Multi-Stakeholder Dispute Resolution: Building Social Capital Through Access to Justice at the Community Level

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Systems of multi-stakeholder dispute resolution are increasingly recognized as objectives of good governance by international organizations such as the United Nations Development Program (UNDP).¹ Such objectives arise out of insights based on the dynamics of social capital that community based initiatives cannot succeed where trust is absent and mechanisms for collective decision-making do not exist.² Yet localized decision-making can take many forms—whether distributional, competitive, or collaborative. This paper will examine, in particular, the impact of collaborative systems of decision-making on building social capital through access to justice in local communities. It will do this through examining participant feedback, meeting minutes, and post-consultation reports of a community multi-stakeholder dialogue process in Cajamarca, Peru. The creation of dispute resolution forums where community members can

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2. Id.
actively participate in the generation of shared objectives, collect and access information, and take action on issues of collective concern represents an important foundation for the development of social capital.3

I. INTRODUCTION

Multi-stakeholder decision-making is increasingly regarded as a key component of good governance processes and a means by which social capital may be developed within communities.4 Such processes of localized decision-making correspond with prevailing conceptions of governance understood as a “system of values, policies[,] and institutions by which a society manages its economic, political[,] and social affairs through interactions within and among the state, civil society[,] and private sector. It is the way a society organizes itself to make and implement decisions—achieving mutual understanding, agreement[,] and action.”5 Such localized governance processes comprise the mechanisms and processes for citizens and groups to articulate their interests, mediate their differences, and exercise their legal rights and obligations.6 Such processes have a positive effect on social capital, which will be explored in greater detail below.

A. The Concept of Social Capital

Social capital is a broad term that encompasses the “norms and networks facilitating collective actions for mutual benefit.”7 Depending on the particular area of application8 and theoretical tradition,9 the concept of social capital may be viewed through multiple lenses. In reviewing the extensive literature on social capital, observers have noted that “its definitions are diverse, numerous, and reveal[] various important aspects of the concept.”10 Whereas no conception of social capital seems to be generally accepted,
most definitions contain references to norms, values, relationships, connections, networks, and trust embodied in specific structural forms (e.g. cooperatives, networks, associations, groups, etc.).\(^{11}\) Below, various applications of the concept of social capital will be examined in greater detail.

1. Social Capital as an Economic Idea

Social capital may be regarded as an economic idea—"a productive resource [similar to] financial, physical, or human capital."\(^{12}\) Capital is a factor of production that is used to help in producing other goods or services.\(^{13}\) In recent years, capital has increasingly come to be used to include intangible items, such as skills or talents.\(^{14}\) Just as a tractor (physical capital) or university education (human capital) can increase productivity (both individual and collective), social cohesion also enhances the productivity of individuals and groups.\(^{15}\)

Social capital, as an economic idea, refers to the connectedness between individuals and groups.\(^{16}\) Such connectedness "generates returns in the form of better access to information, better communication and coordination, [and the] reduction of opportunistic behavior."\(^{17}\)

2. Social Capital as a Socio-Political Idea

Apart from economic benefits, social capital can also bring about social cohesion in communities.\(^{18}\) McDowell considers social capital as "one of a

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\(^{11}\) Id. at 5.

\(^{12}\) Id. at 12.

\(^{13}\) Social capital can also produce negative effects, however. For example, if a social network is used for manipulative purposes such as fixing market prices, it will affect the economy negatively. Cohesive networks can also lead to mutual dependency and conservatism, resulting in resistance to necessary change and hampering growth.


\(^{15}\) Id.

\(^{16}\) See Valentinov, supra note 10, at 7-8.

\(^{17}\) Id. at 8 (citing Partha Dasgupta, *Trust as a Commodity, in Trust: Making and Breaking Cooperative Relations* (Diego Gambetta ed., 1988)).

number of related terms used to describe the extent to which members of a community view themselves as members of a coherent group, and to which they work toward the common good.”19 Putnam, speaking to education ministers of the Organisation for Economic Cooperation and Development (OECD) in 2004, reported robust correlations in various countries between vibrant social networks and important social outcomes like lower crime rates, improved child welfare, better public health, more effective government administration, reduced political corruption and tax evasion, and improved market performance.20 In this sense, the value of social capital is not confined to economic benefits alone. It facilitates coordination and cooperation for mutual benefit and contributes to social cohesion and stability.21

In brief, social capital here refers to the social networks, connections, and norms shared by individuals and groups, or to the resources arising from them.

3. Social Capital and Social Cohesion

Related to the concepts of social cohesion and community, Brehm and Rahn define social capital as “the web of cooperative relationships between citizens that facilitates resolution of collective action problems.”22 Fukuyama observed that “social capital can be defined simply as the existence of informal values or norms shared among members of a group that permit cooperation among them.”23 Putnam also defines social capital as “features of social organisation [sic] such as networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit.”24 It includes, according to Thomas, “those voluntary means and processes developed within civil society which promote development for the collective whole.”25

19. Id.
20. Id.

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Social cohesion refers to the level of connectedness and solidarity among groups in society. In socially cohesive societies, strong social bonds are evinced by high levels of trust and norms of reciprocity (features of social capital); therefore, efficient institutions of conflict resolution and ample organizations that bridge social divisions should be present.

In this sense, social capital can be seen as a subset of social cohesion. A cohesive society is one that has abundant social capital, while social capital includes those features which act as resources for individuals and facilitate collective action.

4. Social Capital and Trust

The concept of social capital is also directly linked with the presence of trust within a given community. Historians such as Francis Fukuyama have defined social capital as “the crucible of trust.” He explains that trust is “critical to the health of an economy, rests on cultural roots,” and is “a key by-product of the cooperative social norms that constitute social capital.” When trust is present, communities comply with shared norms, avoid taking advantage of each other, and readily form groups to achieve common purposes. The energy that is consumed by second guessing is replaced by a commitment to take action on social problems. Without trust, the transaction costs at every level of human interaction, from everyday interaction between neighbors to business associates, are high.

27. See Penelope Hawe & Alan Shiell, Social Capital and Health Promotion: A Review, 51 SOC. SCI. & MED. 871, 871-85 (2000) (defining social capital as an overarching concept that incorporates the relational, material, and political dimensions of social cohesion, information exchange, networks of support, and informal social control).
28. One can see that most authors in their literature stress the positive aspects of social capital, such as trust and mutual reliance leading to development, harmony, and stability. Few take the negative aspects of social capital, e.g., exclusionism, inward looking, and resistance to change, into account.
30. Id.
From one perspective, Putnam suggests that the development of social capital, such as trust, requires long periods of development.\(^{33}\) Other research shows that “the design of institutions delivering local public goods can influence levels of social capital [relatively early on].”\(^{34}\)

This paper submits that development strategies in environments characterized by high levels of distrust might consider integrating consultative decision-making processes, preferably initiated at the outset of a development program, to catalyze the long-term development and the maintenance of trust within a community and strengthen local administrative institutions. To the extent that individuals are trained to resolve conflict on their own and are given access to forums that facilitate such resolution, societal capacity for self-reliance, self-determination, and the ability to find appropriate solutions to collective problems is greatly strengthened.

This paper will proceed as follows. Following an examination of the concept of social capital, section two will explore the impact of collaborative and competitive negotiation on building social capital and achieving social justice within communities. Finally, the last section will examine a case study of how social capital can be built through access to justice programs at the community level.

II. DECISION-MAKING TO UNLOCK INDIVIDUAL AND GROUP CAPACITY AND ENHANCE SOCIAL CAPITAL

Insights based on the dynamics of social capital indicate that community-based initiatives cannot succeed where trust is absent and mechanisms for collective decision-making do not exist. Yet governance decision-making can take many forms—whether distributional, competitive, or collaborative. This section will examine the impact of collaborative systems of decision-making on building social capital in communities.

In general, this section finds that the creation of consultative community-based programs serves to build trust and social capital. The creation of dispute resolution centers where neighbors can become familiar with each other and build bridges of understanding that cross cultural, political, and economic barriers represent an important foundation for the development of social capital.\(^{35}\) Effective exercise of the capacity for collective decision-making and collective action contributes to the

\(^{33}\) Id.
\(^{35}\) Maktiia Wunsttin, supra note 3, at 253.
development of “institutions that are devoid of corruption and . . . that engender public trust.”

A. Negotiated Decision-Making at the Community Level

A key component of a community decision-making forum is the process of coming to decisions about issues facing a community. As defined by Korobkin, negotiated decision-making “is an interactive communication process by which two or more parties who lack identical interests attempt to find a way to coordinate their behavior or allocate scarce resources in a way that will make them better off than they could be if they were to act alone.” Such processes may be carried out within the context of a collaborative or competitive framework with differing effects on the building of social capital. In what follows, two primary types of group decision-making will be examined: competitive negotiation and collaborative negotiation.

Competitive negotiation is sometimes called “positional,” “distributive,” or “distributional bargaining,” whereas the collaborative approach is sometimes referred to as “integrative” bargaining or “problem-solving negotiation.” Lax and Sebenius view these two bargaining processes as being distinguished by “value claimers” and “value creators.” While competitive negotiators focus on claiming value, collaborative negotiators focus on creating value. Competitive negotiation is likely to have a negative impact on social capital as it undermines trust and the tendency to cooperate within a community. Collaborative negotiation, on the other hand, tends to have a positive impact on building social capital. The process of collaborative negotiation often facilitates social cohesion and cooperation through information sharing and exploring solutions.

38. Id. at 34.
40. See KOROBKIN, supra note 37, at 111-29.
41. See id. note 37, at 17-21.
42. See id.
43. See id. at 20-21.
1. Competitive Decision-Making Processes

Competitive negotiation is a form of contest in which there generally is a “winner” and a “loser.” According to the competitive framework, the negotiator needs to be tough, powerful, and skillful in maximizing his or her principal’s self-interest. Competitive negotiation is also called distributive bargaining because it is “distributive” of the limited resources considered to be available for distribution. As Raiffa puts it, in distributive bargaining, “one single issue . . . is under contention and the parties have almost strictly opposing interests on that issue.” Thus, the more you get, the less the other party has left. In other words, the interest pie is seen as fixed. As a result, hard bargaining tactics are often employed to maximize individual profits irrespective of the overall effect on others, or even at the other’s expense. These strategies give rise to a hostile and confrontational approach and response, focusing on manipulation and threats rather than trying to understand the issues sufficiently to find a mutually acceptable solution. Deception and bluffs may also be employed by competitive negotiators.

Competitive negotiation is likely to have a negative impact on social capital. Because the negotiator views the interest pie as fixed he believes that the outcome will be a win or lose situation. This means that joint gains cannot be identified, and innovative solutions will not be created. Moreover, as analyzed by Murray, Rau, and Sherman, communications in competitive negotiation are often distorted, and tension, mistrust, anger, and frustration may result. Brinkmanship inherent in the competitive approach often results in deadlock and a breakdown of negotiations, with consequent delays, stress, and additional costs. Such outcomes have a negative impact on social capital because they increase distrust between individuals within a

44. Id. at 18.
46. Id.
47. HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 33 (1982).
48. Id.
51. Id.
52. Id. at 6-7.
53. Id. at 7.
55. Id. at 121-22.
community. Lewicki, Saunders, and Minton note that misrepresentation or lying is more common in distributive bargaining than in integrative bargaining. This causes hostility and hampers social cohesion, which in turn has a negative impact on social capital.

2. Collaborative Decision-Making

In collaborative problem-solving decision-making, the paradigm shifts from battling over the division of the pie to the means of expanding it by uncovering and reconciling underlying interest. In collaborative negotiation, negotiators avoid being positional but rather concentrate on parties’ respective needs and interests. Looking beyond stated aspirations and trying to assess underlying needs or preferences is a recurring theme of problem-solving negotiation.

Collaborative decision-making contributes to the building of social capital in various ways. In collaborative negotiations, rather than focusing on the form in which an aspiration is expressed, parties examine one another’s underlying needs, particularly where differences exist. By recognizing the differences in underlying needs and priorities, it is possible to create value since the existence of differences allows more scope for constructing a settlement which accommodates those differences. It also provides many opportunities for arriving at creative solutions. Through collaborative negotiation, differences between individuals and groups do not lead to conflict or trigger hostility that restrains cooperation and weakens social cohesion. In contrast, differences are taken as opportunities to create value and solutions. Cooperation between groups is encouraged because mutual benefits are generated through collaborative negotiation. This helps build social capital.

The process of collaborative negotiation, which often includes a space for dialogue and resolution, is also conducive to building social capital. In the dialogue stage, active listening is encouraged. Through focused

60. See Portes, supra note 9, at 1.
listening, the needs and feelings of each party are identified. This helps individuals to “[w]alk in the [o]ther’s [s]hoes,” which, described by Wilson, is one of the “collaborative process skills that [is] the key to building social capital.”\(^61\) It is suggested that walking in the other’s shoes is conducive to both building and bridging social capital.\(^62\)

Another important element in the process of collaborative negotiation is informing. The purpose of informing is to make one’s own positions, needs, and feelings known to the other party. During the process, information unknown to the other party will be shared.\(^63\) As Wilson notes, communicative actions increase parties’ access to information and dialogue, build consensus, foster understanding, and encourage interdependent projects between companies and institutions\(^64\) in turn promote social cohesion and contribute to the building of social capital between groups.\(^65\)

In collaborative negotiation, parties work together to identify joint solutions on which they mutually agree. It is rare for a party in negotiation to be satisfied if he is the only one who pays or contributes to the joint solution.\(^66\) In other words, parties in negotiation contribute toward a common goal, creating a positive impact on social capital.

**B. Collaborative Decision-Making and Social Justice**

Collaborative negotiation, while providing numerous benefits to individuals and societies, must not be indifferent to the possibility of masking procedural or distributional inequalities.\(^67\)

\(^61\) Patricia Wilson, *Building Social Capital: A Learning Agenda for the Twenty-First Century*, 34 URBAN STUD. 745, 750-51 (1997). In her research, she quoted an experience of the Grameen Bank, a bank “known for its successful micro-enterprise group lending to the landless poor of Bangladesh.” The bank “developed an intense six-month training program[...]” that requires its head office professionals to live in a village and work at the local bank branch. It is reported that by walking in the other’s shoes, those who completed the training had a higher level of commitment to its company and its partner, contributing to the building of social capital. Id. at 751-52.

\(^62\) Id.

\(^63\) Through transactional collaborative negotiation, ideas and norms are shared between the parties, “facilitat[ing] coordination and cooperation for mutual benefit.” Putnam, *supra* note 14, at 67. This, as Putnam defines it, is the very nature of social capital. See *id*.

\(^64\) Wilson, *supra* note 61, at 753. Research done by Alex Sharland, focusing on negotiation and business relationships, shows that one of the major requirements for a viable long-term business relationship is for companies to negotiate a win-win solution when finalizing contracts. Alex Sharland, *The Negotiation Process as a Predictor of Relationship Outcomes in Relationship Outcomes in International Buyer-Supplier Arrangements*, 30 INDUS. MKTG. MGMT. 551, 552 (2001).

\(^65\) Wilson, *supra* note 61, at 753.

\(^66\) See RAIFFA, *supra* note 47, at 33.

One means by which collaborative negotiation can address such challenges is through the selection of collective operational rules and principles, pooling common facts, training in decision-making skills, and careful and close evaluation of processes. The ability to pursue legal rights and protections is an additional mechanism by which structural inequalities may be addressed. On the one hand, the goals of social justice are not fully realized without a foundation of social cohesion and trust. On the other hand, trust is maintained through the realization of objectives of social justice, as will be examined further below.

