

2000

Representing Clients in Mediation: Principles that Make a Difference

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Recommended Citation

Jacqueline Nolan-Haley, *Representing Clients in Mediation: Principles that Make a Difference*, 18 CPR Inst. Disp. Resol. 41 (2000)
Available at: https://ir.lawnet.fordham.edu/faculty_scholarship/772

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Alternatives



DIGEST

MEDIATION ADVOCACY

As usual, old habits are proving hard to break. Fordham Law School Prof. **Jacqueline M. Nolan-Haley** describes the principles that attorneys should observe when representing mediation clients so that ADR advocacy doesn't resemble what it is supposed to replace, litigation representation. **Page 41**

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CPR INSTITUTE FOR DISPUTE RESOLUTION WWW.CPRADR.ORG VOL. 18, NO. 3 MARCH 2000

Representing Clients in Mediation: Principles that Make a Difference

BY JACQUELINE M. NOLAN-HALEY

There is no shortage of negative accounts about lawyers' behavior.

A recent Boston Globe article decried the growing problem of incivility in the legal profession: "Call it incivility, unprofessional conduct, or just plain rudeness. From courthouse fistfights to abusive phone calls laced with obscenities, the veneer of decorum that once draped the legal profession is cracking." Sacha Pfeiffer, "Lawyers Bringing Bad Manners to Bar," *Boston Globe*, B1, July 11, 1999.

The Boston bar is not alone in this regard. In New York, the State Bar Association's Continuing Legal Education program re-

cently has been inspired to offer a course in civility for lawyers that includes such topics as: How is civility accomplished? Why is it good for you emotionally and professionally to act civilly?

Unfortunately, lawyering for clients in mediation has not remained immune from the stigma of incivility and unprofessionalism. As mediation practice grows, so too do its abuses and ethical violations. Accounts of lawyers deliberately misrepresenting facts, breaching

confidentiality and intimidating parties are slowly creeping into the reported cases. In some cases when lawyers advocate for clients

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MEDIATION ADVOCACY

Multidisciplinary Practice & ADR: The Minnesota Bar Takes a Stand

BY DUANE W. KROHNKE

The U.S. legal profession is debating whether lawyers should be permitted to practice in firms owned jointly by lawyers and non-lawyers. This debate was precipitated by an August 1999 committee report to the House of Delegates of the American Bar Association. That report recommended amending the ABA's Model Rules of Professional Conduct to permit multi-disciplinary practice, or MDP, firms.

How does this recommendation relate to alternative dispute resolution? Last month, Minnesota took a stand. On Feb. 17, the Conflict Management and Dispute Resolution Section (referred to in this article

as the CMDR section), of the Minnesota State Bar Association, or MSBA, adopted a report about MDP and ADR. The report was prepared by a CMDR committee chaired by

Jenelle Soderquist, senior consultant at the Mediation Center for Dispute Resolution, which is affiliated with Hamline University Law and Graduate Schools in St. Paul, Minn. Other members of the committee were former Minnesota Supreme Court Chief Justice Douglas K. Amdahl; James

W. Brehl, a partner in Minneapolis's Maun & Simon PLC; Daniel B. Ventres, who heads his own firm in Minneapolis; Joseph Kenyon,

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MODEL RULES

ADR Briefs

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Project coordinator Judith Cohen says that a section that states that mediation providers have obligations to make their services accessible to disabled people is important. Organizations already are covered by the ADA, Cohen says, but ADR providers—like many businesses and services—often don't understand their public accommodations' obligations. "This has the potential to be a very powerful part of the guidelines," she says, "not only for ADA mediation but also for mediation across the board."

Cohen, who heads her own ADA mediation firm, Access Resources, in New York, explains that existing mediation standards often say that sessions will not take place or terminate if a party becomes physically or mentally disabled. "These guidelines offer that if a party has a mental or physical disability," she says, "the mediation provider needs to provide an accommodation to enable the person with a disability to participate."

