also one of the first willing to ask the questions (and publish the results) regarding the evolution of institutionalized mediation.

¹ This is consistent with Edward de Bono’s designation of the person wearing the white hat as responsible for raising available facts (or information) when involved in group problem-solving. Importantly, de Bono also values the perspectives offered by those wearing the five other hats. See Edward de Bono, Six Thinking Hats 13 (1999) (cited in Jennifer Gerarda Brown, Creativity and Problem-Solving, in The Negotiator’s Fieldbook 407, 410 (Andrea K. Schneider & Christopher Honeyman eds., 2006)).
control in order to keep these problems from becoming widespread. This Essay also proposes taking these steps without waiting for courts, legislatures, regulators, or anyone else to provide their approval or clear the way for us. It is time for mediation proponents to don the white hat—smudged and worn, to be sure, but retaining some vestige of white underneath it all. Indeed, if we begin to take action, I suspect that courts, legislatures, and regulators will follow the trail that we will have broken for them.

As I begin this Essay, I also want to be clear that I am writing it as a mediation proponent. I first learned about mediation in the early 1980s from one of our field’s founders, Professor Frank Sander at Harvard Law School. As a law student, I participated in an extracurricular mediation clinic offered by the law school and then mediated small claims matters in the state courthouse located in Quincy, Massachusetts. Although I never officially used mediation to help resolve any of my cases while practicing law in Minnesota, opposing counsel once told me that I was clearly serving as a “quasi-mediator” as I worked to settle a case in which my client was a small, third-party defendant. I left private practice to join Mediation Center, a non-profit organization created to provide and promote the use of mediation and other ADR processes in the state of Minnesota. While at Mediation Center, I mediated a wide variety of cases, worked with many other mediation proponents to test and help institutionalize mediation in Minnesota’s state courts, and trained many, many lawyers and judges.

---

2. I am referencing here the white hat worn by the heroes in various Westerns, which fits into the tradition of iconic clothing worn by nobility, spiritual leaders, and members of various religious faiths to symbolize separation, responsibility, and a self-sacrificing bond with their communities. See, e.g., HELEN CASTOR, SHE-WOLVES: THE WOMEN WHO RULED ENGLAND BEFORE ELIZABETH 456 (2011) (describing the “spousal ring” that Elizabeth I wore to symbolize her marriage to her country and maternal relationship with her people).

3. During a poignant yet hilarious conversation on the eve of my departure, Harold Field, one of my wonderful mentors at the firm and a brilliant lawyer, asked why I was leaving to go into “mediation.” There was a time when mediation proponents wanted to distance our process as much as possible from meditation. That is so much less true now, as we recognize the need for mediators to take care of themselves even as they assist others. See, e.g., Leonard L. Riskin, Mindfulness: Foundational Training for Dispute Resolution, 54 J. LEGAL EDUC. 79, 80 (2004); Leonard L. Riskin, The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients, 7 HARV. NEGOT. L. REV. 1, 52-53 (2002). Years later, by the way, Hal became a member of Mediation Center’s Board of Directors and a strong believer in mediation.

4. See Nancy A. Welsh & Barbara McAdoo, Alternative Dispute Resolution (ADR) in Minnesota—An Update on Rule 114, in COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS, 203, 203 (Edward Bergman and John Bickerman eds., 1998); Barbara McAdoo & Nancy A.Welsh, Does ADR Really Have A Place on the Lawyer’s Philosophical Map?, 18 HAMLINE J. PUB. L. & POL’Y 376,
in mediation skills. Since arriving in Pennsylvania, I have worked with mediation organizations, state agencies, state and federal courts, and others to promote the appropriate use of mediation. I have served on the ABA Dispute Resolution Section Council, worked with the International Mediation Institute, and continued to mediate and train mediators. I teach Negotiation/Mediation; I believe in mediation; and, I am a proponent for this process.

Nonetheless, I have sometimes struggled to find my way as a mediation proponent. At times, it has seemed that there is an obligation to support everything that is called “mediation,” everyone who is called a “mediator,” and every consequence of “mediation.” I have not been able to do these things. Instead, I have tried to support mediation by lauding its potential and many accomplishments while also acknowledging the problems that have arisen as the process has been institutionalized in courts and agencies, and then I have tried to call for clarification, improvement, and reform. I am afraid that this approach may not make me a very fun guest at a mediation party. But mediation is a tool, just like any other tool. The humble hammer can be used to construct wonderful dwellings; it can also be wielded in a manner that destroys those same dwellings and maims the people within them. Religion has been used in the same way, for good and for ill. The internet has been revealed as an unbelievably powerful tool for connection and knowledge—and for horrific exploitation and abuse. I could go on, but the bottom line is that our fondness for certain tools, especially those we had a hand in creating, can blind us to their unintended consequences as others pick them up and begin to use them in ways we had never imagined. Despite the natural tendency toward

---

5. See Welsh & McAdoo, The ABCs, supra note 4, at 13.
denial, we need to be willing to see what is before us and respond appropriately, perhaps even opportunistically.

As I have observed repeatedly over the years—and it bears repeating—mediation is a success. As I have observed repeatedly over the years—and it bears repeating—mediation is a success. It is now an integral part of civil litigation and administrative adjudication throughout the United States.