69. See UNDP, supra note 1, at 59.
C. Community Decision-Making and Social Capital

The task of building capacity for community decision-making in environments characterized by weak relational capital requires an initial demonstration of how coordinated behavior can benefit both individuals and the community as a whole [. . .] an agreement on the structures and norms that support the required behavior [. . .] and most important, an institutionalization of these structures and norms in such a way that the desired form of behavior becomes institutionalized or customary.70

Classification Scheme of Social Capital71

<table>
<thead>
<tr>
<th>Relational Capital</th>
<th>Strong</th>
<th>Weak</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strong Institutional Capital</td>
<td>High Social Capital</td>
<td>Strong organization</td>
</tr>
<tr>
<td>Task: Extend scope of activities</td>
<td>Task: Legislation, institutionalization</td>
<td></td>
</tr>
<tr>
<td>Weak Institutional Capital</td>
<td>Traditional/Associative</td>
<td>Anomic, atomistic</td>
</tr>
<tr>
<td>Task: Introduce rules, procedures, and skills</td>
<td>Task: Assist in development of structure and norms</td>
<td></td>
</tr>
</tbody>
</table>

As noted above, research in collaborative group decision-making demonstrate the positive gains to be made by cooperative action.72 The Institute for Studies in Global Prosperity observes that “the realization of justice is dependent upon universal participation and action among all members and agencies of society.”73 It adds that once such a culture begins to evolve, “practical issues such as training in the administration and

71. Krishna, supra note 34, at 79.
72. This research is also supported by findings in cooperation theory, law and economics, and interactive game theory, which all demonstrate the practical gains to be made by cooperative action.
73. INSTITUTE FOR STUDIES IN GLOBAL PROSPERITY, supra note 36, at 6.
enforcement of justice, equitable distribution of community resources, and the upliftment [sic] of persons and groups historically excluded from the benefits and opportunities offered by society can be effectively addressed.74

Joint analysis of the conditions that directly impact the life of a community can serve as the first focal point for developing an intervention strategy designed to build trust. Convening community members to seek consensus through the broadest possible participation contributes to the creation of a setting where the parties to a conflict can learn to bring their issues in a non-confrontational environment. With regard to the nature of that participation, it must be “substantive and creative; it must allow the people themselves access to knowledge and encourage them to apply it.”75

The Institute for Studies in Global Prosperity has identified a number of capabilities needed for effective participation, including:

- the capacities to take initiative in a creative and disciplined manner;
- to think systematically in understanding problems and searching for solutions;
- to use methods of decision-making that are non-adversarial and inclusive;
- to contribute to the effective design and management of community projects; and
- to manifest rectitude in private and public administration.76

This kind of intervention requires an important time commitment from all participants. Changing old habits of debate, conflict, and violence; and establishing new principles of initiative, rectitude, and collaboration requires patience and long-term commitment. When viewed in this manner, the project design phase becomes a part of project implementation.77

D. Conclusion

Because it is intangible, social capital is inherently difficult to measure. Yet, from the discussion above, it is clear that collective decision-making

74. Id.
75. Id.
76. Id.
77. Ali & Davis, supra note 70, at 3.
plays an important role in the construction of social capital. While competitive negotiation has a negative impact on the building of social capital, collaborative group negotiation has a positive impact on forging constructive bonds at the community level.

III. MULTI-STAKEHOLDER DISPUTE RESOLUTION IN CAJAMARCA, PERU

“Among the variety of avenues for the resolution of conflicts is the development of access to justice at the community level” through the use of multi-stakeholder dispute resolution processes. Such dispute resolution forums have both short term and long term benefits. In the short term, such forums allow for the creative resolution of present concerns and the development of decision making and management capacity. In the long term, opportunities for the development of group cohesion and social trust (“relational capital”) developed by this process serves to” build a foundation for achieving collective aims and preventing future conflict. The realization of such social justice objectives, in turn, reinforces social cohesion and fosters the trust necessary to resolve ongoing issues.

The following case outlines insights gained from a multi-stakeholder dispute resolution process in Cajamarca, Peru. This process was implemented under the auspices of the International Finance Corporation following a mercury spill by a national mining corporation. Following a discussion of the background of the case, this section will outline the development of the community multi-stakeholder dialogue forum named by the participants, the “Mesa de Dialogo,” and finally examine and evaluate its process in relation to the creation of social capital.

A. Background

In June 2000, a contractor at the Minera Yanacocha Gold Mine in Cajamarca, Peru, spilled 151 kilograms of elemental mercury along a forty-one kilometer stretch of road between a local mine site and the town of Choropampa. The mercury spill sparked a massive public outcry regarding the activities of the mine in the region. Since the mining activities began, the area (populated primarily by agricultural and dairy farmers who farm

78. Id. at 4.

79. Id.


small plots of land on the hillsides of the Andes) had been affected by an influx of people from outside the region, filling streets with very large trucks and creating a risk to local pedestrians. As a result of the population growth, each year the hillside plots are reported to grow smaller, making the farming less economically sustainable.

Following the mining spill in Choropampa, a number of local farmers were exposed to the mercury and suffered adverse health effects. Immediately following the spill, local authorities intervened to attempt to manage the situation. The Ministry of Health sent a minister to the region who subsequently promised aid to those affected by the spill. However, no attention was forthcoming. Community members submitted a complaint to the Compliance Advisory Office (CAO) of the International Finance Corporation, a minority shareholder in the mine, through the Federation of Rondas Campesinas.

As a general matter, the mining industry in Peru has become an arena of intense conflict. “The mining industry has transformed the regional economy, . . . taxed the local housing market and social service agencies,” and sparked “an unwelcome growth in nightclubs and brothels to entertain the newcomers.” At the same time, the mining industry has stimulated employment and the development of social services through job creation and tax revenue. Increasingly, there is recognition of the need to develop new

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83. Compliance Advisor Ombudsman, Peru / Yanacocha-01/Cajamarca (2009), http://www.cao-ombudsman.org/cases/case_detail.aspx?id=110 (“Despite mine projections conceiving of a [ten] year operational life span, tremendous exploratory success witnessed the significant continuation of operations. The company is a consortium of three shareholders—Newmont Mining Corporation, Compania de Minas Buenaventura S.A., and IFC. A group of individuals affected by the spill also filed suit against Newmont Mining in U.S. and Peruvian courts and deliberation continues in both jurisdictions.”).
84. Id.
86. Id. at 5-7.
87. Id. at 5.
88. Id. at 6.
89. Id. at 5-6 (“According to the [Yanacocha mining] company’s sustainability report for 2003, 7,443 workers were employed by the mine . . . [and] 44% of the permanent employees came from Cajamarca.”). The mine contributed $140 million in taxes. Id.
social and political consensus regarding the role and management of the mining industry within affected local communities.90

In mid-2001, community mine conflicts intensified and local communities expressed concerns, such as the lack of consultation with affected individuals and failure to distribute mining benefits in an equitable fashion.91 In response to the widespread local demand for a comprehensive approach to addressing the conflict, the CAO supported the creation of a multi-stakeholder dialogue roundtable in September 2001.92

In July 2001, the CAO sent a team to investigate the feasibility of utilizing a facilitative or mediation-based approach to address the concerns raised in the complaint.93 After visiting the region, the team became aware of the complex lines of hostility and resentment in the area.94 The team found that this resentment, hostility, and lack of trust within the community impeded collective decision-making.95 It agreed that its task was to create favorable conditions for a process to be initiated that would enable the participants to begin to work together over the long term.96

For four and a half years, the Mesa de Diálogo y Consenso (Mesa) sought to create an open forum for dialogue to help prevent and resolve conflict between the communities and Yanacocha. With the participation of over [fifty] public and private institutions, the Mesa facilitated conflict mediation training, undertook capacity building workshops for community members and mine staff, oversaw an independent participatory water impact study and subsequently led a participatory water monitoring program.97

These efforts aimed to promote dialogue and transparency.98

B. Development of Multi-Stakeholder Dialogue

The development of the Mesa and its identification of collective objectives took place through a sequence of three phases of training and
development. These three phases included an exploratory phase, a period of development, and a “consolidation” phase that will be described below.

1. Phase One: Exploratory Phase

At the outset of the development of the Mesa, the CAO sent a team to meet with a wide variety of stakeholders. During this first phase, which took place between July and September 2001, the team met with community members to identify issues facing the community and to determine the willingness of individuals and groups to engage in a process of dialogue and discussion aimed at identifying options for resolution. After determining that there was a desire and an opportunity to engage in a process of dialogue, the team then met again with stakeholders to convene three meetings to (1) facilitate discussion about the scope of issues identified, (2) explore the principles and alternative approaches for building consensus and resolving disputes, and (3) examine options for moving forward.

At the first meeting, the team of collaborators reviewed the findings regarding the situation in Cajamarca and asked the participants to identify their primary concerns. Approximately fifty individuals from a cross section of the community participated. Representatives of the mine were also present to listen to the complaints. This emotionally charged session reflected the extensive pent-up anger that the participants felt toward the mine. Some remained silent, and key nongovernmental organizations did not attend the session due to a boycott.

The members of the Mesa identified “Work Plan Goals” that included the following: train members in dialogue skills and natural resource management; promote actions to improve the environmental conservation of water, air, soil, and human health quality with participation of the mine; promote social and economic development through strengthening small enterprises; achieve the integration of new public-private and civil society
organizations to strengthen the representation of the Mesa to complete its mission; work on conflicts within a framework of good faith, respect, cooperation and tolerance, and seek solutions through consensus to satisfy the interests and needs of all parties; promoting and publicizing conflict resolution mechanisms through training, dialogue, and active participation of the member institutions of the Mesa with the purpose of promoting good relations; supporting and promoting actions that improve and preserve the environment and that respect individual and group differences; contribute to and promote participation in diverse public and private institutions through representatives with decision-making capacity to promote sustainable development in Cajamarca; promote institutional strengthening of the administration of the Mesa; improve the quality of the environment in the valleys adjacent to the mine; provide optimal quality and quantity of air and water for diverse local users; and provide a technical reference for social environmental conflicts in Cajamarca.\(^{108}\)

In the second public workshop, the parties discussed possible consensus-building models (such as Mesa de Dialogo) and their feasibility, advantages, and disadvantages.\(^{109}\) This enabled the team and participants to determine which model would be most effective in the local environment.\(^{110}\)

“With a view to balancing the negotiating position of all participants, facilitation efforts focused on cultivating capabilities of group decision making.”\(^{111}\) The Mesa selected fifty “representatives to attend a consultative skills training session[].”\(^{112}\) “The training activities provided an environment in which the participants from all groups, including the mine, could engage” one another.\(^{113}\)

Individuals from the rural areas recounted that this was the first time in their lives that they were able to participate as equals with people from the city . . . . The highly interactive style of training assisted all the participants to engage on subjects relevant to their lives.\(^{114}\)

This form of engagement served to assist participants as they gradually adopted broader goals based on interests.\(^{115}\)

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108. RODRIGUEZ, supra note 85, at 12.
109. Id. at 13.
110. WILDAU, supra note 81, at 5.
111. Ali & Davis, supra note 70, at 5.
112. Id.
113. Id.
114. Id.
115. Id.
The dialogue skills training focused on the development of skills such as: “fact finding, selection of relevant principles for decision making, listing of all possible solutions, [and] selection of appropriate solutions and collective implementation.”116 “Individuals were trained to facilitate group processes and re-convene on-going meetings.” 117 Significantly, such training processes “also underscored the importance of structured learning in generating and sustaining an integrated set of social and economic activities.”118

The training sequence, which included a segment for training future trainers,119 aimed to ensure that community-based decision-making capacity could be sustained in the long run. Eventually training for trainers was offered.120 The participants selected members to attend the training sessions to ensure that there was wide representation.121 Special attention was focused on encouraging the participation of women in the process.122

Finally, in the third workshop, three working groups were formed focusing on water, development, and other community natural resource issues, and participants chose which group to be involved in based on their area of interest.123 Each working group was responsible for coming up with a proposed plan of action (rather than a solution to the problem itself).124 Each group had to formulate its own goals as well as decide which specific issues it wanted to focus on.125 The groups also had to come up with a design for their collaborative process, considering questions such as how to make decisions, how to establish a pool of credible information, how to coordinate with other working groups, and how to ensure discussions are balanced, credible, and representative.126 Finally, each group had to consider the relevant time frame required and how to proceed.127 After each working group had finished discussions, it presented its model to all the

116. Id. at 4.
117. Id.
118. Id.
119. Id. at 5.
120. Id.
121. Id.
122. Id. at 6.
123. WILDAU, supra note 81, at 15.
124. Id.
125. Id.
126. Id.
127. Id.
participants who could then ask questions, make comments, and assess the feasibility of moving forward.\textsuperscript{128} The participants also came up with a mechanism to ensure coordination among all working groups.

The three trainings included in this first stage of the development of the Mesa de Dialogo were oriented to the creation of a consultative environment, the creation of shared identity, and the initiation of a group process through which “relational capital” could be built. Through joint identification of issues of common concern and participation in joint dialogue training, the group began to form a group identity and find agreement around common issues of shared concern.\textsuperscript{129}

2. Phase Two: Development Period

During the second phase of development, which occurred between October 2001 and March 2002, the Mesa established a coordinating committee, continued training programs, and launched its technical work.\textsuperscript{130} Additional capacity building workshops were held on dispute resolution and methods for creating consensus in public meetings.\textsuperscript{131} Terms of reference were established for the water study, including the concept of using “Veedores” (community monitors) to verify the activities and methods of the hydrology team.\textsuperscript{132} Ostrom’s references to the shared knowledge, understandings, norms, rules, and expectations that groups of individuals bring to a recurrent activity are consistent with the aims and operational mode of the Mesa community dispute resolution forum at this stage.\textsuperscript{133}

3. Phase Three: Consolidation of the Mesa

During this third phase of consolidating the activities of the Mesa, which occurred between March 2002 and January 2003, the meetings included regular progress reports on the water study.\textsuperscript{134} At this time a full-time coordinator was hired.\textsuperscript{135}

\textsuperscript{128} Id. at 15-16.
\textsuperscript{129} The formation of group identification as opposed to constituency identification further enabled participants to build on a foundation of trust and thus enhance the prospects of achieving a viable solution.
\textsuperscript{130} Rodriguez, supra note 85, at 8-9.
\textsuperscript{131} Id. at 9.
\textsuperscript{132} Id.
\textsuperscript{133} Elinor Ostrom, Social Capital: A Fad or a Fundamental Concept?, in SOCIAL CAPITAL: A MULTIFACETED PERSPECTIVE 172, 175 (2000).
\textsuperscript{134} Rodriguez, supra note 85, at 9.
\textsuperscript{135} Id.
The members of the Mesa engaged in the following activities to work toward its goals: Mesa training workshops; annual planning sessions; referral of complaints (i.e., contractor payments); water study and oversight of data collection through community monitors (Veedores); and an aquatic life study. In an effort to localize the Mesa and establish it as a fully Cajamarcan entity, the CAO concluded its active oversight in March 2006.

4. Results: Impact of Mesa Activities on the Development of Access to Justice and Social Capital Development

During its four-year existence, the Mesa de Dialogo y Consenso CAO-Cajamarca worked to “address and resolve conflicts between Minera Yanacocha and the community of Cajamarca with the participation of public and private institutions in a transparent, open, independent[,] and participatory manner.”

Determining whether the Mesa was successful in addressing its aims of fostering access to justice and contributing to the building of social capital requires an assessment of its achievements in relation to its stated aims, which included: (1) achieving broad representation of the community; (2) facilitating a participatory, open, transparent, and independent governance process; and (3) establishing an effective mechanism to prevent and resolve conflicts between the community of Cajamarca and Minera Yanacocha.

C. Results

1. Representation of the Community

The aim of the Mesa to be fully representative of the community corresponds with insights into good governance practice that aims for management of resource decisions through interactions within and among the state, civil society, and private sector.

At the outset, members of the Mesa recognized that “the lack of trust and social fragmentation existing in Cajamarca could not be overcome

136. Id.
137. Compliance Advisor Ombudsman, supra note 83.
138. RODRIGUEZ, supra note 85, at 11.
139. Id. at 11-12.
140. Id. at 11.
without a broadly representative and participatory body."141 As a result, the policies and actions of the Mesa have deliberately sought to embrace a broad spectrum of the community as possible.142 In reviewing participant feedback, one participant noted that “at the moment there is good representati[on]: men and women are representing their towns and institutions.”143 While a significant effort was made to ensure that all major governmental actors, and rural and urban civic organizations and interest groups would participate,” nevertheless, observers noted that “there are still some significant actors absent from its meetings.”144 The Mesa’s fifty-two plus organizations represented a broad spectrum of the community,145 yet at the same time, the Mesa lacked the participation of regional and local government and civil society NGOs.146

2. Participatory, Open, Transparent, and Independent Governance Process

Among the recognized values associated with good governance and decision-making at the grassroots level are participatory, open, transparent, and independent governance processes. Such decision-making processes have an impact on fostering the establishment of trust in communities so that collective challenges can be effectively addressed.

In working to foster participation, the Mesa organized a series of training sessions in group decision-making.147 The ongoing development of skills has enabled participants to gain skills in group decision-making and to seek practical solutions.148 According to one participant, “the training is a

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141. Id. at 18.
142. Id.
143. Id.
144. See id.
145. Id. Represented entities included, among others, the following: representatives of the Rondas Campesinas:

Representatives of [those] valleys affected by the operation of the mine, a representative of the Mayor of Cajamarca, mayors of small villages, representatives of the Chamber of Commerce, the Water Company (SEDECAJ), representatives of the two principal Universities in Cajamarca, nongovernmental organizations, the Ministry of Mines and Gems, The Ministry of Health, representatives of the Catholic Church, and representatives of the Minera Yanacocha.