At press time, the guidelines were about to be posted at www.cardozo.yu.edu/cojcr/index.html, a Web site constructed by the Kukin Program for Conflict Resolution at New York City's Benjamin N. Cardozo School of Law. The site also will feature a discussion area to air issues as the guides are put to use. ■

Representing Clients in Mediation: Principles that Make a Difference

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in mediation—what is called in this article "representational mediation practice"—the process looks more like Rambo pre-trial settlement conferences with lawyers as the star performers and clients on the sidelines, uninformed.

Have we abandoned the traditional perspective of mediation as a human and relational process (see Lon F. Fuller, "Mediation—Its Forms and Functions," 44 S. Cal. L. Rev. 305, 325 (1971)), which offers lawyers what University of Missouri-Columbia School of Law Prof. Leonard L. Riskin has labeled a "different philosophical map"? (See Leonard L. Riskin, "Mediation and Lawyers," 43 Ohio St. L.J. 29 (1982).)

Despite persistent rhetoric about the transformative potential of mediation, many lawyers fail to appreciate the premises and values that drive the mediation process, possibly because they have failed to consider their own beliefs about the fundamental capability of human beings to solve their own problems. When advocating for clients in mediation,

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some lawyers act as if mediation were *their* process, not their client's. The problem in part, may lie in pouring new wine into old wineskins. Viewed in this perspective, we can understand why the mutual respect and responsible client decisionmaking that is often missing in traditional adversarial lawyering also is noticeably absent in many current versions of representational mediation practice.

THE CONCEPTUAL DIFFERENCES

That the growth of mediation practice is changing the practice of law is obvious. The inability of many lawyers to understand the conceptual differences between adversarial lawyering and mediation practice strongly suggests the need to develop a theory of "good" representational mediation practice that takes into account competing client interests. On the one hand, lawyers must encourage client voice and participation. At the same time, however, the demands of professionalism require that lawyers guide their clients toward responsible decisionmaking.

Representational lawyering in mediation may involve a number of distinct and traditional lawyering functions—client counseling, negotiation, evaluation and advocacy. This article focuses primarily on client counseling activities, because, in this author's view, (continued on following page)

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ARBITRATION COMMISSION GOES PUBLIC

CPR is the cosponsor of an arbitration program at the Association of the Bar of the City of New York next month.

The program, "Fulfilling the Promise of Commercial Arbitration," is sponsored by the association and its Arbitration Committee.

The April 4 session will feature members of the CPR Commission on the Future of Arbitration discussing significant issues in complex cases considered by the commission.

CPR convened the commission in early 1998 to devise "best practices" in arbitration. A book describing the commission's findings is due later this year.

John M. Townsend, of the Washington office of Hughes Hubbard & Reed LLP, will moderate the session. It will feature commission members Gerald Aksen, a partner in New York's Thelen, Reid & Priest LLP; Paul J. Bschorr, a partner in Dewey Ballantine in New York; Carroll E. Neesemann, a New York City-based partner at Morrison & Foerster LLP; John H. Wilkinson, of counsel to Fulton, Rowe, Hart & Coon in New York; and Stephen P. Younger, a partner at New York's Patterson, Belknap, Webb & Tyler. ■

EMPLOYMENT LAW REVIEW

A CPR vice president is serving as a faculty member for an employment law review conference later this month.

F. Peter Phillips, who is CPR's vice president for committees, industry initiatives and model ADR procedures, will participate in the Georgetown University Law Center Continuing Legal Education program's 18th Annual Employment Law and Litigation Update on March 30-31 in Washington. Attendees will be eligible for a total of 13.5 continuing legal education credit hours.

Phillips will be on a second-day seminar panel called "Problem Solving and Dispute Resolution in the Workplace." The 90-minute program will cover "strategies, solutions and options available to the employee and the employer."

For registration information, call (202) 662-9890 or go to www.law.georgetown.edu/cle. ■

Lawyering for Clients in Mediation:

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if mediation client counseling is firmly grounded in a deliberative and problem-solving process, the mediated negotiations that follow will be responsive to clients' real needs and interests.

Then we may just begin to see a law practice in which the human element really does matter.