Private companies offer in-house mediation. National and international dispute resolution firms earn many millions of dollars largely through the provision of mediation. The proponents of American-style mediation—on their own and as part of governmental initiatives—have successfully exported mediation throughout the world. Further, many cases settle in mediation. Beyond this, I strongly believe that most individual mediators, directors of mediation programs, lawyers, and

---


9. See Stipanowich, supra note 8, at 902–03 Table 31.


judges care about the quality of the mediation process. In the vast
totality of cases, litigants express satisfaction with mediation. They
indicate that they had the opportunity to express themselves, perceive
that the other party heard them, and view the process as fair. They
rarely seek to undo the settlements reached in mediation. Even though
I cannot assert that litigants regularly view mediation as more
satisfactory or fairer than trial, litigants do not view mediation as less
satisfactory or fair. Some, though not all, research indicates that
mediation saves time and costs for both courts and litigants. Occasionally, mediation even achieves communication and outcomes
that would be unlikely in other court-connected procedures.

I have just catalogued the many and impressive accomplishments
of mediation. I am concerned, though, that the research just described
does not mean as much as we may assume because the word
"mediation" now connotes so little. While some would urge that this
has been true for a very long time, I have asserted that at the very least,
"mediation" should mean a process for achieving settlement that
involves: 1) a mediator; 2) communication and negotiation between the

13. See Riskin & Welsh, Is That All There Is?, supra note 7, at 915–26 (describing
lawyers, mediators, mediation programs, and courts committed to the quality of the
mediation process).
14. Id. at 863; Wissler, Court-Connected Dispute Resolution, supra note 12, at 58.
15. See James R. Cohen & Peter N. Thompson, Disputing Irony: A Systematic Look at
Thompson, Disputing Irony); James R. Cohen & Peter N. Thompson, Mediation Litigation
16. Wissler, Court-Connected Dispute Resolution, supra note 12, at 64–68.
17. See Riskin & Welsh, Is That All There Is?, supra note 7, at 871–74; Stipanowich,
supra note 8, at 852–75 (citing to studies showing such effects).
18. See Leonard L. Riskin, Decisionmaking in Mediation: The New Old Grid and the
of the concept of "problem-definition" to capture "the great virtue of mediation" which
"was to help the parties address— in addition to their positional claims—what was really at
stake for them and reach responsive solutions); Welsh, Stepping Back, supra note 7, at
667–69 (describing the "normative frames" offered by legislation and judicial opinions that
support parents’ and school officials’ competing understanding of the interests that can be
achieved in educating students with special needs); Michael Moffitt, Three Things to be
Against ("Settlement" Not Included), 78 FORDHAM L. REV. 1203, 1205 (2009); John Lande,
How Much Justice Can We Afford?: Defining the Court’s Roles and Deciding the
Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to
Administer Justice, 2006 J. Disp. Resol. 213, 252 (2006); Jean Sternlight, ADR is Here:
Preliminary Reflections on Where it Fits in A System of Justice, 3 NEV. L.J. 289, 292–93
Mediators Can Help With Relationship Repairs, 19 ALTS. HIGH COST LITIG. 193, 193
parties; and 3) voluntary decision-making or agreement. This is such a minimalist definition. Consider the many different ways in which a mediation session possessing these characteristics could be implemented. The "communication," "negotiation," "parties," and "voluntary agreement" involved could take many different forms. Indeed, all of the divergent "schools" of mediation—facilitative/elicitive, evaluative/directive, transformative, narrative, understanding-based, etc.—easily fit within this definition.

However, I have been in settings recently in which knowledgeable, worldly people—public and private leaders—have used the term "mediation" in a manner suggesting that it means nothing more than a "process for achieving settlement." It has not even been clear to me that the speakers understood that a neutral third party or someone called a "mediator" should be involved in this process. Meanwhile, the influence of lawyers' traditional frames is evidenced in the use of "mediators" for surprisingly adjudicative purposes. In bankruptcy matters, for example, some courts and litigants have expected neutrals called "mediators" to order discovery, decide disputes arising out of mediated settlements, issue "mediators' awards," and determine whether or not a mediation impasse has occurred.

In the family law area, similarly, parenting coordinators with adjudicative power have been equated with "mediators." Increasingly, judges speak of

19. See, e.g., Welsh, You've Got Your Mother's Laugh, supra note 7, at 432. I have also urged that mediation should provide parties with procedural justice. See Welsh, Stepping Back, supra note 7, at 667; Welsh, Making Deals, supra note 7, 861.

20. Welsh, You've Got Your Mother's Laugh, supra note 7, at 433-41 (describing the various mediation approaches).

21. See Richard C. Reuben, Process Purity and Innovation: A Response to Professors Stempel, Cole, and Drahozal, 8 Nev. L.J. 271, 273 (2007) (proposing a "'process characteristic and value' approach to the legitimacy of innovation that can be applied generally to variations in dispute resolution processes").


25. See Bobbi McAdoo et al., Doesn't Somebody Have a Fiduciary Duty Here? (presentation, Annual Conference of the ABA Dispute Resolution Section, April 6, 2011) (on file with author). In a recorded interview, a family law client explained that her lawyer described a parenting coordinator as a mediator, though with decision-making power at the conclusion of the process. Id. Perhaps the lawyer used the term "mediator" simply to suggest that the neutral would bring a more empathic, humanistic approach to the resolution of the issues. See Leonard L. Riskin, Mediation and Lawyers, 43 OHIO ST. L.J. 29, 43-44 (1982) (describing the lawyer's philosophical map and the potential for service as mediators.
engaging in “judicial mediation”26 even if they will preside over the trials of cases that do not settle.