Ali & Davis, supra note 70, at 5.
146. RODRIGUEZ, supra note 85, at 16.
147. Ali & Davis, supra note 70, at 5.
148. Id. at 5-6.

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process where we need the willingness to learn and also practice the skills. I am discovering a whole new facet of concepts and strategies that are important for me, especially the need to be well informed in elements of communication and to solve problems . . . ." 149  "Another participant noted that through the training they learned to ‘not see the conflict as unsolvable,’ 150 while another participant noted that she learned to dialogue and not to judge." 151 

From the outset, the Mesa meetings were made open to the public and press. 152  The Mesa technical work has also been directly monitored by the public, and the Mesa has actively sought to disseminate and explain the results of its technical studies to affected members of the public. 153 Observers noted that in order for the Mesa to improve its level of openness and independence and address concerns that the Mesa is not independent, “a set of rules regarding conflict of interest and public disclosure of a member’s interests in the Mine” would be useful. 154 According to one evaluation, “in the current context of Cajamarca . . . no institution, person, or initiative is immune from the pervasive atmosphere of suspicion and distrust affecting the relations between Minera Yanacocha and the community.” 155 

Finally, the ability to independently investigate the socioeconomic conditions of a community and search for common solutions requires an effective process of joint fact-finding and investigation. Achieving this objective requires that “mechanisms be established and avenues be opened for community members to participate meaningfully in the conceptualization, design, implementation[,] and evaluation of the policies and programs that affect them.” 156 Research has found that “[r]esolving a complex public policy dispute requires that interested parties share understanding of the technical dimensions of the problem they face . . . [and that] the very best scientific information must be collected and used.” 157 

149. Id. at 5.
150. Id. at 6.
151. Id.
152. RODRIGUEZ, supra note 85, at 21.
153. Compliance Advisor Ombudsman, supra note 83.
154. RODRIGUEZ, supra note 85, at 22.
155. Id. at 20.
In pursuing the aim of collecting reliable, independent, technical information regarding the impact of the mine’s activity on the community, the Mesa oversaw a technical study on water quality and quantity carried out by Stratus Consulting.\(^{158}\) The Water Study reflects a strategy for dispute resolution that focuses on providing an open and transparent process for developing and disseminating technical information about issues in dispute. This view rests on the accepted proposition that an effective dispute resolution process requires that all parties share credible, independent, scientifically-sound information regarding the issues to be addressed.\(^{159}\)

3. Facilitate Mechanisms to Prevent and Resolve Conflicts

At the outset of its development, community members voiced the desire that the Mesa become an effective organization capable of addressing community concerns.\(^{160}\) In examining its impact, observers noted that the Mesa provided a safe place to address critical and challenging issues regarding the operation of the mine and oversee the collection of important information necessary for the community to reach joint consensus and action.\(^{161}\) At the same time, its efficacy was hindered by ongoing questions as to the existence and operation of the mine.\(^{162}\)

With regard to its efficacy, the Mesa met regularly for three years, developed annual work plans, and oversaw the implementation of fact-finding, assessment, and community development activities derived from those plans.\(^{163}\) In addition, participation in the Mesa was constant and regular.\(^{164}\) “[T]he Assembly . . . met over [twenty] times since its inception, and membership participation has seldom dropped below [sixty] . . . .”\(^{165}\) Several observers noted that the Mesa “[has] become a valuable forum for the mayors of smaller rural villages and other rural organizations to air issues and inform themselves about the activities of the Mine and the work being done under the auspices of the Mesa.”\(^{166}\)

The Mesa evolved into a “mixture of a forum for civil society dialogue and a mechanism for providing objective technical information on issues

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158. See Rodríguez, supra note 85, at 29.
159. Id.
160. Id. at 2.
161. Id. at 21.
162. Id. at 6.
163. Id. at 17.
164. Id. at 2.
165. Id. at 20.
166. Id. at 17.
surrounding the relationship between Yanacocha and Cajamarca.\footnote{167} Over a period of four years, the Mesa participants have identified work plans and activities designed to: (1) establish “an open and transparent process for developing accurate, objective[,] and authoritative factual information about the issues in dispute which can be made available to all parties,” and “to provide an environmental oversight role[,] based on technical information gleaned from independent monitoring;”\footnote{168} (2) provide education on effective methods for resolving disputes; and (3) “establish an administrative system for conflict resolution between [the] community and [the] mine that people recognize as credible, independent, and accessible.”\footnote{169}

From a wider perspective, “the Mesa has become a broad forum for Civil Society Dialogue, an instrument for Technical Dispute Resolution, and in the minds of some of its members, a fledgling mechanism for Targeted-Issue [D]ispute resolution.”\footnote{170} The study of water quality in the region\footnote{171} established an objective, scientific basis for understanding the scope of the problems facing the community.\footnote{172} On this basis, “the dialogue group was able to achieve a number of significant environmental, social, and economic achievements.”\footnote{173}

These included: . . . the development of an environmental management plan, a new mechanism to transport dangerous materials, an emergency response manual, increased employment of rural residents in the work of the mine, a plan for the promotion of health in the region and the delivery of health services, the initiation of a public works project in the three affected towns; and the development of potable water, sewage drainage, health centers[,] and schools.\footnote{174}

At the same time, addressing concerns regarding the existence of the mine, some observers have recommended that early intervention, community consultation, and input regarding the existence, scope, and duration of mining activities would go far to prevent future conflict.\footnote{175} In reaching the Mesa’s objective of establishing a formal dispute resolution

\footnote{167}{Id. at 28.}
\footnote{168}{Id. at 23.}
\footnote{169}{Id.}
\footnote{170}{Id. at 16.}
\footnote{171}{Id. at 28.}
\footnote{172}{Id. at 28.}
\footnote{173}{Ali & Davis, supra note 70, at 6.}
\footnote{174}{Id.}
system, observers noted that several steps would need to be taken to enhance its capacity to effectively resolve community disputes. These steps would include the drafting of (1) a set of documents describing the objectives, methodology, and staffing of the dispute resolution body; (2) a set of policies and procedures to receive and handle complaints; and (3) the identification of a team of mediators or conflict resolution specialists as resource people.

IV. CONCLUSION

In virtually every development activity, the primary focus must be the early engagement and participation of community members in formulating consensus, trust, and social cohesion surrounding the nature and scope of activities within a community. Recent experience has found that development-project design directly benefits from early development of mechanisms to manage and resolve conflicts as they arise, and from training participants and community members in the practical skills of collective decision making. Through this approach, the ability to prevent conflictive situations is enhanced, and local partnership, trust, and social cohesion are strengthened.

The development of new capacities to manage and resolve conflict is a key element in the strategy to build social capital. The informal sector offers many opportunities to develop unique and distinctive approaches to decision making; individuals acquire new skills and new relationships as they develop these dispute resolution capacities.

Development designs that incorporate forums for multi-stakeholder dispute resolution can defy the conclusion that the creation of social capital is an unapproachable ideal, requiring the passage of centuries. Rather, given the opportunity to build decision-making capacity, individuals are enabled to effectively exercise their will for change, strengthen social cohesion, expand access to justice, and thereby contribute to the progress and development of their communities.

176. See RODRIGUEZ, supra note 85, at 28-35.
177. Id. at 30-34.
Clouded Diamonds: Without Binding Arbitration and More Sophisticated Dispute Resolution Mechanisms, the Kimberley Process Will Ultimately Fail in Ending Conflicts Fueled By Blood Diamonds

Shannon K. Murphy*

I. INTRODUCTION

“In America, it’s bling bling but out here it’s bling bang.”

Conflict diamonds, the so-called “blood diamonds” mined in the resource-rich nations of Africa, have led to the displacement and death of millions. The decolonization of Africa and the arbitrary boundaries left by Europeans created a power vacuum and unnatural divide amongst people, creating the perfect breeding grounds for rebel movements. These counter-government forces use fear and poverty to drive the African peasantry to illegally mine rough diamonds. These diamonds are then sold back to the rebel forces that use the exorbitant profits to further fuel their reign of

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1. BLOOD DIAMOND (Warner Brothers Pictures 2006).


3. See id. at 221.

oppression—fanning the flames of anarchy within the infantile nations.\(^5\) These rough diamonds, the sale of which would enable the building of infrastructure and the establishment of society, have turned into a curse for the countries in which they are found. These plagued African nations are hemorrhaging resources and potential for profits while the rebels usurp the blood, power, and labor of a people desperate to survive.\(^6\) For many, diamonds are the key to rebuilding Africa.\(^7\) Those who control the diamond mines are the keepers of the keys to a new African continent.

Polished diamonds abound in America. They are celebrations of accomplishment and love. But as global awareness of the conflicts in Africa continues to increase, diamonds are held to a new standard of clarity. Consumers continue to investigate the new clouds in their diamonds—how distasteful it is to sport a diamond, the sale of which funds murder and oppression.\(^8\) But while awareness among consumers is spreading, it is not spreading fast enough.

In 2003, under an initiative of the United Nations (U.N.), various nations of the world gave life to the Kimberley Process Certification Scheme (KPCS)—a method by which consumers of all levels could know the origin of their diamonds—with the Scheme only certifying those harvested from legal, government-run mines.\(^9\) The Scheme’s drafters believed that, if given the choice, consumers would choose to buy diamonds mined legally, with profits flowing to legitimate sources of power.\(^10\) However, the KPCS as it stands is voluntary and lacks the teeth needed to deter its violators.\(^11\) The KPCS lacks a binding arbitration agreement and needs a more articulate and sophisticated method of resolving disputes and violations among its signatory countries. This article will offer suggestions for increasing the efficiency of the KPCS.

Part II provides an explanation of the problem of conflict diamonds, including brief profiles of some of the most conflicted areas of Africa. Part III highlights the relevancy of conflict diamonds to Americans. Part IV explains the motivations for enacting the KPCS. Part V provides the

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8. See generally Fishman, *supra* note 2, at 224-28 (explaining how the negative publicity surrounding blood diamonds led to the Kimberley Process Certification Scheme).
9. See *id.* at 225-27.
10. See generally *id.* at 227 (explaining how the KPCS can ease the worries of purchasers).
11. See *id.* at 234.
relevant provisions of the KPCS. Part VI outlines the shortcomings of the KPCS, including its voluntary nature, vague wording, and lack of dispute resolution mechanism. Part VII describes the author’s suggested modifications to the KPCS, including an enhanced method of dispute resolution and a binding arbitration clause. Part VIII concludes the article, addressing future hurdles to be faced.

II. WHAT ARE CONFLICT DIAMONDS?

“Conflict diamonds, also known as ‘blood’ diamonds, are rough diamonds used by rebel movements or their allies to finance armed conflicts aimed at undermining legitimate governments” throughout the African continent, with the primary trouble areas being the Democratic Republic of the Congo (DRC), Republic of Angola, Sierra Leone, and Cote d’Ivoire (the Ivory Coast). These diamond-fueled and diamond-funded conflicts have “forced more than 6.5 million people from their homes in Sierra Leone, Angola, and the DRC,” and are responsible for the death of roughly 3.7 million people.

The actual number of diamonds and the worth of these jewels, primarily discussed in their rough form, is staggering. Roughly $8.5 billion worth of diamonds are exported from the African continent each year, with over sixty-five percent of the world’s diamonds originating in African countries. The United States Department of State estimates that the international rough diamond trade generates $30 billion annually. Of this number, the global trade of blood diamonds is worth approximately $300 million a year. The following paragraphs provide brief synopses of the role of conflict diamonds in various African nations.

13. Fishman, supra note 2, at 231-32.
16. Fishman, supra note 2, at 219. This number (i.e. $300 million) is roughly 3%-15% of the total trade of diamonds worldwide. Id. However, these numbers represent only ascertainable percentages, and in actuality, the blood diamond trade may constitute a significantly larger portion of the global diamond trade. Tracey Michelle Price, The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate, 12 MINN. J. GLOBAL TRADE 1, 25 (2003).
A. Republic of Angola

Following its secession from Portugal in the mid-1970s, Angola was split along the lines of two political factions vying for control of the country’s resources.\textsuperscript{17} From 1975 to 1989, the National Union for the Total Independence of Angola (UNITA), backed by the former Soviet Union, had “virtually exclusive” control of the country’s diamond mines.\textsuperscript{18} Because UNITA was receiving funds from the Soviets and the Angolan government was backed by the United States, neither side was in short supply of resources, thus allowing UNITA to stockpile diamonds for later sale.\textsuperscript{19} However, UNITA was forced to sell the diamonds at the close of the Cold War when the Soviets stopped supplying the necessary resources.\textsuperscript{20}

The sales from these illicit diamonds are estimated to be $4 billion between 1992 and 1998.\textsuperscript{21} UNITA has “turned larger profits from diamond smuggling than any other Central African rebel group.”\textsuperscript{22} Though the country is currently in a relative state of peace, since 1999 there has been evidence of UNITA’s continued trade of diamonds for weapons, despite no longer having actual control over the mines.\textsuperscript{23} This fact alone demonstrates the fragility of the situation in Angola.

B. Sierra Leone

The most prosperous diamond mines in the world are in Sierra Leone.\textsuperscript{24} This wealth of natural resources has proven to be a curse, however, with the country marred by a diamond-funded war from 1991 to 2002.\textsuperscript{25} The Revolutionary United Front (RUF), an insurgent group, maintained control over most of the country’s mines and traded the diamonds in exchange for the essentials needed to fuel the rebel group’s efforts.\textsuperscript{26} The RUF sold $25–$125 million in rough diamonds each year to fuel its insurgent efforts,
committing atrocious crimes that eventually brought the blood diamond conflict to the global stage. By action of the United Nations Security Council, Sierra Leone was sanctioned, faced a weapons embargo, and subsequently was able to disarm the RUF. However, Sierra Leone remains the largest U.N. peacekeeping effort with troops patrolling the diamond-rich areas since 2002.

C. The Democratic Republic of the Congo (DRC)

Though the UNITA in Angola has been deemed the most prosperous and the land of Sierra Leone the most diamond-rich, “no place on Earth have conflict diamonds wreaked more havoc than in the DRC.” Africa’s World War, as it has been coined, has led to the death of an estimated 2.5 million people in the DRC in just four years. The war in the DRC wages on today despite U.N. recognition of the connection between the conflict and the exploitation of diamond mines, with roughly $50–$60 million in rough

27. Id.; Price, supra note 16, at 15.

At the end of 1998, the London-based NGO Global Witness issued the first powerful and vivid account of the nature of the African conflicts fueled by diamonds. That report set off substantial press attention, even in the United States, primarily on the basis of the guerrillas’ trademark atrocity of chopping off the hands or forearms of tribal villagers who resisted their authority . . . . They also liked to burn people–adults and children–alive.

Feldman, supra note 4, at 840.


29. Id.

30. Id. at 32.

[The] DRC provides an exaggerated example of a country lacking the infrastructure necessary to establish effective internal controls. While Sierra Leone and Angola have a long history of poor governance and armed conflict, both countries have seen relative peace in recent years, allowing for growing infrastructures. The DRC, on the other hand, remains plagued by constant violence. In contrast to Angola where at least 50%-75% of diamond mining takes place under formal government supervision, the DRC’s recognized mining sector accounts for only 25% of all official reports.

Id. at 50.

31. Price, supra note 16, at 16. The war was given this name because of the involvement of troops from seven African nations including Zimbabwe, Chad, Namibia, Angola, Uganda, Burundi, and Rwanda. Malamut, supra note 5, at 32.

diamonds smuggled out of the country each year. Until the country can control more than this small portion of its resources, it will be hard pressed to make meaningful progress in other sectors of government and society.

D. Republic of Ivory Coast

Until a failed coup d’état in 2002, the Republic of the Ivory Coast was the fourth largest economy in Sub-Saharan Africa. Now the country lies in the midst of crisis with rebels controlling the diamond-rich north. Like many African nations, the United Nations Security Council imposed a ban on the importation of any diamonds coming from the Ivory Coast in 2004, and subsequently renewed the ban in 2005. The U.N. reported that the illicit diamonds were being smuggled through Ghana in violation of a U.N. embargo. As of October 2009, the embargo on arms and rough diamonds, as well as other sanctions, is still in place. The continued renewal of this embargo, as well as accusations of foreign complicity and even importation of illicit diamonds coming from the Ivory Coast, is evidence that the situation in this country is far from resolved.