SPECIFIC PRINCIPLES ARE NEEDED

While there are several rulemaking initiatives being developed to govern the conduct of lawyers who serve as advocates for parties in mediation, more than rulemaking is required. [For example, the ABA Dispute Resolution Section Ethics Committee and the CPR-Georgetown Commission on Ethics and Standards in ADR are developing amendments to the text and comments of the existing Model Rules of Professional Conduct that would address the role of the lawyer who serves as an advocate for a party in mediation.] Lawyers need a conceptual understanding of the values that differentiate mediation from the hired gun mentality of adversarial practice. In short, we need to develop foundational principles that will allow lawyers to respect the dignitary and participatory values of mediation and at the same time protect client interests.

In "A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society" (1994), Mary Ann Glendon offers an approach to lawyering that can inform development of these founda-

tional principles. Her understanding of civility and vision of deliberation can help to develop a theory of good representational mediation practice.

Glendon's description and understanding of the deliberative process is grounded in her respect for the intrinsic value of every human being. If deliberation is to go beyond what she describes as the "mere clash of unyielding interests, and to end in seemingly irreconcilable conflicts," then it must rest on some basic social assumptions: "the belief that each and every human being possesses great and inherent value, the willingness to respect the rights of others even at the cost of some disadvantage to one's self, the ability to defer some immediate benefits for the sake of long-range goals, and a regard for reason-giving in public discourse." Mary Ann Glendon, *Rights Talk: the Impoverishment of Political Discourse* 179 (1991).

Deliberation, according to Glendon, is a process that "requires time, information, and forums where facts, interests, and ideas can be exchanged and debated." For lawyers, this means being present to clients with conscious awareness not just of what the client is saying but what he or she is feeling. In mediation client counseling, deliberation calls for greater attention to the principle of informed consent. (For a more detailed discussion of this issue see Jacqueline M. Nolan-Haley, "Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking," 74 *Notre Dame Law Review* 775 (1999).)

Lawyers must understand their client's perspective—the facts as well as their emotional state. They must attempt to understand and not presume to know their clients' goals. Lawyers must ensure that clients have a general understanding of what will happen in the mediation counseling interaction.

EDUCATION ABOUT THE PROCESS

Clients must be informed that deliberative counseling has informed decisionmaking as its goal, both in the attorney-client relationship and in the mediation process. They should be advised of the roles that both attorney and client will play in it. Clients also must be educated about the mediation process and understand its essential differences from litigation. Finally, clients must have a general knowledge about the relevant law governing their case so that during deliberations they may meaningfully evaluate alternative courses of action. Clients' awareness of their legal rights honors the principle of informed consent.


The heart of the deliberative process is the exchange of ideas and debate between attorney and client about ends and means, goals and strategies. In this process of co-deliberation, trust is enhanced and the autonomy of both lawyer and client is honored. Trust, an essential part of all human relationships, provides the foundational structure for the mediation counseling relationship.

An explicit goal of deliberative mediation counseling is to structure a decisionmaking process that, like the mediation process, is responsive to clients' needs and respectful of individual values. This requires integration of legal with nonlegal interests. The information the lawyer initially acquires is continually integrated with new data about the clients' real interests in order to achieve a reasonably full understanding for decisionmaking.

PRACTICAL DECISIONS

If a client decides to participate actively in mediation, then a number of practical decisions must be examined. What is the appropriate mediation model? Who should be enlisted as the mediator? What are the lawyer's and client's roles at the mediation sessions? Finally, lawyers and clients must be sensitive to the ethical and moral implications of client decisionmaking in mediation.

One of the benefits of mediation client counseling based on a deliberative model is the educational value it offers clients in informing their decisionmaking during the mediation process. Just as clients make their own decisions in the lawyer-client relationship, after reasoned deliberations with their lawyers, so too do the disputing parties craft their own resolution after reasoned deliberations with the mediator and with each other. In short, deliberation in pre-mediation client counseling enhances the subsequent mediation process.

As lawyers reaffirm a commitment to professionalism in which the problem-solving and peacemaking activities of mediation are valued in the practice of law, new practice principles must be activated and encouraged. The practice of deliberation enhances good lawyering. It invites development of a representational mediation practice driven by the values of cooperation, courtesy and mutual respect where the human element matters. Lawyers and clients who truly listen to one another, who can persuade each other based on reasoned discourse, will make all the difference in and out of mediation. 

ANNUAL INDEX



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See back page for details.