“Mediation,” it seems, has become the new “Kleenex” or the new “Xerox.” Those breakthrough products became so successful and ubiquitous that others quickly copied them, or at least copied their superior response to an apparently-unmet need. In order to invoke the reputation for quality that consumers associated with Kleenex tissues and Xerox machines, competitors also tended to copy what they viewed as these products’ most salient—and marketable—characteristics.27

What are those characteristics for mediation? Some of us have lauded the qualities or aspirations that drew us to mediation in the first place28—i.e.:

empower[ment of] the parties to work together in a respectful and productive manner; allow[ing] a focus on the parties’ real needs and interests, in addition to their legal claims; offer[ing] a flexible process customized to fit the parties’ situation, emotions, and interests; and encourage[ing] the development of a range of creative and responsive outcomes.29

Increasingly, however, we have acknowledged that these characteristics might be significant for only a minority of litigants.30 Now recall the slimmed-down set of characteristics proposed supra, suggesting that mediation should be understood as a process designed to achieve settlement but also specifically including a mediator, communication and negotiation between the parties, and voluntary decision-making or to help lawyers become “aware of the many interconnections between and among disputants and others, and of the qualities of these connections . . . be sensitive to emotional needs of all parties and recognize the importance of yearnings for mutual respect, equality, security, and other such non-material interests as may be present.”). Importantly, however, the client indicated that the process lacked accountability. Id.


29. Riskin & Welsh, Is That All There Is?, supra note 7, at 869.

30. See id. at 866. “In some segment of cases . . . the exclusive focus on litigation means that at least some of these parties miss out on opportunities for processes and outcomes that could be far better suited to their needs.” Id. McAdoo & Welsh, Look Before You Leap, supra note 6, at 426.
agreement. Is it possible that even these are not the characteristics that can and should distinguish mediation?

Confusion regarding the meaning of mediation and the presence and role of the mediator obviously can contribute to the likelihood of problems arising in mediation. At least for some litigants, there can be a disconnect between their expectations—based on rhetoric, descriptions in court rules, lawyers' representations or even mediators' introductions of themselves and their process—and the actual practices of mediators, lawyers and other repeat players. Confusion regarding the process and roles can even result in satellite litigation. In fact, judicial opinions referencing mediation increasingly represent cautionary tales regarding disputes over the scope of lawyers' authority in entering into settlements, malpractice claims arising out of mediated settlements and non-settlements, allegations of breach of good faith and fair dealing, attempts to vacate preliminarily-approved class settlements, and imprecise contract formation. This process that was

31. See Riskin & Welsh, Is That All There Is?, supra note 7, at 896-97.
The repeat players tend to assume implicitly that the problem definition is narrow; this leads them to establish procedures that will be limited primarily to the kind of information that is relevant to litigation (and economic) issues. And, once such a mediation commences, information and perspectives that would broaden the focus are largely absent, excluded, or marginalized. In other words, the procedures not only rely on the professionals' assumptions about the appropriate problem definition—they also make that definition real.


32. See Cohen & Thompson, Disputing Irony, supra note 15, at 47.


35. See Fehr v. Kennedy, 387 Fed. Appx. 789, 790 (9th Cir. 2010).


37. See Ehrheart v. Verizon Wireless, 609 F.3d 590, 601 (3d Cir. 2010).

38. See Gatto, 2009 WL 3062316, at *10 n.1 (disputing Term Sheet as enforceable settlement agreement and calling for settlement negotiations to be conducted in writing, rather than orally); Haghigii v. Russian-Am. Broad. Co., 577 N.W.2d 927, 928–29 (Minn. 1998) (failing to include statutorily-required terms in mediated settlement agreement); Williams v. Kan. City Title Loan Co., 314 S.W. 3d 868, 869 (Mo. Ct. App. 2010) (failing to memorialize mediated settlement agreement in writing, as required by court rules).
designed to reduce the incidence of litigation now sometimes contributes to courts' dockets.\textsuperscript{39}

Most seriously, however, ugliness is occurring too frequently within the privileged bubble surrounding the varying processes now labeled "mediation." Cases suggest that some are exploiting the obligation of confidentiality and the non-discoverability and inadmissibility of mediation communications (usually referenced as the "mediation privilege").\textsuperscript{40} Confidentiality and the mediation privilege were designed to support mediation's aspirational purposes described \textit{supra}—encouraging productive communication, allowing parties to reveal and focus on their real needs and interests, and encouraging parties to work together in developing creative and responsive outcomes.\textsuperscript{41} In other words, confidentiality and the privilege were supposed to enable the mediation process to be effective in \textit{helping} disputants to reach their own responsive resolution. But now, it seems that the mediation privilege and obligation of confidentiality are being used sometimes to \textit{harm} disputants, by \textit{keeping} them from reaching their own responsive resolutions or accessing the courts. Rather than playing \textit{supporting} roles, confidentiality and the privilege seem to be gaining stature as among mediation's most salient and prized attributes.\textsuperscript{42}

\textsuperscript{39} See generally \textit{ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS GUIDE} (1998).