III. RELEVANCY OF CONFLICT DIAMONDS TO THE UNITED STATES

There are various reasons the United States should take a vested interest in the legitimacy and efficiency of the diamond trade worldwide. First, the

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33. Malamut, supra note 5, at 32-34. The diamonds are generally smuggled out of the DRC into the Brazzaville, the capital of the Republic of Congo (ROC). Id. The ROC is an attractive locale because of the already established trade routes, geographic proximity, and lower export taxes than other African nations. Id.


38. Id. “Along with Israel, the panel . . . named the United Arab Emirates, Lebanon, Guinea[,] and Liberia as some of the countries that needed to step up efforts to enforce a four-year-old U.N. embargo on buying rough diamonds mined in the Ivory Coast.” Id.

39. Id.
United States is the world’s largest consumer of diamonds. As Americans become increasingly conscious of their social responsibility as consumers, knowing how their products are made and where they come from becomes ever more important in their buying decisions. Wearing diamonds, the sale of which funds anti-government movements and fuels the human rights violations committed by these rebel organizations, is hardly viewed as en vogue.

Second, from a political standpoint, the diamond trade is an integral facet of Africa’s ability to build its infrastructure, establish long-standing governments, and free itself of its financial dependence on Western aid. As a Western power with political, social, and economic ties to the continent, the United States has a strong interest in the establishment of legitimate governments and means of trade. The largest consumer of diamonds, the United States, must combat conflict diamonds, the sale of which allows rebel forces to undermine the very sources of power the United States supports.

Ending the illicit sale of conflict diamonds will not change the fate of the African continent overnight. Converting the illicit diamond trade into a government-regulated sector is very expensive—many African nations simply do not have the funds. Because these countries cannot afford to spend money fighting off rebel forces, it is up to consumers to refuse to buy illegitimate diamonds in the hope of driving the rebels out of business. Only then will diamond-rich African nations be able to legitimately mine the diamonds and use the funds to build infrastructure and eradicate the causes of poverty that drive the peasant miners to sell the diamonds to the rebels. Legitimating the diamond industry holds infinite promise for the African nations that house some of the richest diamond mines in the world.

Under the Bush administration, Congress enacted the Clean Diamond Trade Act of 2003, implementing the KPCS in the United States. The Act

40. The jewelry industry in the United States was estimated at $26 billion for the year 2000. Fishman, supra note 2, at 231; Price, supra note 16, at 42.
41. Certain groups argue that “[d]iamond smuggling will continue to flourish for two reasons: lack of governmental control over licensing, and the artisanal miner’s extreme poverty levels.” Malamut, supra note 5, at 44.
42. According to the World Diamond Council, roughly ten million people worldwide are directly or indirectly supported by the diamond industry, and over five million people have access to healthcare because of diamond revenues. World Diamond Council, Diamond Facts, http://diamondfacts.org/facts/index.html (last visited Jan. 10, 2010). In the DRC, roughly $40 million of taxes are unpaid each year. Fishman, supra note 2, at 220. Essentially, the government is unable to benefit from the sales of the country’s resources. Id.
itself states that roughly 3.7 million people have died in Africa as a result of wars funded from the sale of conflict diamonds. This legal initiative demonstrates the United States’ willingness to partake in the effort to end diamond-driven bloodshed.

IV. BIRTH OF THE KIMBERLEY PROCESS CERTIFICATION SCHEME

The KPCS was ultimately adopted to “break the link between trade in blood diamonds and armed conflict in Africa” and to help the legitimate governments of these conflicted nations regain control of their nations’ natural resources, allowing them to rightfully profit off the sale of diamonds in the hopes of building and rebuilding the infrastructure of their countries.

By 2000, bad press; growing public awareness and outcry; and pressure from NGOs, including Global Witness and Oxfam, “motivated the South African government to summon all interested governments, members of the diamond industry, and NGOs to meet and discuss ways to solve the blood diamond problem.” In late 2000, the United Nations General Assembly voted unanimously in support of the KPCS, a diamond certification scheme that had arisen from this and subsequent meetings. Two years later, thirty-nine diamond-trading countries officially adopted the KPCS at Interlaken, Switzerland, and on January 1, 2003, all participating countries implemented the Scheme. Currently, the KPCS has forty-nine member states representing seventy-five countries, with the European Union and its member states counting as an individual participant.

V. THE LOGISTICS OF THE KPCS

The preamble of the KPCS denotes its purpose as countering the “devastating impact of conflicts fuelled by the trade in conflict diamonds on the pace, safety[,] and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in

44. Clean Diamond Trade Act § 3901.
45. Fishman, supra note 2, at 233.
46. Id. at 224. The group met in Kimberley, South Africa, thus giving the Process its name.
47. Fishman, supra note 2, at 224.
48. Id. at 224-25.
such conflicts.\textsuperscript{50} The KPCS is based on “simple and workable certification” for rough diamonds,\textsuperscript{51} the standard of which is internationally agreed upon.\textsuperscript{52} Perhaps the most glaring word of the preamble is “voluntary.” The KPCS is admittedly a voluntary system of self-regulation that can only enjoy credibility to the extent that “all [p]articipants have established internal systems of control designed to eliminate the presence of conflict diamonds in the chain of producing, exporting[,] and importing rough diamonds within their own territories . . . .”\textsuperscript{53}

Section II of the KPCS states that each participant should ensure that: a Kimberley Process Certificate (Certificate) accompany each export of rough diamonds; its process for issuing Certificates meets the standard set out in Section IV;\textsuperscript{54} the Certificate itself meets the requirements of Annex I;\textsuperscript{55} and

\begin{itemize}
  \item[(a)] establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territories;
  \item[(b)] designate an Importing and an Exporting Authority(ies);
  \item[(c)] ensure that rough diamonds are imported and exported in tamper resistant containers;
  \item[(d)] as required, amend or enact appropriate laws or regulations to implement and enforce the Certification Scheme and to maintain dissuasive and proportional penalties for transgressions;
  \item[(e)] collect and maintain relevant official production, import and export data, and collate and exchange such data in accordance with the provisions of Section V;
  \item[(f)] when establishing a system of internal controls, take into account, where appropriate, the further options and recommendations for internal controls as elaborated in Annex II.
\end{itemize}

\textit{Id.} § IV.

\textsuperscript{50} KPCS, supra note 46, pmbl.

\textsuperscript{51} According to the definition provided by the KPCS, “‘rough diamond’ means diamonds that are unworked or simply sawn, cleaved or bruted and fall under the Relevant Harmonised Commodity Description and Coding System 7102.10, 7102.21 and 710.31.” \textit{Id.} § 1. Conspicuously absent is the inclusion of polished diamonds, diamonds already included in jewelry, and other precious stones. See infra Part VI and accompanying notes for why this is one of the KPCS’s most obvious shortcomings.

\textsuperscript{52} KPCS, supra note 46, pmbl.

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} Section IV outlines the recommended undertakings for internal controls, by stating that each participant should:

\begin{itemize}
  \item establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territories;
  \item designate an Importing and an Exporting Authority(ies);
  \item ensure that rough diamonds are imported and exported in tamper resistant containers;
  \item as required, amend or enact appropriate laws or regulations to implement and enforce the Certification Scheme and to maintain dissuasive and proportional penalties for transgressions;
  \item collect and maintain relevant official production, import and export data, and collate and exchange such data in accordance with the provisions of Section V;
  \item when establishing a system of internal controls, take into account, where appropriate, the further options and recommendations for internal controls as elaborated in Annex II.
\end{itemize}

\textit{Id.} § IV.

\textsuperscript{55} Annex I requires the Certificate to at least contain the following information: ‘title ‘Kimberley Process Certificate’ and the following statement: ‘The rough diamonds in this shipment have been handled in accordance with the provisions of the Kimberley Process Certification Scheme for rough diamonds’”; country of origin; English language translation (if Certificate is not printed in English); unique numbering with the Alpha 2 country code; tamper and forgery resistant; date of issuance; date of expiry; issuing authority; identification of exporter or importer; carat weight/mass; value in U.S. dollars; number of parcels in shipment; relevant Harmonised Commodity Description and Coding System; and validation of Certificate by the Exporting Authority. \textit{Id.} Annex I(A).
that the participant notify the other participants of the features of its Certificate.\footnote{56}

Section III of the KPCS denotes the requisite undertakings with respect to the international trade in rough diamonds.\footnote{57} Specifically, each participant should require that a valid Certificate accompany every exported shipment.\footnote{58} It also requires that each imported shipment reaching a participant country must be accompanied by a valid certificate, that a confirmation of receipt be sent to the relevant exporting authority, and that the original Certificate be accessible for a period of no less than three years.\footnote{59} Participants must ensure that no shipment of rough diamonds be imported or exported from a country not participating in the KPCS.\footnote{60} Lastly, shipments passing through participant countries must leave the country in an identical way in which they entered—that is to say “the shipment must be unopened and not tampered with.”\footnote{61}

Section IV denotes the internal controls to be taken by participating countries.\footnote{62} Essentially, this section stresses the importance of establishing proper authorities, maintaining internal controls, enforcing the requirement that diamonds be transferred in tamper-resistant containers, maintaining proper data on imports and exports, and establishing and maintaining “dissuasive and proportional penalties for transgressions.”\footnote{63} Annex II, providing more detailed recommendations relevant to Section IV, includes the suggestion that, “Participants that produce diamonds and that have rebel groups suspected of mining diamonds within their territories are encouraged to identify the areas of rebel diamond mining activity.”\footnote{64} They are also encouraged to name the companies or individuals convicted of activities in violation of the KPCS.\footnote{65} Lastly, there is the recommendation that all cash

Section B of Annex I also provides “Optional Certificate Elements” including: characteristics of a Certificate, quality characteristics of the shipped diamonds, and a recommended import confirmation that should include the country of destination, identification of importer, carat/weight in U.S. dollars, relevant Harmonised Commodity Description and Coding system, date of receipt by Importing Authority, and authentication by Importing Authority. \textit{Id.} Annex I(B).

\footnote{56} \textit{Id.} \textsection II(c).
\footnote{57} \textit{Id.} \textsection III.
\footnote{58} \textit{Id.} \textsection III(a).
\footnote{59} \textit{Id.} \textsection III(b).
\footnote{60} \textit{Id.} \textsection III(c).
\footnote{61} \textit{Id.} \textsection III(d).
\footnote{62} \textit{See supra} note 55 for full text of document regarding Annex I.
\footnote{63} KPCS, \textit{supra} note 46, \textsection IV(a)-\textsection (e).
\footnote{64} \textit{Id.} Annex II(5).
\footnote{65} \textit{Id.} Annex II(6).
purchases be routed through “official banking channels.” Section V outlines the regulations for “[cooperation] and transparency.”

Section VI denotes the administrative matters of the KPCS. The participants and observers meet in plenary annually, or more frequently if deemed necessary, with the purpose of evaluating the effectiveness of the KPCS. The meetings are held in the country in which the chair, who is elected each year, resides. Ad hoc “working groups” may be formed during these meetings for various purposes. Regarding decision making, the KPCS says only: “Participants are to reach decisions by consensus,” and when “consensus proves impossible, the Chair is to conduct consultations.” The vagueness of this last statement is crippling, as will be discussed in depth in Part VI.

The same section of the KPCS states that “[p]articipation in the Certification Scheme is open on a global, non-discriminatory basis to all applicants willing and able to fulfill the requirements of that Scheme.” Participants are expected to prepare reports explaining how the KPCS requirements are being implemented in their countries. If further clarification is deemed necessary, per the recommendation of the chair, measures in accordance with national and international law may be implemented. These measures include, but are not limited to, requests for

66. *Id.* Annex II(7).
67. This section suggests that each participant should provide the others with synopses in English of the relevant laws and procedures within its country. *Id.* § V(a). It encourages dialogue regarding the best practices and suggestions for improvements in implementing the KPCS. *Id.* § V(c)–(d). It also suggests a minimal watchdog requirement that participants inform the chair if they believe the practices of another participant “do not ensure the absence of conflict diamonds,” and that there should be cooperation in resolving problems that arise “from unintentional circumstances . . . which could lead to non-fulfillment of the minimum requirements for the issuance and acceptance of the Certificates” *Id.* § V(e)–(f). Most obvious is the suggested cooperation amongst the relevant officials of each participant. *Id.* § V(g).
68. *Id.* § VI.
69. *Id.* § VI(1).
70. *Id.* § VI(3)–(4).
71. *Id.* § VI(4).
72. *Id.* § VI(5).
73. See infra Part VI for reasons why vague wording is problematic in this context.
74. KPCS, *supra* note 46, § VI(8). Applications to the KPCS should entail a request to the chair through diplomatic means. *Id.* § VI(9). This request is then circulated to all participants within one month of submission to the chair. *Id.*
75. *Id.* § V(11), (13).
76. *Id.* § V(13).
additional information or review missions by other participants “where there are credible indications of significant non-compliance with the Certification Scheme.” These review missions are only conducted with the permission of the participant concerned, and the circumstances of each suspected transgression determine the “size, composition, terms of reference[,] and time-frame” of the mission.78

The KPCS includes just one paragraph regarding “compliance and dispute prevention.”79 Essentially, when an issue regarding compliance arises, concerned participants must notify the chair who is then responsible for informing other participants “without delay” and to “enter into dialogue on how to address it.”80 Section VI calls for the periodic review of the KPCS, specifically a three-year review, to be conducted in 2006.81 Annex III of the KPCS requires participants to keep reliable and comparable data on exportation and importation of rough diamonds for publishing and compilation on a semi-annual basis.82

VI. LIMITATIONS AND SHORTCOMINGS OF THE KPCS

While the mere birth of the KPCS demonstrates a changing global sentiment and commitment to both the rebuilding of Africa and the integrity of trade on a global scale, it is severely limited by shortcomings that threaten to cripple its long-term effectiveness. The document stands to be more articulate, stern, and inclusive of delineated methods of dispute resolution.

A. Vague Wording

One of the most glaring shortcomings (it should be noted that this problem is not unique to the KPCS, but rather is one that plagues most international agreements) is vague wording and inarticulate direction. The KPCS talks of “proportional penalties for transgressions”83 but never articulates what these penalties would be or how to ascertain the proportionality to the transgression. The KPCS goes on to assert that decisions be reached by “consensus,” though it never states what types of

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77. Id. § V(13)(a)–(b).
78. Id. § V(14). A report of the mission is circulated to the chair and other participants within three weeks of completion of the mission. Id. § V(15).
79. Id. § V(16).
80. Id. The KPCS also calls for participants and observers to make every effort to observe strict confidentiality. Id.
81. Id. § V(20).
82. Id. Annex III(a), (c).
83. Id. § IV(d).
voting mechanisms should be used. It further states that if such “consensus” cannot be reached, the chair should conduct consultations. But what would these consultations entail? How would impartiality be ensured? Is there a time frame for reaching some semblance of a conclusion from these consultations? While these questions, and likely many more, seem intuitive and worthy of concern, they are never addressed in the text of the KPCS and thus leave the door open for confusion, word-play, and prohibitive interpretation.

For another example of vague—or more appropriately, non-existent—wording, look to the Compliance and Dispute Prevention Clause of Section VI, which includes just one paragraph to address the disputes that are causing major conflict and war. Understandably, the dispute resolution clauses and enforcement mechanisms of multinational treaties are often opaque because of the difficulties faced in finding consensus. However, it is worth spending the time to argue through and come to an agreement, because without the dispute resolution aspect, the rest of the treaty faces the prospect of disintegrating because of conflict among signatories.

Another glaring shortcoming, though not within the breadth of this article, is that the KPCS’s definition of “diamond” is excessively narrow and “does not include polished stones and jewelry.” This is problematic because it allows diamonds that are smuggled or illicitly purchased to be transformed, polished, turned into jewelry, and then imported to go virtually undetected.

B. Voluntary Membership

Perhaps the most troubling shortcoming is the voluntary nature of the KPCS. The KPCS relies “too heavily on Participants policing themselves” and makes compliance with the KPCS voluntary, thus allowing countries to ignore the recommendations provided to them by other participants and the chair. Further, as the KPCS is neither treaty nor law, it has no effect in non-member countries, including those that are members of the United

84. Id. § VI(5).
85. Id.
86. Id. § VI(16).
87. Petrova, supra note 34, at 954.
88. Id. at 954-55.
89. Malamut, supra note 5, at 47-49.
Nations. Not only does this undermine the integrity of the KPCS by demonstrating a lack of political will and compassion on the part of non-members, it opens the door to a host of logistical issues including the use of non-participating countries as corridors for smuggling diamonds from the mines to the consumer nations.

Lastly, the KPCS has run aground on some of the provisions of the World Trade Organization that promotes freer movements of goods and the promotion of “free trade.” The crux of the issue here is that “without a ban on trade with non-participants, the Kimberley Process could have no significant effect.” However, a trade ban of this sort appears to be a “red-flag violation” of the General Agreement on Tariffs and Trade (GATT), the foundation of the World Trade Organization.

As the system stands, the KPCS does not allow for private rights of action by individuals against other individuals, companies, or countries in violation of the KPCS. If this private cause of action were established, industry leaders, as well as countries, would be able to participate more aggressively in the system. Like other methods of prosecution, many industry and government leaders would find the threat of suit deterrence enough, looking to avoid bad press (an often fatal blow in the realm of luxury goods). However, until the KPCS becomes formalized law, or at the very least binding among its signatories, this cause of action remains a fiction.

C. Lacking an Enforcement Mechanism

While in theory the goals of the initiative are sound and feasible, in practice they will fail to solve the blood diamond trade problem. A system

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90. “The KPCS is not a legally binding document, as matter of international law. However, the KP Participant countries have considered it necessary to voluntarily fulfill the KPCS minimum requirements at the national level and have adopted relevant laws and/or executive acts to that effect.” THE KIMBERLEY PROCESS CERTIFICATION SCHEME: THIRD YEAR REVIEW 5 (Oct. 2006), available at http://www.worlddiamondcouncil.org/download/resources/documents/Kimbeley%20Process%2020Thi rd%20Year%20Review%20%2811-2006%29.pdf [hereinafter KPCS REVIEW].

91. Petrova, supra note 34, at 954. Weak countries essentially serve as gateways for smuggling. Further, it provides a loophole of sorts with regards to the “country of origin” specification; a rough diamond from the Ivory Coast, smuggled into non-participant Mali, and transformed in Belgium or the United States now becomes “a polished diamond from Belgium or the United States.” Id.

92. Feldman, supra note 4, at 855.

93. Id.

94. Fishman, supra note 2, at 235.

95. Id.
that requires no international watchdog or universal guidelines, and instead merely suggests ways for nations to conduct their investigations and punish violators, invites abuse and inefficiency.  

In April 2003, at the first plenary meeting of the KPCS participants, it was discovered that several participating countries failed to implement regular and independent monitoring for all participants. Despite this shortcoming being called to light, no action was taken to establish any regular monitoring systems. This inaction certainly diminishes the credibility of the KPCS, a significant shortcoming given its short existence.

D. KPCS Third Year Review—Ineffective Implementation

In 2006, the KPCS compiled the results of a questionnaire circulated to its participants in the form of a third-year review and critique of the system. The review focused on three major areas: (1) the impact and effectiveness of the KPCS “on the international trade in rough diamonds;” (2) whether the technical provisions of the KPCS are adequate as planned or require improvement; and (3) the effectiveness and efficiency of the operations of the KPCS. Though the questionnaire returned largely positive results, the major problem cited was the “effective implementation of internal controls.” Essentially, as predicted by many, the KPCS was great on paper but hard to implement without proper funding and clearer guidelines. The review also stated that there was a “lack of agreement on non-compliance and the procedures for removing Participants that are deemed to be in significant non-compliance with the KPCS.” While this is certainly disconcerting, it demonstrates the discontent of some nations with the KPCS and the need to continue dialogue on how to make the dispute resolution aspect of the KPCS more effective.

The review notes the one occasion “on which the formal provisions of the [Kimberly Process] for dispute resolution ha[s] been invoked.” In 2004, just one year after implementation, the Republic of Congo (ROC) was

96. Id. at 218.
97. See KPCS Review, supra note 90, at 63.
98. See id. at 8-10.
99. Id. at 3.
100. Id.
101. See generally id.
102. Id. at 7.
103. Id.
found to be improperly issuing Certificates for over five million carats of rough diamonds.\textsuperscript{104} A review mission confirmed these suspicions and deemed the ROC to be in “major non-compliance of the KPCS.”\textsuperscript{105} One month after this mission, the ROC was removed from the list of countries participating in the KPCS.\textsuperscript{106} While other participating countries were self-congratulatory on the ROC’s removal because it served to “enhance the reputation” of the KPCS, the country now serves as a corridor of illegal smuggling.\textsuperscript{107} This situation demonstrates that the removal of a rogue country, while sparing the other participants a tarnished reputation, does little to control the diamond trade or reign in the rebels.

The review also notes the Ivory Coast’s dissatisfaction with the KPCS.\textsuperscript{108} The Ivory Coast stated that the KPCS “has not effectively responded to the mandate given by the relevant U.N. General Assembly resolution to combat the threat of conflict diamonds, because, despite the implementation of the [KPCS], Ivorian diamonds have been sold to the international market without any sanctions for those involved in the trade.”\textsuperscript{109} The Ivory Coast expresses these sentiments despite KPCS monitoring since early 2005, a special envoy of the KPCS chair, and investigations conducted by the U.N. and Global Witness.\textsuperscript{110} While the situation appears to have improved in other previously conflicted countries, the KPCS is admittedly falling desperately short in the case of the Ivory Coast.\textsuperscript{111}

Zimbabwe is the most recent and relevant strain on the KPCS. In 2006, diamonds were discovered in the Marange region of eastern Zimbabwe.\textsuperscript{112} Since 2009, these diamonds have been denied certification because of clear evidence that the military has overrun the area, with individuals rather than legitimate government entities profiting from the diamonds, many of which are being smuggled through neighboring Mozambique.\textsuperscript{113} At the three day

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\textsuperscript{104} Id. at 63.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 66.
\textsuperscript{108} Id. at 17.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} See id. at 23-24 (sharing positive updates on countries, including the DRC, Sierra Leone, and the Republic of Angola). But cf. id. at 17-20 (discussing the failures of the KPCS in the Ivory Coast).
\textsuperscript{113} Sara Toth Stub, Talks Stall on Zimbabwe Diamonds, WALL ST. J., June 24, 2010, available at http://online.wsj.com/article/SB10001424052748704629804575325021274013424.html. If fully
2010 plenary meeting of the KPCS held in Tel Aviv in June, KPCS members could not come to a consensus on whether or not to certify Zimbabwe’s diamonds.\footnote{Id.} The definition of “conflict diamond” was a point of contention—as it stands the definition includes diamonds sold to finance anti-government rebel groups.\footnote{Id.} However, in Zimbabwe, where the government controls the diamond mines, the issue is over reported human rights violations at the hands of the government.\footnote{Id.} For seemingly obvious reasons, the definition should be amended to be inclusive of diamonds that provide funding for groups known to violate human rights.

A follow-up visit to Zimbabwe in August 2010 resulted in approval of a limited sale of diamonds after the monitor (a South African diamond expert) revealed the diamonds to be “clean.”\footnote{Arthur Bright, Zimbabwe Restarts Diamond Sales Amid ‘Blood Diamond’ Accusations, CHRISTIAN SCI. MONITOR, August 12, 2010, available at http://www.csmonitor.com/World/terrorism-security/2010/0812/Zimbabwe-restarts-diamond-sales-amid-blood-diamond-accusations.} The “limited” sale was for 900,000 carats of diamonds worth $72 million.\footnote{Id.} Whether the KPCS can handle the situation in Zimbabwe remains to be seen. But what is clear is that if the KPCS cannot control the diamond trade out of Zimbabwe, a large portion of the world’s diamonds will enter the market uncertified, thus allowing profits to flow into the hands of governments that continue to violate human rights. An atrocity of this magnitude would surely cripple the credibility of the KPCS.

The purpose of this paper is to shed light on these shortcomings and offer suggestions for increasing efficiency so that the KPCS may function as intended.

VII. WHAT WOULD THE ENHANCED KPCS LOOK LIKE?

Logistically, a modification of the KPCS would require consensus by the participants and may be proposed in a written statement to the chair by

\textit{mined, diamonds from this region of Zimbabwe could make up twenty-five percent of the world’s supply of diamonds, valuing in the billions of dollars. Id.}
any one of the participants, at least ninety days prior to the next plenary meeting. 119

Substantively, the modification would call for a binding arbitration agreement to replace the inefficient method of discussion and dialogue by the chair. The method of dialogue and forum in which complaints would be brought would need to be clear and not yield to the existing ad hoc working groups. The arbitrators would come from participating countries—observers, 120 diamond industry experts, and counsel from the United Nations and relevant private industry specializing in alternative forms of adjudication.

The modification would also make the review missions 121 required for every member country, or at the very least, countries where conflicts are continuing. While countries would still be able to voluntarily sign on to the KPCS, this would require a relinquishing of power and privacy. However, given the amount of money to be made from diamonds, even when sold legally, which is admittedly less than when sold on black markets, this would be a small price to pay to be able to certify one’s diamonds as legitimate, thus increasing their value in the consumer marketplace.

According to the KPCS Review, some participating countries believe that “government monitoring and verification of industry compliance should be made an explicit minimum requirement” of the KPCS. 122 This requirement, joined with a binding dispute resolution agreement, would force participating countries to be policed by the KPCS. While for some this steps on the toes of sovereignty, those committed to changing the diamond industry for the proper reasons would find it a worthwhile sacrifice and small price to pay.

The modification would also call for more specific punishments for transgressing nations, individuals, or companies. The United Nations Security Council is granted the power to administer sanctions under Chapter VII of its Charter “to maintain or restore international peace and security.” 123 KPCS participants in violation of the proposed binding agreement and subsequent action taken by the proposed tribunal would face targeted

119. KPCS, supra note 46, § VI(17)-(18). The chair would then need to circulate the proposal to all participants and observers and place it on the agenda of the next meeting. Id. § VI(19).

120. As defined by the KPCS, “observer” means a “representative of civil society, the diamond industry, international organizations and non-participating governments invited to take part in Plenary meetings.” Id. § I.

121. Id. § VI(14)-(15).

122. KPCS REVIEW, supra note 90, at 53.

sanctions by the United Nations. However, these sanctions would need to be accompanied by major press coverage because ultimately it would be up to the consumers to choose to stop purchasing diamonds from illegitimate, sanctioned sources.

I suggest that the KPCS should use the dispute settlement scheme of the World Trade Organization (WTO) as a model for increasing effectiveness and achieving the aforementioned changes and goals. Such a system would give much-needed teeth to the well intended but ultimately too soft KPCS. A more effective dispute resolution system would make the KPCS more legitimate, secure, and predictable.

The WTO dispute resolution mechanism is applicable to the KPCS for various reasons. The WTO provides a solid example for the KPCS as both documents seek the same end—efficient and quick dispute resolution with priority given to settling these disputes through consultation. Further, the nature of the disputes to be settled is similar enough to almost seamlessly apply WTO standards to the KPCS. Lastly, the WTO previously experienced many of the problems plaguing the KPCS—“no fixed timetables,” easily blocked rulings, and disputes and infractions that dragged on “for a long time inconclusively.”

The modifications to the WTO agreement, achieved at the Uruguay Round, provided a “more structured process with more clearly defined stages in the procedure.” This would be particularly helpful to the KPCS, which, as it stands, has no distinct stages. Further, the KPCS lacks any real structure because the dispute resolution is based on the actions of a chair who changes every year and the ad hoc working groups who, by their definition, are tailored to each situation. A case, under WTO standards,

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124. Targeted sanctions are narrower than general comprehensive trade or economic sanctions. Targeted sanctions can include freezing assets, blocking financial transactions by certain individuals or organizations, and prohibiting the international movement of these individuals and organizations. 


126. The WTO identifies the crux of its disputes as “broken promises.” Specifically, a “dispute arises when one country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreement, or to be a failure to live up to obligations.” Similarly, a dispute within the KPCS would consist of one country failing to take proper policing action and thereby failing to live up to its obligation to regulate the diamond trade within its borders.

127. Id.

128. Id.
normally takes about one year—fifteen months if appealed. While this may seem lengthy given the transgressions that could continue during the dispute process, it is unfortunately realistically indicative of the true timeframe for both domestic disputes and disputes resolved in the U.N., barring any emergency or unilateral action. Rulings under the WTO are automatically adopted unless a consensus rejects it. That is to say that any country, including the parties to the dispute, must convince all other members to move to block the settlement. In the WTO, unlike the KPCS, the action stands unless opposed. In the KPCS, the action must be actively agreed upon by the member states before it would become effective. Clearly, the WTO arrangement provides for swifter dispute resolution.

The KPCS would need to adopt a standing dispute resolution body similar to the Dispute Settlement Body of the WTO. It would be the sole authority of this body to create a panel of experts to hear the case. It would also be this body’s responsibility to accept or reject the ultimate decision at the conclusion of the proceedings. Some participating countries of the KPCS have already “expressed interest in a dedicated, funded, administrative body to work in close collaboration” with the chair. While some other participants oppose the creation of such a body for fear of bureaucratic slowdown, it should be noted that with ineffectiveness running as high as it is, a slow pace from a functioning body is better than the current stagnation resulting from the inexistence of such a body.

The first stage in the KPCS’s new dispute settlement procedure, as adopted from the WTO, would be consultation that could last up to sixty days. The KPCS chair would be the initial mediator in this consultation. He would be able to request assistance from experts or outside counsel from other observers, participating countries, or both, if he felt that he was either unfit or biased in the matter.

The second stage of the dispute resolution process would be the panel. There would be a set number of days—in the case of the WTO it is forty-five—in which the panel would be composed and another six months for the panel to examine and ultimately conclude on its findings. The dispute would only reach this stage if the mediation of the consultation phase failed.

129. Id.
130. Id.
131. Id.
132. Id.
133. KPCS REVIEW, supra note 90, at 58.
134. WTO Disputes, supra note 125.
135. Id.
and further, it would be at the discretion of the complaining party to ask for the appointment of such panel.\textsuperscript{136}

It is the job of the panel to assist the settlement body in drafting a ruling. As to the workings of the panel, each side would initially present its case in writing and then make its case at a “first hearing.”\textsuperscript{137} The hearings would proceed with opportunities for rebuttals and the presentation of experts.\textsuperscript{138} The panel then provides both sides with interim reports that they can review, and then ultimately provides them with a final report that is circulated to the disputing parties and the rest of the organization’s members.\textsuperscript{139} The report would then become a ruling within sixty days unless the other members reject it.\textsuperscript{140} The new system would also include a method of appeal.\textsuperscript{141}

I suggest the WTO dispute resolution agreement as a jumping off point and functioning model. The KPCS would require modifications, some of which have been previously discussed, to tailor the settlement to its particular needs. What cannot be compromised, however, are the timeframes within which disputes are resolved, and the binding nature of both becoming a signatory and the subsequent process of adjudicating disputes and distributing justice.

\textbf{VIII. CONCLUSION}

Ultimately, the KPCS is representative of a good faith effort and acknowledgement on the part of many of the plight of the African nations that are cursed with diamond-rich land. However, the six-year-old KPCS stands to undergo modifications including an all-out revamping of its means of enforcing provisions and keeping participating countries in line.

In the end, the African continent is plagued with troubles that far exceed the blood diamond conflicts. However, success in bringing down the illicit

\textsuperscript{136} Id.

\textsuperscript{137} Id.

\textsuperscript{138} Id.

\textsuperscript{139} Id.

\textsuperscript{140} Id.

\textsuperscript{141} Id. Appeals would have to be based on points of law and could not involve a reweighing of the evidence or presentation of new issues. Id. A three-member panel of a permanent seven-member body created specifically for the purpose of handling appeals would hear the appeal. Id. The members of this panel would come from participating countries, though they would be experts, lawyers, and not politically affiliated with any government. Id. The appeal would not last more than sixty days, and the dispute settlement body would have to accept or reject it within thirty days of the new holding. Id. Again, rejection would only be possible by a consensus of the members. Id.
diamond trade would provide these countries with lucrative business—the
profits of which could be used to tackle the other pressing issues of
infrastructure rebuilding, education, the HIV/AIDS epidemic, and extreme
poverty. With this said, regaining a hold of the diamond mines is absolutely
crucial.