\textsuperscript{40} Cassel v. Superior Court, 244 P. 3d 1080, 1094--95 (Cal. 2011).

\textsuperscript{41} See Ellen E. Deason, \textit{The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach}, 54 U. KAN. L. REV. 1387, 1392 (2006) (using interdisciplinary approach to propose "framework for functional theory for role of confidentiality in mediation"); Sarah Cole, \textit{Protecting Confidentiality in Mediation: A Promise Unfulfilled?}, 54 U. KAN. L. REV. 1419, 1422 (2006) (considering "whether, how, and to what extent courts should sanction" parties' intentional violation of the obligation to keep mediation communications confidential); Richard C. Reuben, \textit{Confidentiality in Arbitration: Beyond the Myth}, 54 U. KAN. L. REV. 1255, 1256--57 (examining the rationale underlying evidentiary rules and privilege used to protect the confidentiality of mediation communications and considering the applicability of such rationales to arbitration); Scott H. Hughes, \textit{The Uniform Mediation Act: To the Spoiled Go the Privileges}, 85 MARQ. L. REV. 9, 23 (2001) (raising concerns regarding various provisions in the UMA, particularly those designed to offer special protection to mediators and suggesting that the UMA does more to protect confidentiality than self-determination); Nancy A. Welsh, \textit{Mediation Confidentiality in the U.S., in MEDIATION EN VERTROUWELIJKHEID} (Mediation and Confidentiality) 2 (Hester Montree and Alexander Oosterman eds., 2009).

\textsuperscript{42} I am beginning to believe that mediators' ability to engage in \textit{ex parte} communications with the parties is emerging as another such attribute. See Welsh, \textit{Stepping Back, supra} note 7, at 669--71 (describing the unanticipated but marked significance of caucus to mediation participants' assessment of the mediation process); Welsh, \textit{Importance of Context, supra} note 11, at 122--24. \textit{But see} Rule 2.9(A)(4), ABA Model Code of Judicial Conduct ("A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.").
Even though I strongly believe in mediation and in the integrity and good will of the vast majority of mediators, lawyers, and litigants who implement the process, I cannot help but notice the emergence of a line of cases involving allegations of misbehavior in mediation—particularly allegations of misbehavior by lawyers. Further, I cannot help but notice the defendant-lawyers asserting the mediation privilege against their own clients, in order to keep them from introducing evidence that might help to prove claims of legal malpractice. In other words, these lawyers are using mediation to prevent potential litigants from accessing the very forum that lawyers are supposed to hold most dear—the public courtroom.

This brings me, not surprisingly, to the case of Cassel v. Superior Court of Los Angeles County,\textsuperscript{43} decided by the California Supreme Court in early 2011. In that case, a client entered into a mediated settlement upon the advice of his lawyers.\textsuperscript{44} Subsequently, however, he claimed that his lawyers “had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth.”\textsuperscript{45} He brought an action for legal malpractice, breach of fiduciary duty, fraud, and breach of contract.\textsuperscript{46} Pursuant to California statutes governing mediation confidentiality, the lawyers made a motion \textit{in limine} for the exclusion of any evidence of the lawyers’ communications with their client immediately before and during the mediation session regarding mediation settlement strategies and the advisability and terms of settlement.\textsuperscript{47} After a two-day hearing, including examination of the client’s deposition and further testimony from one of the lawyers, the trial court granted the motion \textit{in limine}.\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{43} Cassel, 244 P.3d at 1083–84.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} Id. at 1086. Specifically, \[t\]he court ruled that, in addition to information about the conduct of the mediation session itself, the following evidence was protected by the mediation confidentiality statutes and would not be admissible: (1) discussions between petitioner and WCCP attorneys on April 2, 2004, concerning plans and preparations for the mediation, mediation strategy, and amounts petitioner might be offered, and would accept, in settlement at the mediation; (2) similar discussions between petitioner and WCCP attorneys on April 3, 2004; (3) all private communications among petitioner, Paradise, and WCCP attorneys on April 4, 2004, during the mediation, concerning (a) the progress of the session, (b) settlement offers made, (c) petitioner’s departure from the mediation over the objection of WCCP attorneys and their efforts to secure his return, (d) recommendations by WCCP lawyers that petitioner accept VDO’s $1.25 million offer, (e) their accusations that he was “greedy” for considering $5 million as an appropriate amount, (f) who would try the case if petitioner did not settle the
The Court of Appeal granted mandamus relief, vacating the trial court's order. The California Supreme Court reversed, holding that such evidence was undiscernable and inadmissible.

Importantly, this case was decided as a matter of law. Although there was an evidentiary proceeding, it was only to determine the application of the exclusion. Because there was no conclusive determination regarding the substantive merits of the client's claims against his lawyers, it is important not to assume that all of the plaintiff's allegations are true. When a deal goes bad, after all, it is human nature to try to find someone to blame, and lawyers have long been easy targets (or surrogates for the real targets) when it is the rule of law that stands in the way of reaching a desired objective.