But even if the KPCS enacts more stringent rules, it will come down to
the consumers to ultimately drive the rebels out of business. Feldman has
alluded to the economics that presumably would accomplish this end.\[142\]
Ultimately, the mining, transportation, and sale of blood diamonds carry a
huge risk, and “[t]hose who incur the increased risk will want to be paid a
large premium for doing so. But the buyer of illegal diamonds will want to
pay a lower price for goods that lack legitimate credentials.”\[143\] Literally, the
clean diamonds would drive the blood diamonds out of the market.\[144\]

However, this theory relies heavily on an educated and compassionate
consumer. But the problem in America and other parts of the world is that
the atrocities of blood diamonds break into Western media channels with
pathetic infrequency. Consumers need to be educated not only of the
atrocities being committed to harvest these diamonds but also on the
illegality of the process that turns these rough diamonds into shiny
gemstones. They must also be educated on the KPCS itself and how
and where to obtain properly certified stones. While many jewelers claim to
sell only the best in quality and origin—certainly no one would advertise
their diamonds coming from illegitimate sources—the conflicts in Africa
still rage on. Clearly, there is a disconnect between the message consumers
are hearing and the legal logistics of truly cleaning up the diamond industry.
At the end of the day, the participating governments, as well as the diamond
industry heavy hitters, will have to find a vested interest in the plight of the
African nations and the integrity of consumers before major changes will
occur.

\[142\] Feldman, supra note 4, at 867.
\[143\] Id.
\[144\] Id.
Collaborative Practice’s Radical Possibilities For The Legal Profession: “[Two Lawyers And Two Clients] For The Situation”

Robert F. Cochran, Jr.*

I. INTRODUCTION

During Louis Brandeis’s Senate confirmation hearings, he was subject to criticisms of his negotiation practices and his client counseling.1 In negotiations, he sought to resolve cases in a manner that benefitted all of the affected parties, rather than focusing solely on the interests of his client; when asked whom he had represented in one case he said that he saw himself as “counsel for the situation.”2 In counseling, he pressed clients to

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2. Id. Brandeis used this phrase to describe his work in the Lennox bankruptcy affair. Brandeis represented one of the creditors in the matter and was approached by a representative of Lennox, the bankrupt company. Brandeis stated that he would act as trustee for Lennox’s property and seek “to give everybody, to the very best of my ability, a square deal.” ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN’S LIFE 233 (1956). Lennox grew dissatisfied with the arrangement and initiated criminal fraud charges against Brandeis, which were later dropped. Id. at 235. When pressed by Sherman Whipple, who became Lennox’s lawyer, to identify his client, Brandeis replied, “I should say I was counsel for the situation.” ROY M. MERSKY & J. MYRON JACOBSTEIN, THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1975, at 287 (2d. prtg. 1977) (Testimony of Whipple). Whipple described his reaction:

I think Mr. Brandeis was so much absorbed in the question of caring for the situation, and so much interested in the development of his ideas as to how this estate should be administered, that he unconsciously overlooked the more human aspect of it . . . . He took a broader view . . . that he was charged with the duty and responsibility, not merely of looking to Mr. Lennox or to Mr. Lennox alone, but that he owed a larger and broader duty to all the interests involved.
act justly—in the words of one of his opponents, he took a “judicial attitude toward his clients.” Brandeis was confirmed despite these criticisms.

In recent years, a type of law practice, collaborative practice (CP), has emerged that may move lawyers in a Brandeis-like direction. In CP, the parties and lawyers agree that if they are unable to resolve their dispute by negotiation, neither of the lawyers will represent the parties in the litigation of the matter. This creates a strong incentive for both sets of lawyers and clients to develop a mutually advantageous settlement of the case. CP

Scholarly reaction to the “counsel for the situation” has been mixed. See John P. Frank, The Legal Ethics of Louis D. Brandeis, 17 STAN. L. REV. 683, 702 (1965) (“[O]ne of the most unfortunate phrases [Brandeis] ever casually uttered.”); GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 65-66 (1978) (“[W]hen a relationship between clients is amenable to ‘situation’ treatment, giving it that treatment is perhaps the best service a lawyer can render to anyone;” so long as the client and his adversary are fully informed of the arrangement and are willing to trust the good judgment and skill of the attorney). See also Hazard, Jr., supra note 1, at 377; John T. Noonan, Jr., The Lawyer Who Overidentifies with His Client, 76 NOTRE DAME L. REV. 827, 828-29 (2001); Clyde Spillenger, Elusive Advocate: Reconsidering Brandeis as People’s Lawyer, 105 YALE L.J. 1445, 1499-1507 (1996); John S. Dzienkowski, Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession, 1992 U. ILL. L. REV. 741, 751-57 (1992).

3. Austen G. Fox is reported to have said:

It is true that nothing unethical has been proved against Mr. Brandeis. What has been proved against him is that he does not act according to the canons of the Bar. The trouble with Mr. Brandeis is that he never loses his judicial attitude toward his clients. He always acts the part of a judge toward his clients instead of being his client’s lawyer, which is against the practices of the Bar.

MASON, supra note 2, at 506 (quoting a letter from Steven S. Wise to Louis D. Brandeis dated March 23, 1916). Clyde Spillenger argues: “Perhaps Fox’s words reflected the changed self-image of the mainstream bar, from a nineteenth-century conception of representation as moral and public to one that regarded it as private and professional.” Spillenger, supra note 2, at 1501.

4. In addition to “collaborative practice” (CP), the type of law practice described in this article goes by the terms “collaborative law” and “collaborative divorce.” In my view, collaborative practice is a better term than collaborative law for a couple of reasons. First, the term collaborative law implies that it is a form of law. It is not. It is a means of dispute resolution. Second, as indicated infra at note 24, CP often brings a variety of professionals—most often child psychologists, counselors, and accountants—into the dispute resolution process. Numerous professionals, not merely law professionals, try to deal with the conflict in a way that will be best for the parties.

The term collaborative practice is preferable to collaborative divorce, because although divorce practice is the dominant segment of collaborative practice, CP is suited to and used in numerous other areas of the law—not merely divorce practice. Finally, collaborative practice is the name chosen by the largest group of CP professionals. See International Academy of Collaborative Professionals Homepage, www.collaborativepractice.com (last visited January 31, 2011).


6. Several bar associations have concluded that CP complies with the rules of the legal profession. See John Lande, Principles for Policymaking About Collaborative Law and Other ADR
lawyer Pauline Tesler reports: “What was unexpected [in CP] is the degree of creativity that often arises . . . . [A] quantum leap in problem solving frequently occurs: both lawyers and both clients marshal their creative intellects toward finding solutions for each problem that will work well for both parties . . . .”\(^7\) This is more than Brandeis’s lawyer for the situation, or even two lawyers for the situation;\(^8\) it is two lawyers and two clients for the situation.

CP significantly changes the way that legal disputes are resolved from beginning to end. Social scientist Julie Macfarlane’s extensive study of CP finds that CP “reduces the posturing and gamesmanship of traditional lawyer-to-lawyer negotiations, including highly inflated and lowball opening proposals;”\(^9\) “fosters a spirit of openness, cooperation and commitment to finding a solution that differs qualitatively from solutions achieved through

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\(^8\) In an article that is critical of many aspects of CP, John Lande states: “[O]ne might think of [CP] lawyers as two ‘counsel for the situation.’” John Lande, Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering, 64 Ohio St. L.J. 1315, 1337 n.70 (2003) (citing Clyde Spillenger, Elusive Advocate: Reconsidering Brandeis as People’s Lawyer, 105 Yale L.J. 1445, 1502-11 (1996)).

conventional lawyer-to-lawyer negotiations;”\textsuperscript{10} and produces results “that are both fair within a legal standard and satisfactory to the parties.”\textsuperscript{11} This is a refreshing change from the current adversarial system that often yields unfair results, exacerbates and draws out conflict, and is so expensive that many cannot afford legal representation.\textsuperscript{12}

CP is a dramatic shift from the way law is generally practiced today in the United States, and it has the potential to transform that practice.\textsuperscript{13} It could help to shift the lawyer norm from thinking primarily about winning for a client at the expense of the other party, to thinking about reaching a resolution that will benefit all. After decades of growing public resentment toward lawyers,\textsuperscript{14} and growing disillusionment among lawyers toward the work they do,\textsuperscript{15} CP may serve as a tipping point.

There are dangers that accompany CP. When lawyers seek to protect the interests of those other than their clients, other parties may take advantage of the client. When a lawyer presses clients to settle on terms that benefit all of the parties, this may undercut client autonomy. But it appears that CP lawyers generally are able to avoid these risks. CP is a client choice, not something that is forced on clients. CP clients agree at the beginning of the representation to seek a mutually satisfactory resolution of the dispute. The CP lawyer’s pursuit of a mutually beneficial settlement is done at the direction of the client. In addition, CP insures that clients’ interests will be represented. In CP, the lawyer serves as the client’s advocate in the negotiation sessions.

This article will consider the two dramatic changes that CP brings to law practice: a change in the mental attitude of lawyers and clients toward the conflict and a change in lawyers’ counseling techniques. Part II defines CP and compares it to traditional negotiation-pending-litigation. Part III considers the change in attorney and client mental attitudes wrought by CP, where both lawyers and clients take responsibility for identifying a

\textsuperscript{10} Id. at x.
\textsuperscript{11} Id. at 77.
\textsuperscript{12} Id.
\textsuperscript{13} See infra notes 79-82 and accompanying text.
\textsuperscript{14} See, e.g., Robert Clifford, The Public’s Perception of Attorneys: A Time to Be Proactive, 50 DEPAUL L. REV. 1081 (2001) (criticizing lawyers for their perceived win-at-all-costs mentality); Susan Hayes Stephan, Blowing the Whistle on Justice as Sport: 100 Years of Playing a Non-Zero Sum Game, 30 HAMLINE L. REV. 587, 589-91 (2007) (stating that lawyers drive up transaction costs through overly-adversarial litigation tactics); AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, PUBLIC PERCEPTIONS OF LAWYERS CONSUMER RESEARCH FINDINGS 7-18 (2002) (claiming that the public considers lawyers to be most irresponsible when they neglect the needs of the client in favor of winning at any cost).
\textsuperscript{15} See, e.g., MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 87-100 (1994) and sources cited therein.
resolution that will meet the needs of all of the parties. Part IV considers the type of client-counseling that is often generated by CP—lawyers in CP may strongly encourage clients to find a resolution that meets the needs of all of the parties. I conclude with a consideration of the possible future of CP.

II. COLLABORATIVE PRACTICE

In CP, the parties and lawyers sign a “four-way agreement,” which includes the following provisions.

First, the parties agree to seek a mutually satisfactory settlement of their dispute. CP agreements stress the importance of cooperation among the parties and lawyers to achieve that end. The hope is that clients can work through highly-charged emotional periods of the negotiation, as the lawyers remind them of their commitment to settle.

Second, the parties agree to act in good faith at every stage of the negotiation and to fully disclose to one another all information relevant to the prospective agreement, including the parties’ interests. When the parties reveal their real interests, all who are involved in the negotiation can focus on identifying a solution that will address those interests.

Third, the parties agree to engage in interest-based negotiation. This requires them to give serious consideration and creative effort to finding

17. Id.
18. See, e.g., Jay E. Grenig, 2 ALT. DISP. RESOL. APPENDIX R, FORM 170 (2009) (offering the following model stipulation and order based on Wisconsin law: “By signing this stipulation, the parties commit themselves to proceeding in the collaborative process to find solutions acceptable to both parties with integrity, dignity, professionalism, respect and honesty.”); See also infra note 61 and accompanying text (quoting the model California agreement).
19. See John Lande, Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin, 2008 J. DISP. RESOL. 203, 205. As John Lande has shown, there is significant disagreement among CP lawyers over what information a full disclosure provision covers. See id. at 243-245 (stating that CP lawyers disagree over whether disclosure of various factors, including affairs, promotions, and inheritances are required).
21. Interest-based negotiation was popularized in the path-breaking book by Roger Fisher, William Ury, and Bruce Patton, Getting to Yes: Negotiating Agreement Without Giving In (2d ed. 1991). First published in 1981, and now translated into twenty-five languages, Getting to Yes introduced the ideas of separating the people from the problem and focusing on the parties’ underlying interests (rather than their positions) so that mutually advantageous exchanges can occur. See id. at 70-71. This practice is more likely to lead the parties to consider the broad range of means
solutions that address the interests of each party. Before coming to the bargaining table, lawyers prepare their clients for interest-based negotiation, attempting to move the clients from taking positions to identifying their interests. Then, during negotiations, lawyers assist their clients in articulating their interests clearly and in listening to and understanding the other party’s interests, for an understanding of each party’s interests is a necessary step in creating solutions that both can accept.

Finally, as noted previously, the parties and lawyers agree that if the CP process breaks down the lawyers will withdraw and neither lawyer will participate if the matter goes to litigation. Each client lays down one possible weapon (his lawyer’s participation in litigation) in exchange for the other party laying down the same weapon. Thus, the parties and lawyers make a structural change to the adversary system that creates an incentive for both parties and lawyers to follow through on the previously identified commitments. In CP, both parties and lawyers can focus on identifying a mutually beneficial resolution of the dispute.

of attaining those goals. Id. at 79-80; see also ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000).

22. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 07-447 (2007). As the ABA opinion approving of CP states: “When a client has given informed consent to a representation limited to collaborative negotiation toward settlement, the lawyer’s agreement to withdraw if the collaboration fails is not an agreement that impairs her ability to represent the client, but rather is consistent with the client’s limited goals for the representation.” ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 07-447 (2007).

When CP works, the parties can avoid many of the costs that accompany litigation. See William H. Schwab, Collaborative Lawyering: A Closer Look at an Emerging Practice, 4 PEPP. DISP. RESOL. L.J. 351, 355-56 (2004) (noting that estimates of the cost of successful CP relative to litigation ranged from 1/10 to 1/20). In this survey, clients who participated in CP reported spending an average of 6.3 months and $8,777 in attorneys’ fees. Id. at 377. Of course, the time involved will vary substantially, depending on the complications of the issues and the cooperativeness of the parties. Id.; see also David A. Hoffman, Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR, 2008 J. DISP. RESOL. 11, 27-33 (summarizing data collected from 199 divorce cases handled by Boston Law Collaborative, including a chart that compares the median costs in divorce: $6,613 for mediation, $19,723 for CP, $26,830 for traditional negotiation, and $77,746 for full-blown litigation). Failed CP can be more expensive than litigation alone, because the parties must bear the cost of both the CP and the litigation. Id. at 33-35. Failed CP also carries with it the additional expense of getting the litigation attorneys up to speed on the case following the CP. Id. at 33. Julie Macfarlane has identified several methodological difficulties in comparing the costs of CP and traditional representation. See MACFARLANE, supra note 9, at 62. Though mediation is often less expensive than other dispute resolution methods, it typically does not give the client the benefit of representation during the dispute resolution process. See id. at 71-72.

23. See Colo. Bar Ass’n Ethics Comm., Formal Op. 115, n.11 (2007). The Colorado CP ethics opinion concluded that CP’s disqualification agreement creates a conflict of interest. Id. It found that the lawyer’s representation of the client is “materially limited” by the opposing party, because the opposing party can prohibit the lawyer from going to court by refusing to settle. See id. This is an odd thing to call a conflict of interest. One might as well say that giving an opposing party a settlement offer creates a conflict of interest because the opposing party can control the lawyer by
CP negotiation is significantly different from traditional negotiation-pending-litigation (NPL). During NPL, the pending litigation casts a shadow over all of the negotiations. NPL often involves posturing that can poison the relationship between the parties. In addition, NPL may not generate the best settlement terms, for during NPL much of the parties’ and lawyers’ effort goes into preparing for litigation, and negotiation is often an accepting the settlement offer. A CP lawyer’s refusal to go to court if a matter is litigated is better viewed as the lawyer complying with the client’s agreement and instructions.

24. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 07-447 (2007). An additional distinction of many CP cases is the use of non-legal experts to facilitate the negotiation. See TESLER, supra note 7, at 8. In a CP family case, ideally each client has his or her own mental health professional “coach” who helps the client deal with the stresses of the divorce and assesses the long-term effects of the divorce on the client and the family. See id. Coaches actively participate in the negotiations and work with the clients and lawyers to de-escalate client conflict and encourage communication. See id. In addition, in many CP cases the parties share other experts. See id. For example, financial experts may advise the parties on valuation of businesses and child development experts may advise the parties on child custody matters. See id. Shared experts can save the parties substantial time, money, and emotional expense over the traditional dueling experts. Id. at 106-07.

25. CP differs from other means of dispute resolution (litigation, arbitration, traditional negotiation, and mediation) as to some or all of the following:

(1) Client Control: CP differs from litigation, arbitration, and traditional negotiation in that in CP the client is in control. Though clients must approve of the final settlement in traditional negotiation, lawyers conduct most aspects of the negotiation outside of the presence of the clients. In CP, clients participate in all of the negotiation sessions and control the resolution of the dispute.