Nonetheless, the allegations in this case are both worrisome and plausible. The client alleged that his lawyers: wrongly advised him; VDO suit, (g) a possible deal, if petitioner settled, to acquire an interest in VDO for him through the pending divorce of VDO's owner, and (h) WCCP's willingness to reduce its fees if petitioner settled the suit. The court also ruled inadmissible, as communicative conduct, the act of a WCCP attorney in accompanying petitioner to the bathroom during the mediation.

Id.
49. Cassel, 244 P.3d at 1084.
50. Id.
51. Id. at 1086-87.
52. Id. at 1080.
54. See William Shakespeare, The Second Part of King Henry the Sixth, act 4, sc. 2. "The first thing we do, let's kill all the lawyers." The context of that famous quote, as noted by Professor Stephen Gey in his April 28, 1990 commencement speech at Florida State University College of Law, is important: "If you go back and read the play, you'll discover that the people saying those things are the bad guys. In fact, they're not only the bad guys, they're a bunch of murderous tyrants . . . One of the central functions of lawyers is to tell tyrants that they can't do what they want to do." Stephen Gey, Remarks at the FSU Law School Graduation (April 28, 1990), available at http://www.youtube.com/watch?v=100MNOwNNsM.
55. See Tracy Walters McCormack et al., Probing the Legitimacy of Mandatory Mediation: New Roles for Judges, Mediators, and Lawyers, 1 St. Mary's J. on Legal Malpractice and Ethics 150, 186-87, 194 (2011). available at http://stmaryslawjournal.org/pdfs/McCormack_step12.pdf. Based on survey of lawyers and mediators in Texas, reporting that 38% of responding lawyers did "not always discuss all factors, including errors, which could affect the value of the client's case in mediation" and that nearly 95% of responding mediators "believe[d] that attorneys have made an error in the case that substantially affected the value of the case in at least 10% of the cases they have mediated[,]" and therefore urging that [m]ediation becomes the venue for the 'perfect crime' when the lawyer never tells the client about lawyer errors that make a mediated settlement the only recourse for the client, the mediator remains silent about lawyer errors, and the
failed to oppose a preliminary injunction which was therefore granted to the client's significant detriment;\textsuperscript{57} had a conflict of interest in representing him in settlement negotiations due to the failure to oppose the injunction and business dealings between the client and the son of one of the lawyers;\textsuperscript{58} forced the client to continue to participate in a pre-trial mediation that went on for 14 hours and did not conclude until midnight;\textsuperscript{59} told him that he was "greedy" to insist on a settlement of more than $1.25 million;\textsuperscript{60} threatened to abandon him at the imminently pending trial;\textsuperscript{61} misrepresented the terms of the proposed settlement;\textsuperscript{62} falsely assured him they would negotiate a side deal and waive a portion of their fees;\textsuperscript{63} and even followed him into the bathroom and "hammered" him there.\textsuperscript{64} Some of these communications allegedly occurred prior to the mediation while others occurred when the client was in caucus with his lawyers, outside the presence of any of the other mediation participants.\textsuperscript{65}

Throughout the majority opinion affirming the inadmissibility of the mediation communications, the California Supreme Court emphasized that it was simply following the plain language of California's statutes and that if limitations on mediation confidentiality were warranted, such limitations had to come from the Legislature.\textsuperscript{66} The majority acknowledged the very rational argument that:

\[\text{[The Legislature might reasonably believe that protecting attorney-client conversations in this context facilitates the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against}\]

case gets settled without the client ever realizing why a trial or further court proceedings would have been fatal to his or her claims.

\textit{Id.}

\textsuperscript{56} \textit{Cassel}, 244 P.3d at 1085.

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} See \textit{id.} at 1086. It is unclear whether the client sought $2 million, as he and his lawyers had discussed, or $5 million. \textit{Id.}

\textsuperscript{61} \textit{Cassel}, 244 P.3d at 1085.

\textsuperscript{62} \textit{Id.}

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} \textit{Id.}

\textsuperscript{66} \textit{Id.} at 1096.
either. The Legislature also could rationally decide that it would not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.67

The majority then went on to say that the Supreme Court expressed no view about whether the statutory language, thus applied, ideally balances the competing concerns or represents the soundest public policy. Such is not our responsibility or our province. We simply conclude, as a matter of statutory construction, that application of the statutes' plain terms to the circumstances of this case does not produce absurd results that are clearly contrary to the Legislature's intent. Of course, the Legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims of malpractice against his or her attorneys.68

Justice Ming Chin wrote a reluctant concurrence, also explicitly inviting action by the Legislature and observing, "I doubt greatly that one of the Legislature's purposes in mandating confidentiality was to permit attorneys to commit malpractice without accountability."69

I must emphasize again that the claims made by this client represent only allegations. Every lawyer, judge, and thoughtful human being knows that there is a world of difference between a simple allegation and a claim deemed credible enough to merit a state-sponsored remedy. And yet, the claims in this case are consistent with the claims in a string of other California cases70 that highlight the extreme position that California has taken in protecting the

67. Cassel, 244 P.3d at 1096.
68. Id.
69. Id. at 1098 (Chin, J., concurring). These cases may just represent the latest manifestation of doctrines developed over the years—now abandoned in most states—that have had the effect of protecting lawyers from malpractice claims arising out of settlements. See, e.g., Guido, 995 A.2d 844; Muhammad v. Strassburger, McKenna, Messer, Shilobod and Gutnick, 587 A.2d 1346 (Pa. 1991); McMahon v. Shea, 688 A.2d 1179, 1181 (Pa. 1997). See J. Mark Cooney, Benching the Monday-Morning Quarterback: The "Attorney Judgment" Defense to Legal-Malpractice Claims, 52 WAYNE L. REV. 1051, 1083-84 (2006).
70. See, e.g., Benesch, 2009 WL 4885215 (involving a claim of legal malpractice); Wimsatt v. Superior Court, 61 Cal. Rptr. 3d 200 (Cal. Ct. App. 2007) (involving a claim of legal malpractice); see also Fehr, 387 Fed. Appx. 789.
confidentiality of mediation communications. Further, there can be wisdom in old sayings, and some of those sayings include: “there can be too much of a good thing;” “moderation is the key;” “where there’s smoke, there’s fire;” and “if it’s too good to be true, it probably isn’t.”

Mediation can be a very good tool, and it is now being used extensively. But it seems indisputable that mediation is sometimes being used inappropriately: to shield lawyers from potential claims of malpractice; to force parties to settle when they would rather go to trial; and even to find a back door means to fund the staff that courts can no longer afford to hire themselves. I fear that mediation is selling itself too cheaply—or perhaps I should say more accurately, we mediation proponents are selling our good process too cheaply. We are inviting scandal—and then “reform” by those who may not be friends of our process.

The past does not foretell the future, but it can alert us to likely dynamics and foreseeable consequences. Perhaps, for example, mediation’s evolution must follow the controversial arc of mandatory pre-dispute arbitration—or even mimic the now-largely-forgotten history of the evolution of our courts and the scandal needed to trigger the adoption of judicial ethics codes. Even informed by the past, though, my crystal ball is inevitably cloudy. Today at least, I predict that we will end up with three distinct groups of mediators (or quasi-mediators) in the United States for civil, non-family court-connected

71. See Foxgate Homeowners’ Ass’n, Inc. v. Bramalea Cal., Inc., 25 P.3d 1117, 1119 (Cal. 2001); Rojas v. Superior Court, 93 P.3d 260, 271 (Cal. 2004); Fair v. Bakhtiar, 147 P.3d 653, 654–57 (Cal. 2006); Simmons v. Ghaderi, 187 P.3d 934, 942, 946 (Cal. 2008); LEONARD RISKIN, ET AL., DISPUTE RESOLUTION AND LAWYERS 491–92 (4th ed. 2009) (describing California’s approach as “unique” and representing a “categorical exclusion” that “has been the most litigated of all the vehicles of mediation confidentiality.”).


73. See The Honorable M. Margaret McKeown, To Judge or Not to Judge: Transparency and Recusal in the Federal System, 30 REV. LITIG. 653, 659–60 (2011) (describing the appointment of federal judge Kenesaw Mountain Landis as the first Commissioner of Baseball after the Black Sox scandal, the resulting public outcry and censure when he failed to resign his judgeship, and the realization that no code of ethics existed for judges).
litigation. For most such cases, litigants will be expected to demonstrate that they have tried to reach a resolution through their own negotiation efforts.\textsuperscript{74} Those with small cases will be expected to document their negotiation attempts, which will include attempts to mediate with the help of a personally-trusted intermediary, community mediation organization,\textsuperscript{75} or online facilitation service (or virtual mediation) of some sort.

For those relatively few cases that do not settle with the help of this first set of human and virtual intermediaries,\textsuperscript{77} courts will employ lawyers as full-time or part-time judicial officers and will mimic the model of mediation staffing that exists in the federal circuits and in

\textsuperscript{74} See Michael Moffitt, \textit{Pleadings in the Age of Settlement}, 80 Ind. L.J. 727, 729 (2005) (proposing that conferences be required as a condition of filing a lawsuit); see also Nancy A. Welsh, \textit{Iqbal and the Role of the Courts: I Could Have Been A Contender: Summary Jury Trial as a Means to Overcome Iqbal’s Negative Effects Upon Pre-Litigation Communication, Negotiation and Early, Consensual Dispute Resolution}, 114 Penn St. L. Rev. 1149, 1189 n.87 (2010) (suggesting that courts “would need to determine the circumstances under which they would sanction parties who failed to attempt or respond to such pre-pleading negotiation.”); Jacqueline Nolan-Haley, \textit{Mediation Exceptionality}, 78 Fordham L. Rev. 1247, 1262-63 (2009) (observing that English courts may penalize parties who unreasonably refuse to mediate, but they also require the party seeking revision of the usual cost provisions to bear the burden of proof).


some federal district courts—which itself mimics the evolution that led to today’s federal magistrate and bankruptcy judges.

There will then be a small cadre of elite lawyers and retired judges who operate as private mediators and can command top dollar for large cases. The lawyers and parties involved in these cases will not turn to these private mediators because of any documented inadequacy of those employed by the courts to mediate. Rather, many of these mediators will be former judicial officers who proved their effectiveness in that context. But “quality” is inevitably a subjective term that often invokes issues of status, class and connections, and many believe that you get what you pay for. Further, and unlike many public employees, private mediators will be able to devote the time and resources that the parties in complex matters need, desire and are able to afford.