(2) Privacy: CP, like other forms of alternative dispute resolution, takes place in private. The parties can avoid the disclosure of information that might be personally embarrassing or damaging to business interests. In contrast, all allegations and disclosures in litigation are a matter of public record.

(3) Potential Outcome: In CP, as in other forms of negotiation, the parties can agree to almost any resolution of their dispute. In litigation, the judge and jury are generally limited to issuing a judgment declaring one party the winner and the other the loser.

(4) Lawyer Advocacy: In CP, the lawyer is present during all of the negotiations; she serves as advisor and advocate to the extent desired by the client. This practice contrasts with most mediations where the mediator meets with the clients outside the presence of the lawyers, and clients lose the benefits of lawyer advocacy.

Another form of dispute resolution that has received attention from some commentators is Cooperative Law. See Lande, supra note 19, at 205. It is like CP except without a disqualification agreement. See id. The attorneys and clients seek to negotiate an agreement through interest-based bargaining with full disclosure, but the attorneys can litigate the matter if no agreement is reached. The Cooperative Law movement is much smaller than the CP movement. See id. For a summary of the history of Cooperative Law, see id.; see also John Lande & Gregg Herman, Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases, 42 Fam. Ct. Rev. 280 (2004). It may be that without the structural limitations of CP’s disqualification agreement, Cooperative Law lawyers are likely to slide into competitive, litigation-focused practices.
afterthought. Tactics during NPL are likely to distort the final settlement—the participants argue over predetermined positions that are often engineered to increase the client’s share of the settlement and are likely to yield settlements that do not really meet the clients’ interests. Bluffing may cause clients to win concessions that are not especially important to them. Feigning disinterest may cause them to lose on matters that really are important to them. Threats may yield deadlock. The terms of a “split-the-baby” compromise on the courthouse steps are likely to be ill-considered.

CP excludes such tactics. Lawyers and clients are freed from the strategic maneuvering involved in preparing a case for trial. The resulting alteration of the lawyers’ role, purpose, and focus allows the parties and lawyers to harness the efforts of all participants from the start in an agreed, congruent set of steps aimed at the common goal of a mutually beneficial settlement. Lawyers and clients disclose information, identify goals and priorities, explore interests, expand settlement options, and ultimately design settlement options that are in the interests of both parties.

In addition, CP’s disqualification agreement removes the incentive for the lawyers to litigate, and thereby removes the conflict of interest that accompanies NPL. Under traditional NPL, if negotiation fails, the parties litigate and lawyers who are paid on an hourly basis are likely to receive greater income. CP lawyers have no such conflict of interest because they may not represent the clients if the matter goes to trial.

III. TAKING RESPONSIBILITY FOR “THE SITUATION”

Some CP practitioners have suggested that CP represents a “paradigm shift” in lawyering. In CP, lawyers look beyond the narrow interests of their clients to the broader interests of all who might be affected by the representation. The intensity of the change in outlook that CP generates

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26. Cochran, supra note 6, at 541.
27. See Schwab, supra note 22, at 375. A 2003 study of 361 collaborative lawyers found an overall settlement rate of 87.4%. Id. These rates are similar to those found in studies of traditional negotiation and mediation. See Carrie Menkel-Meadow, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference, 33 UCLA L. REV. 485, 488 n.19 (1985) (“[T]here is no empirical evidence that settlement rates have changed in response to increased settlement conference activity. Settlement rates of about 90% are remarkably constant in civil litigation, criminal cases, and family cases.”) (citing Marc Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious Society, 31 UCLA L. REV. 4 (1984)). See also Christopher Fairman, A Proposed Model Rule for Collaborative Law, 21 OHIO ST. J. ON DISP. RESOL. 73, 82 (2005) (discussing the 2003 study addressed above).
28. Schneyer, supra note 6, at 291.
among some lawyers is illustrated by the phrases they use to describe their work. Some CP family lawyers refer to themselves as lawyers for the “whole family.”\textsuperscript{30} Some use “ratios such as 60/40 or 51/49 to describe their allocation of commitment between their client and the family or the other party.”\textsuperscript{31} One lawyer stated that if asked by a client whom she represented in the four-way negotiation meetings, she would reply: “I’m really here to represent the interests of both you and your husband . . . .”\textsuperscript{32}

There are significant divisions within CP about how far the lawyer should focus on the interests of all parties.\textsuperscript{33} Those who use some of the phrases mentioned above to describe their responsibilities have been subject to criticism from other CP practitioners.\textsuperscript{34} Some of those who have used these phrases may have been new converts, caught up in the excitement of CP, and some of these phrases do not hold up under scrutiny as accurate means of stating the CP lawyer’s responsibility. One CP lawyer, suggesting a balanced approach, stated that though CP lawyers act in response to all interests, they are nonetheless their clients’ “best friend in the room.”\textsuperscript{35} Others have been quick to argue that the primary commitment of CP lawyers is to the client.\textsuperscript{36}

The Pennsylvania Bar’s CP opinion, though it approved of CP, stated that the rules of the profession require a collaborative lawyer “to represent the client 100%, not 51%,”\textsuperscript{37} that as a CP lawyer you “must begin by

\begin{itemize}
\item \textsuperscript{30} MAcfarlane, supra note 9, at xi; see also Lande, supra note 8, at 1336 (“[S]ome [CP] practitioners describe lawyers’ roles as serving the interests of the whole family as all or part of their professional duty.”).
\item \textsuperscript{31} Lande, supra note 8, at 1336 n.70.
\item \textsuperscript{32} MAcfarlane, supra note 9, at 47. As the Pennsylvania CP opinion correctly notes, there would be significant problems if a CP family lawyer jointly represented the husband and wife (“the risks are too large and the lawyer may not be able to effectively judge when [the lawyer] is favoring one spouse”) or the client and the family (“there would be a significant risk that the lawyer’s representation of the spouse would be materially limited by the lawyer’s representation of a second client, which is the organization called ‘the family.’”). Pa. Bar Ass’n Comm. Legal Ethics & Prof’l Responsibility, Informal Op. 2004-24 (2004).
\item \textsuperscript{33} See generally Thomas L. Shaffer & Robert F. Cochran Jr., Lawyers, Clients, and Moral Responsibility (2009).
\item \textsuperscript{34} See, e.g., infra note 38.
\item \textsuperscript{35} Julie MAcfarlane, The New Lawyer: How Settlement is Transforming the Practice of Law 110 (2008).
\item \textsuperscript{36} See Pauline H. Tesler, Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts, 2008 J. Disp. Resol. 83, 102-04.
\end{itemize}
identifying a specific client (or clients) that you represent,” and (with a poke at Brandeis) that it is “not acceptable to view yourself as ‘the lawyer for the situation.’”

For some CP critics, a lawyer’s concern for the whole situation is inconsistent with the lawyer’s loyalty, “zeal,” and “diligence.” One

38. The Pennsylvania Ethics Opinion states:

a. The Threshold Question—Who is the Client?
Most of the Pennsylvania Rules of Professional Conduct address a lawyer’s obligations with respect to the lawyer’s representation of a specific client or clients. Thus, the question of “who is my client?” is a threshold question with which a lawyer’s analysis must always begin. Accordingly, even in the collaborative law context, I believe that the first question you must ask is the question of “who is my client?” Once you have answered that question, you are in a position to examine the Pennsylvania Rules of Professional Conduct and determine what duties you owe toward that client or clients. The Pennsylvania Rules of Professional Conduct do not permit a lawyer to view him or herself as the “lawyer for the situation.” I was troubled by a note in Professor Lande’s article indicating that some collaborative lawyers view themselves as representing the divorcing spouse 51% and the family 49% and analogized the situation to the Brandeis “lawyer for the situation.” Despite the views of the lawyers cited by Professor Lande, I conclude that if a collaborative law lawyer represents one divorcing spouse, then that lawyer should view him or herself as representing that client 100%, not 51%.

In sum, in order to comply with the Pennsylvania Rules of Professional Conduct in a collaborative law situation, you must begin by identifying a specific client (or clients) that you represent. It is not acceptable to view yourself as “the lawyer for the situation.” Once you identify your client, you can take steps to ensure that your representation of that client is consistent with the Pennsylvania Rules of Professional Conduct.

Id.

39. See Lande, supra note 8, at 1336-37.
40. In the earliest version of the Canons of Professional Ethics, adopted in 1908, the ABA stated:

The lawyer owes “entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,” to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied.


Canon Seven of the ABA Model Code of Professional Conduct, the predecessor to the Model Rules, stated that a lawyer “should represent a client zealously within the bounds of the law.” MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1980), available at http://www.abanet.org/cpr/mrpc/mcpr.pdf. Though the Model Rules (MR) dropped the use of the term “zeal,” the term remains in the comment to MR 1.3: “A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.” MODEL RULES OF PROF’L CONDUCT R. 1.3 (2003).
cannot say, in Lord Brougham’s classic description of the lawyer advocate, that the CP lawyer “knows but one person in all the world, and that person is his client.” But is the CP requirement that the lawyer seek to settle the claim in accord with the interests of all concerned parties inconsistent with client loyalty? The rules of the profession make it clear that the lawyer is to allow the client to control the objectives of the representation. Clients who choose CP (assuming that they are properly informed) have chosen a process that seeks to yield a stable settlement that addresses the concerns of all of the parties. Once a client has chosen that objective, the job of the lawyer is to pursue that objective with diligence. If the client places a high priority on the CP objectives, developing a stable and creative resolution of the conflict, preserving relationships with the opposing party, and protecting third parties (such as children in a family dispute) are the client’s interests. In such a case, loyalty, zeal, and diligence are matters of seeking to fulfill the client’s desire for an amicable settlement.

In addition, once a client has entered CP, the CP agreement’s mandatory attorney withdrawal provision increases the client’s interest in settlement. If the parties and lawyers fail to reach a settlement, the client will have to bring a new lawyer up to speed as well as go through the challenge of a trial. In CP, the lawyer’s commitment to a mutually beneficial settlement flows from representation of client interests. Lawyers who speak of themselves as representing the whole family or a 51%-49% division of loyalty might better say that a 100% commitment to the client has led them to think about what will be good for the other party.

42. TRIAL OF QUEEN CAROLINE 8 (1821), quoted in MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 9 (1975). The full statement is:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

Id.
44. See Cochran, supra note 6, at 552.
45. Id.
In adversary system theory, judges (not the lawyers) are responsible “for the situation.” But there are significant limits to what judges can do for the situation. Generally, they can only declare a winner and a loser and award monetary damages; they cannot impose a resolution that will address the needs of all who might be affected. Moreover, judges are not likely to know the whole situation. They only get the evidence that the parties choose to give them.

Of course, most cases today are not even resolved by a judge; most cases are settled. And as noted previously, in most NPL, settlement is a zero-sum game, with limited ability to develop a creative solution. The prospect of litigation drives lawyers’ decisions, and cases are settled on the courthouse steps.

Some might fear that a lawyer who is concerned with the whole situation is likely to get a poor result for her client. According to this view of lawyering, each party should have a “hired gun” advocate aggressively arguing his case. Mickey Rooney may be a pleasant, fair-minded, idealistic fellow, but generally he will be no match for John Wayne on the streets of Laredo. But in CP, all of the roles have changed. All of the parties and lawyers have agreed to work together to find a settlement of the dispute. The clients have left their hired guns at the ranch. In CP, both lawyers try to work out a deal that will be good for everyone. If both lawyers enter the CP negotiations with such a mindset, both clients are likely to join in the search for a mutually beneficial solution.

It may be that in some CP negotiations cooperation will be impossible. Wise CP lawyers will judge whether the opposing side is attempting in good faith to reach a mutually beneficial objective. If not, the lawyer should withdraw and let the case proceed to litigation. But if CP works as it should, there will be two lawyers and two clients for the situation.

Actually, CP merely pushes lawyers and clients to engage in the most effective type of settlement negotiations. CP’s withdrawal provision reinforces interest-based negotiation. The most effective advocates in any negotiation seek to develop settlement proposals that meet the needs of the opposing party. Successful negotiation requires a lawyer to step back from her client and consider the whole situation, envisioning all of the futures that

46. Id. at 541.

47. Id. at 552.


49. If you are not a fan of old movies, you may miss my analogy. Most will know that John Wayne generally was the tough gun-slinger. Mickey Rooney was generally the fresh-faced, cooperative, “can’t we all get along” organizer of high school musicals.
could emerge from the conflict. Those futures, if the case is to be successfully settled, must satisfy all of the parties to the dispute, including the opposing party. Both sides should put themselves in the shoes of the opposing party and determine what will meet his needs. That mental exercise (and skill) can easily be described as the lawyer envisioning herself as the lawyer for the situation. The lawyer considers the entire situation because she represents the client and wants to do what is best for the client.\textsuperscript{50} CP creates an incentive for both lawyers and both clients to engage in this sort of deliberation early in the representation and without the tactical distortions of pending litigation.\textsuperscript{51}

Julie Macfarlane raises a separate concern regarding CP lawyers who see the whole family as their client. She argues that such lawyers “risk unintentionally substituting their own judgment for that of their client.”\textsuperscript{52} She notes that the lawyer “is not working privately with each member of the ‘whole family,’ nor taking instructions from them collectively.”\textsuperscript{53} How exactly would the lawyer for one party even know what the best interests of the family are? Without someone directing the lawyer on behalf of the family, the lawyer may merely pursue her own agenda.

\textsuperscript{50} As Julie Macfarlane notes, identifying the needs of the opposing party and identifying solutions that will meet those needs is an important part of reaching any settlement.

Critical to being able to persuade the other side to settle on your client’s best terms is an understanding of what the other side needs in order to be able to settle. [T]he client’s best interests can only be achieved if the interests of the other side are taken into account.

\textsuperscript{51} Two factors make it especially unlikely that a CP lawyer will sacrifice a client’s interests. First, lawyer training and culture push lawyers toward client advocacy. If anything, CP lawyers will probably need to resist the tendency to be overly aggressive. In addition, in CP the lawyer is unlikely to undercut her client’s interests because the client is present during all of the CP sessions. CP clients take an active role in all negotiations. Client disloyalty might be a greater risk in traditional lawyer negotiation, where lawyers typically negotiate without clients being present.

\textsuperscript{52} MACFARLANE, supra note 35, at xi. The possibility that lawyers might “substitut[e] their own judgment for that of their client” is not limited to CP lawyers. The more common problem may be that lawyers, trained in advocacy skills, are more aggressive than their clients would want. See THOMAS L. SHAFFER & ROBERT F. COCHRAN JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 7-9 (2d ed. 2009) (discussing “Godfather lawyers” who attack the opposing party without much input from the client).

\textsuperscript{53} MACFARLANE, supra note 35, at xi.
Macfarlane’s analysis gives little room for common decision-making. What is likely to emerge from the discussions of both lawyers and both clients is a mutual decision about what would be best for the family. Admittedly, the lawyer cannot assume that she knows the interest of the family. The lawyer is just one player. But the lawyer is an informed player and may help the whole group to gain insight into what would be best for the family.

IV. COLLABORATIVE PRACTICE CLIENT COUNSELING

Another controversial aspect of CP is the type of client counseling in which some practitioners engage. In her American Bar Association book, *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation*, Pauline Tesler argues that the CP lawyer has a duty “[t]o represent the highest-functioning client, and to take no instructions from the ‘shadow’ client” whom she defines as the client “who is possessed by primitive grief, anger, or guilt.”54

As John Lande notes, the danger with this notion is that “[p]aternalistic lawyers can [use the shadow client] theory to justify ignoring or trying to change clients’ stated desires as coming merely from the shadow client, not the ‘true client.’”55 In the following excerpt from an e-mail message to me, Tesler gives further details about her view of the place of highest functioning and shadow client imagery in client counseling. She writes in the context of a family dispute. I asked whether this concept would enable the lawyer to disobey client instructions:

Of course the lawyer does not and must not do what the client says not to do and I’ve never suggested that the lawyer would ever substitute his/her judgment for the client’s. The initial conversations with the client in which the mutual decision is made to proceed collaboratively should include a discussion of the interests of all of the parties affected by the representation. There is no point in attempting to proceed collaboratively unless the client has serious interest in proceeding from a perspective of wise deliberation and attention to the longer term interests of those about whom the client cares—a perspective that includes moral considerations about others as well as “enlightened self interest”. . . . The “shadow client” metaphor is discussed with the client at the beginning of the representation and an agreement is reached that this will be a tool used later to remind the client why he or she chose this process rather than litigation, at moments of strong emotion when cognitive processing is impaired and the client is in danger of sinking the process that he or she chose at a more deliberative time.