Meanwhile, I predict that other countries will enthusiastically continue to follow our lead, starting on the journey that we began over two decades ago. Some might argue, by the way, that we are actually following other nations’ leads—or unknowingly following in their footsteps. I suspect that both assertions are true. I have written about the Netherlands—which has continued to offer a facilitative model of

78. See Welsh, Is That All There Is?, supra note 7, at 874; Roselle Wissler, Judicial Settlement Conferences and Staff Mediation, Disp. Resol. Mag., Summer 2011, at 19–20 (reporting results of study comparing lawyers’ assessments of settlement procedures conducted by judges and mediators); see also Donna Stienstra et al., Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990, at 222 (1997), available at http://ftp.resource.org/courts.gov/fjc/0024.pdf; Bobbi McAdoo, A Mediation Tune Up For the State Court Appellate Machine, 2010 J. Disp. Resol. 327, (2010). I have recently become aware, however, of budgetary discussions that may reduce staffing levels in programs like those in the Northern District of California.


81. The parties in these large cases may access this small cadre of elite lawyers and retired judges on their own and entirely privately or courts may choose to facilitate such service, with the private neutrals designated as mediators, special masters, or even arbitrators. See, e.g., Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 384 n.50 (17th century colonial courts in New York referred particularly complex cases to arbitrators for settlement) (citing H. Scott, The Courts of the State of New York, 43–44 (1909)).


83. See generally Oscar Chase et al., Civil Litigation in Comparative Context (2007) (describing the varying roles of judges in different countries’ systems of civil litigation).
mediation; is experimenting with judge-mediator teams, and is also recasting mediation as the midwife for new experimentation with online tools designed to increase citizens’ problem-solving abilities. In Italy, parties are now required to mediate before they may file claims in the country’s congested courts. Court-ordered mediation is also occurring in Argentina, where mediators are motivated to settle cases sooner rather than later, in order to be paid. China has long used a process they call “mediation.” I have some concerns that all of these countries have institutionalized the mediation process in a manner that has the potential to make it more difficult or risky for people to access their nation’s courts. But, of course, context matters. Much depends upon the costs, risks, degree of access, evidentiary standards, and judicial functions that characterize these countries’ civil litigation systems.

Finally, in my darkest moments, I fear that many will view mediation in much the same way that many now portray jury trials and discovery—as good, well-intended innovations that were co-opted by those who relish the adversarial litigation process and use it to win, even if injustice is the result. I can imagine the proponents of new procedures urging that mediation itself must be replaced with a new paradigm because the older process has “broken bad.” I can foresee the end of any credible promotion of mediation as a sort of alchemy, magically protecting justice and community and parties’ interests, rights, and self-determination, for those who may have been persuaded of that view at one time. That last development may be a very good thing, by the way, even if it is also a bit sad.

If this is what the future holds—or could hold—what then is our role, the role of seasoned mediation proponents? How can we help mediation achieve the realistic elements of its promise? I believe that we must embrace the wisdom of checks and balances and help establish

---

84. See Welsh, The Importance of Context, supra note 11, at 130.
85. See id. at 131.
87. See Welsh, The Importance of Context, supra note 11, at 130–31.
88. See id. at 132.
89. See Wayne Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change 31 Vand. L. Rev. 1295, 1299 (1978); see also Menkel-Meadow, Pursing Settlement, supra note 6, at 5.
90. See Welsh, You’ve Got Your Mother’s Laugh, supra note 7, at 454 n.75 (urging consideration of hybrids) (citing Peter Salem, The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?, 47 Fam. Ct. Rev. 371, 385–86 (2009)).
effective counterbalances to discourage the use of mediation for harm rather than help. First, it is time to follow the lead of courts like the California Supreme Court and invite the introduction and passage of legislation that realistically narrows the reach of the mediation privilege, mediation confidentiality, or exclusionary rules. We need to make confidentiality's protection of mediation communications less vulnerable to inappropriate and unintended manipulation. The drafters of the Uniform Mediation Act grappled with this issue. Their solutions were not always pretty or succinct, but they were pragmatic.91

Second, we mediation proponents should stop looking only to others—the courts, legislatures, executives, administrative agencies—for our solutions. We are not children. We can, and should, recognize our own power and use our hard-won personal legitimacy to force appropriate protection of the legitimacy of the mediation process. Good mediators do not want or intend to have legal malpractice claims arising out of their mediation sessions. Good mediators do not want or intend to shield lawyers who understand mediation's primary advantages as a protected forum in which to provide inadequate legal counseling or one that effectively discourages clients from seeking lawful access to their courts.

Mediation proponents in states that have adopted the Uniform Mediation Act ("UMA") know that there is no privilege for mediation communications that are "sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator," or against "a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation session."94

91. Another option would be to provide for a default provision, but then provide for the ability to opt-in to other provisions. See, e.g., Scott Peppet, Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism, 90 IOWA L. REV. 475, 524 (2005) (using this approach to enable lawyers' election of more stringent options under ABA MODEL RULES OF PROFESSIONAL CONDUCT R. 4.1 (2010)). See also John Lande, An Empirical Analysis of Collaborative Practice, 49 FAM. CT. REV. 257, 273 (2011) [hereinafter Lande, Collaborative Practice].


93. See also Olam v. Cong. Mortg. Co., 68 F. Supp. 2d 1110, 1126 (N.D. Cal. 1999). Mediation proponent, Judge Wayne Brazil, nonetheless conducted an in camera review in order to determine whether to pierce the confidentiality of mediation in order to protect the integrity of the courts. The Pennsylvania mediation privilege statute, meanwhile, provides an exception to the privilege for fraudulent communications, but only for the purposes of enforcing or setting aside a mediated agreement. See 42 PA. CONS. STAT. § 5949 (2007).

California did not adopt the UMA. In his dissent, though, Justice Chin proposed that California’s relevant statutes should be amended to “provide that communications during mediation may be used in a malpractice action between an attorney and a client to the extent they are relevant to that action, but they may not be used by anyone for any other purpose....” Rather than waiting for legislators in California or other non-UMA states to heed Justice Chin’s words, we mediation proponents could use and improve upon this language to incorporate its objectives into our agreements to mediate. We mediation proponents could even lead by example by including in our agreements to mediate that such mediation communications may also be used in actions against mediators. We would be modeling our willingness and ability to “work mediation” to achieve improved communication, negotiation, and voluntary resolution. We would also be modeling our commitment to a process that, at the very least, does no harm to the people it is supposed to serve.

Similarly, as we work with parties in mediation, we could make it our regular practice to remind them that they can go to trial—and that though there are risks involved, this is a civic right that we respect and value. We could offer this reminder early in the mediation, in the midst of the intense negotiations that can occur just before reaching a settlement, and even after the parties have reached a settlement that is “good enough.” We could make it our regular practice to hold caucuses with the parties after such settlements have been reached, to give them one last chance to ask questions about the short-term and long-term consequences of the deal they have reached, deliberate further, and either agree to end to their negotiations or continue to work toward an even better resolution. We could require, or at least urge, the inclusion of a cooling off period in the settlement agreements that

95. Id. § 6(a)(6): also providing, though, that a mediator may not be compelled to provide evidence. See id. § 6(c).
96. Cassel, 244 P.3d at 1098.
97. I must admit, however, that I would be likely to pair that provision with another specifying that the parties will be liable for my attorneys’ fees, in the event that they are unsuccessful with their malpractice claim.
98. See McEwen, Managing Corporate Disputing, supra note 6, 1–3 (cited in Lande, Collaborative Practice, supra note 91, at 273).
99. I recall that mediator and director of the ADR program of the Federal District Court of the Northern District of California Howard Herman shared this practice with me; see also, Max H. Bazerman & Katie Shonk, The Decision Perspective to Negotiation, in THE HANDBOOK OF DISPUTE RESOLUTION 52, 55 (Michael L. Moffitt & Robert C. Bordone eds., 2006) (describing the tool of post-settlement settlement).
emerge from our mediations.\(^{101}\) We could encourage lawyers to read Professor John Lande’s\(^{102}\) or others’ books on negotiation,\(^{103}\) mediation,\(^{104}\) and mediation representation.\(^{105}\) Even better, we could encourage lawyers to enroll in hands-on skills training in negotiation, client counseling, or mediation representation. They could learn to mirror and acknowledge their clients’ emotions, make apologies,\(^{106}\) and incorporate reflective practice into their lawyering.\(^{107}\) Meanwhile—and perhaps counter-intuitively—because lawyers tend to perceive respected and confident trial lawyers as more effective negotiators,\(^{108}\) we also will want to urge lawyers to take advocacy training.

These are just ideas. Some represent experienced mediators’ current practices that are largely-unacknowledged in the academic literature. We could and should seek out the wisdom of these pragmatic elder states(wo)men. Some of the ideas briefly sketched above are the product of solitary brainstorming and would require substantial work to become reality. Some of these ideas may not work at all. Still, there is

\[\text{\footnotesize 101. See Welsh, The Thinning Vision, supra note 7, at 6 (2001).}\]
\[\text{\footnotesize 102. See, e.g., John Lande, Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money (2011).}\]
\[\text{\footnotesize 103. See, e.g., Charles Craver, Skills and Values: Legal Negotiating (2009); Donald G. Gifford, Legal Negotiation: Theory and Practice, (2d ed. 2007); G. Richard Shell, Bargaining for Advantage: Negotiation Strategies for Reasonable People (2d Ed. 2006); Roger Fisher et al., Getting To Yes: Negotiating Agreement Without Giving In (2d ed. 1991).}\]
\[\text{\footnotesize 105. See, e.g., Abramson, Mediation Representation, supra note 104; Golann, Mediating Legal Disputes, supra note 104.}\]
\[\text{\footnotesize 108. See Gerald R. Williams, Presentation: Ten Keys to Effective Negotiation (and Suggested Movies to See If You are Serious About Negotiation) (March 2002), available at http://www.utahbar.org/sites/midyear/Effective_Negotiation_Charts.pdf (indicating that surveyed lawyers perceived effective legal negotiators—whether fitting the pattern of cooperative or aggressive negotiation—as possessing the following traits: being prepared on the facts and law; effective trial lawyers; observant of the customs and courtesies of the bar).}\]
responsibility to try to respond to current troubles in the evolution of mediation, to consider available options, to pick up that bedraggled sort-of-white hat. Even though we must humbly acknowledge that no mortal will ever really earn the right to claim the white hat, there is at least honor in trying to live up to its call.