54. TESLER, supra note 7, at 161-62.
55. Lande, supra note 8, at 1370; see also John Lande, The Promise and Perils of Collaborative Law, DISP. RESOL. MAG., Fall 2005, at 29-30.
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If the client says, in essence, “that was then and this is now and I want you to go for the jugular,” the collaborative lawyer then says, in effect, “that’s not how we do it in collaborative law because it’s not possible to get to well-considered mutually acceptable solutions that way and well-considered mutual decisions is what we all agreed to work toward. So let’s look at your options. You could decide to litigate . . . you could take a break and reconsider with me whether you really want to be that aggressive . . . .”

Elsewhere, Tesler describes the CP lawyer as “an engaged moral agent.” The discussion advised by Tesler is different from that which goes

56. Email from Pauline Tesler to Robert F. Cochran, Jr. (Nov. 3, 2008) (on file with author) (emphasis in the original). CP lawyer Diane Diel notes that the initial conversation with prospective clients is likely to screen out cases with unreasonable parties:

Clients who are married to “unreasonable” clients . . . self screen themselves at the outset of the process . . . . The clients who ultimately sign participation agreements understand and articulate in meetings with the other party and the other lawyer that they are choosing, voluntarily and with understanding, to resolve their dissolution issues in this environment, by themselves and in a fashion that recognizes the interests of all.

In addition, the CP professionals other than the lawyer who are often a part of CP are likely to make CP clients more reasonable:

The “reasonableness” of a client’s position is often directly related to the knowledge and information that client possesses. [In CP, many clients] work with a team of trained collaborative professionals . . . . A client who might take a wholly unreasonable position with respect to cash from the business can become far more reasonable when he/she learns from a neutral financial expert how much cash is actually in the business. A client who might have a wholly unreasonable position with respect to parenting time can become far more reasonable when he/she learns from the child specialist about the developmental needs of the child . . . .

Email from Diane Diel to Robert F. Cochran, Jr. (Mar. 8, 2010) (on file with author).

Pauline Tesler notes that CP lawyers come prepared to deal with shadow feelings on the part of both clients.

“Shadow” feelings (anger, fear, grief, and the like) are expected and accepted—"normalized"—but not permitted to direct the dispute-resolution process. [Both lawyers respond appropriately and constructively to the shadow behavior of the spouse] without being manipulated, angered, or frightened by it. Each lawyer takes responsibility for moving each client from artificial bargaining positions to the articulation of real needs and interests.

TESLER, supra note 7, at xxi (also arguing that a client can learn to deal with the other party’s shadow feelings by observing the lawyers deal with the other client).

57. TESLER, supra note 7, at 160.
on between many lawyers and clients. Indeed, many legal counselors argue that when counseling a client, the lawyer should remain neutral and nonjudgmental.58

Though all CP lawyers do not use Tesler’s shadow client terminology or think of themselves as “engaged moral agent[s],” in my view, the nature of CP pushes lawyers toward this sort of “ethical dialogue with [their] clients about what the goals of the representation should properly be . . . .”59 At a minimum, CP encourages lawyers to discuss the impact of decisions on the opposing party and challenges lawyers to wrestle with the dilemma of moral agency. In order to gain the client’s informed consent, the CP lawyer must inform the client that the objective of the representation will be to identify an agreement that meets the needs of all of the parties. In addition, the CP attorney should inform the client of the emotional nature of CP’s face-to-face negotiations. CP lawyer Diane Diel notes that the CP lawyer’s advice “is filtered through a lens that assumes that the client is looking for workable and reasonable solutions . . . . One of the practical reasons why CP is such an advantage for clients is that the focus is in fact always on the settlement which is the most likely outcome of their case anyway . . . .”60

Some CP agreements explicitly anticipate counseling that is focused on settlement. For example, the California CP statutory form agreement includes the following provision:

Each of us will be expected to take a reasonable position in all disputes. Where such positions differ, each of us will be encouraged to use our best efforts to create proposals

59. TESLER, supra note 7, at 160.
60. Diel, supra note 56 (emphasis in original). Diel further notes:

The CP community, including local and state/provincial practice groups and the IACP, presents courses on achieving settlement and avoiding/breaking impasse on an extremely regular basis. The research, writing and training going into the dynamics of reaching settlement is extensive. The IACP Forum, for example, in Minneapolis in October, 2009, presented over [thirty] Workshops dealing with approaches to CP in the face of difficult or emotionally reactive clients, sticky issues, adaptations of mediation approaches to negotiation within the CP approach, interventions in the face of impasse.

Id.
that meet the fundamental needs of both parties and if necessary to compromise to reach a settlement of all issues.61

Lawyers may not think of this as ethical dialogue, but its effect is to bring the client to consider the interests of other people, the primary component of the moral life. The CP lawyers’ and clients’ commitment to find an agreement that meets the needs of all of the parties, along with CP’s withdrawal provision, discourages clients from quickly initiating a lawsuit, or even threatening to do so. They may lead a client to make more deliberate, wiser decisions.

The lawyer as an engaged moral agent is not new. Here, as with the related notion that the lawyer has a responsibility for the situation, CP finds an analogy in Louis Brandeis’s practice. Brandeis firmly counseled his clients to consider the effects of their actions on other people.62 As noted previously, one of Brandeis’s critics observed, “The trouble with Mr. Brandeis is that he never loses his judicial attitude toward his clients.”63 Another of Brandeis’s contemporaries, Elihu Root, wrote, “half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.”64

Lawyer moral counsel found a place in the 1969 American Bar Association Model Code: “In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.”65 Similarly, the ABA Model Rules of Professional Conduct provides that throughout the counseling process, lawyers must “exercise independent professional judgment and render candid advice,” noting that the lawyer may refer to “moral, economic, social and political factors, that may be relevant to the client’s situation.”66

62. See supra note 3 and accompanying text.
63. MASON, supra note 2, at 506 (quoting Austen G. Fox in Letter from Steven S. Wise to Louis D. Brandeis (Mar. 23, 1916)).
CP encourages a type of client counseling that, independent of the CP movement, adopted the label “collaborative” client counseling. Whereas the “collaborative” in collaborative practice refers to the collaboration between the two lawyers and the two clients during negotiation, the “collaborative” in collaborative client counseling refers to the collaboration between the lawyer and the client during decision-making. The collaborative client counselor, like many CP lawyers, engages the client in moral dialogue. In the words of Anthony Kronman, the lawyer acts like a friend to the client, bringing sympathy and detachment to the relationship, and can thereby help the client make a “deliberatively wise choice.”

Kronman discusses how a lawyer-as-friend might deal with a client who appears to be making an impetuous decision:

[The lawyer’s responsibility to help a client make a deliberatively wise choice] may be seen most clearly in the case of what I shall call the “impetuous” client—the client who, in the grip of some domineering passion like anger or erotic love, has made a quick decision to change his life in an important way . . . . [When surrounding circumstances suggest that a client’s decision is impetuous], a responsible lawyer will test his client’s judgment before accepting it, recognizing that in such situations the danger of regret is large and that a lawyer must protect his client from this familiar species of self-inflicted harm as well as the harms caused by others.

The responsible lawyer will help a client assess a decision’s wisdom “through a process of cooperative deliberation in which the lawyer examines the decision with sympathy and detachment from the client’s point of view.” Therefore, “[o]nly those lawyers who are able to combine the qualities of sympathy and detachment are thus able to give an impetuous client the advice he needs, even if it is not always the advice he wants.”

Such counseling, of course, carries risks. A lawyer may not know whether strong advice concerning a matter will ultimately serve as helpful guidance or unsound interference. Determining whether a client is making a thoughtful determination or having an emotional reaction is ultimately a

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67. See JAMES E. MOLITENRO & JOHN M. LEVY, ETHICS OF THE LAWYER’S WORK 86 (1993); ROBERT F. COCHRAN, JR. ET AL., THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING 181-89 (1999); SHAFFER & COCHRAN, supra note 52, at 44-54. “Collaborative client counseling” is synonymous with what many commentators have called the “lawyer as friend”—a lawyer who counsels the client as she would a friend, neither imposing her values on the client, nor letting the client go his own way, but raising the clients questionable choices as a matter for moral discourse. See id.; ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 129-32 (1993).

68. KRONMAN, supra note 67, at 129.

69. Id. at 131.

70. Id. at 129.
matter of judgment. As Duncan Kennedy has noted in a different context, this can be a difficult judgment:

The truth of the matter is that what we need when we make decisions affecting the well-being of other people is correct intuition about their needs and an attitude of respect for their autonomy. Nothing else will help. And even intuition and respect may do no good at all. There isn’t any guarantee that you’ll get it right.72

No model of client counseling is going to ensure that there will not be errors. Some might argue that the lawyer should do the “safe” thing and defer to what the client says at any given point. But what the client says at the moment may not be the safe thing for the client. Ultimately, the client may deeply regret decisions made in the heat of passion, depression, or anger.

The adversary system and CP tend to lead lawyers in different directions. The adversary system inclines lawyers toward following, and maybe encouraging, the client’s angriest instincts. CP moves the incentives in the other direction. It encourages lawyers and clients to seek settlement and reconciliation.

Collaborative client counseling can be an important part of CP achieving what I identified above as the CP ideal: “Two lawyers and two clients for the situation.” Through such counseling, the lawyers can encourage their clients to pursue a resolution of the dispute that will meet the needs of both parties.

V. THE POSSIBLE FUTURES OF COLLABORATIVE PRACTICE

I see several potential futures for collaborative practice. As noted previously, CP has grown primarily in the family context. For several reasons, I am confident that CP will continue to grow as a means of resolving such disputes, especially those involving children.

(1) Parties to such disputes, even if they hate one another, generally are concerned with the welfare of their children, and the growing evidence that high conflict divorce is disastrous for children will continue to drive parties to CP.

(2) Parties to a family dispute, especially where children are involved, are likely to need to have a continuing relationship with one another. CP may help the parties to work together in the future.

(3) Parties to family disputes are likely to want to retain control over the disputes. Resolution of family disputes are likely to control many things that the parties care about, including the disposition of their property, the future of their children, and their own freedom of action. At present, CP appears to be the dispute mechanism that is most likely to enable the parties to control the outcome creatively.

(4) Finally, parties to family disputes often are already under substantial emotional stress. The last thing they need is the stress of the adversarial conflict that can be generated at trial. CP enables them to resolve the dispute in a more comfortable, non-adversarial setting, with their lawyers present to insure that a resolution is fair to all.

Expansion of CP into new areas is likely to occur in cases that combine some or all of the elements mentioned above. Probate disputes often involve the same factors as divorce and child custody cases. Business disputes where the parties want or need to continue to do business with one another are also likely candidates for CP. The two factors that are present in a substantial number of additional cases are the litigants’ desire to control and be creative with the outcome and the desire to protect themselves from the emotional turmoil of litigation. As more lawyers experience CP and see its benefits, it may be that they will suggest it to clients, and voluntary CP’s popularity will grow.

If courts, legislatures, and other policy makers see CP reducing conflict, generating stable agreements, and protecting third parties, they may push lawyers and clients to pursue CP, for example, by requiring clients to attempt CP before litigating a matter. Such a rule may meet with limited success. Lawyers who are pressed by policy makers to engage in CP will be able to focus on settlement without the pressures of preparation for litigation, but a client who has not chosen CP and is not committed to settlement can force a case to litigation by merely refusing to cooperate during CP. CP is not likely to be nearly as effective if clients are forced into it. Though experimentation might be valuable, in my view courts should hesitate to push lawyers and clients into CP.

An option that respects client autonomy is for courts and legislatures to require lawyers to present CP as an option to clients, under threat of legal

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73. See, e.g., Kathy A. Bryan, Why Should Businesses Hire Settlement Counsel?, 2008 J. DISP. RESOL. 195, 196 (arguing that businesses, as well as families, often have reasons for wanting to preserve relationships and should consider CP).
malpractice or professional discipline. It may be that a professional duty to present CP to clients will evolve the existing legal ethics rule requiring lawyers to inform clients of alternatives to litigation in appropriate cases. It is important that clients know the potential benefits and risks of ADR options and litigation before choosing between them.

There is a danger that as CP becomes more common, especially if it is required and there is not party buy-in, it will become merely another forum for acting out party hostilities. As Carrie Menkel-Meadow has noted, mediation, which began with high hopes that it would be a means of transformation and reconciliation of disputants, became in many cases merely “another weapon in the adversarial arsenal to manipulate time, methods of discovery, and rules of procedure for perceived client advantage.” CP might be subject to the same misuse. One can imagine a lawyer using CP to discover information, wear down an opponent, and set up litigation. CP could become merely another example of lawyers turning “plowshare[s] into sword[s].” However, if attorneys develop a reputation for using such tactics in CP, it is unlikely that other lawyers will agree to engage in CP with them. Under such circumstances, the case is likely to move quickly into litigation.

Another possibility is that CP will help to transform law practice. In addition to her studies of CP lawyers, Julie Macfarlane has explored whether law practice in general is in the midst of a transformation. The title of her book, The New Lawyer, captures the radical nature of the change she sees:

74. For the argument that the failure to present arbitration or mediation as options to clients might be legal malpractice or a violation of ethical norms see Robert F. Cochran, Jr., Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation, 48 WASH. & LEE L. REV. 819-77 (1990) (malpractice potential) and Robert F. Cochran, Jr., Must Lawyers Tell Clients About ADR?, ARB. J., June 1993, at 8-13 (attorney discipline potential).

75. See MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. 5 (2002).


77. Cf. MARVIN E. FRANKEL, PARTISAN JUSTICE 18 (1980) (criticizing misuse of discovery: “Where the object always is to beat every plowshare into a sword, the discovery procedure is employed variously as weaponry. A powerful litigant, in a complex case, may impose costly, even crushing, burdens by demands for files, pretrial testimony, and other forms of discovery.”).

78. Such tactics would be unlikely to be successful today. CP lawyers control the process and it takes two lawyers to engage in CP. “A [CP] lawyer who is deemed to have taken an unnecessarily adversarial approach to negotiations will . . . be monitored by his or her [CP] community.” Julie Macfarlane, Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project, 2004 J. DISP. RESOL. 179, 196.
The most successful lawyers of the next century will be practical problem solvers, creative and strategic thinkers, excellent communicators, persuasive and skillful negotiators, who are able and willing to work in a new type of professional partnership with their clients. Many lawyers have told me that this modified approach to legal practice resonates with their own changing norms and habits of practice, and fits better with their personal value systems than the old warrior model. These are the new lawyers, who are . . . competitive in the new conditions of legal practice, and market forces will ensure their numbers will only increase.79

It may be that this new lawyer will emerge within the traditional adversary system. But it is difficult for lawyers to take peacemaking steps within a structure that rewards their opponents for adversarial tactics. CP changes that structure.

There is some evidence that CP has had an impact on the adversary system. One study of lawyers in Wisconsin found that collaborative law and cooperative law80 have yielded several changes in the way litigation-oriented practice is conducted.81 It found greater efforts to (1) be informal, respectful, cooperative, and trusting; (2) have candid conversations; (3) elicit client input; (4) voluntarily exchange information; (5) use four-way meetings and productive negotiation techniques; (6) use coaches and shared experts; (7) use mental health providers more creatively to help address the needs of the children; and (8) use mediation.82

It may be that CP will influence the entire legal system in that direction. At a minimum, the growth in CP demonstrates that there is an appetite for change among many lawyers and clients.

VI. CONCLUSION

CP changes the focus of lawyers and clients during negotiation from preparing for trial to developing the best settlement terms for all concerned. It identifies a fair resolution of the dispute as the objective of both lawyers and both clients. This substantive aspiration, coupled with CP’s procedural change—requiring both lawyers to withdraw from representation if the case moves to litigation—harness the energies of both parties and both clients. It significantly alters two aspects of the representation—in CP, both the lawyers’ and clients’ focus and the client-counseling focus are on a settlement that meets the needs of all of the parties. CP creates two lawyers

80. For a discussion of cooperative law, see supra note 25 and accompanying text.
81. Given the small number of Wisconsin lawyers who engaged in cooperative law, it is likely that CP is responsible for these results. See Lande, supra note 19, at 247.
82. See generally id. at 247-49.

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and two clients “for the situation” and is likely to yield the best resolution of the dispute for all concerned.
The Assault of Jamie Leigh Jones: How One Woman’s Horror Story Is Changing Arbitration in America

Jeffrey Adams*

I. INTRODUCTION

On July 28, 2005, Jamie Leigh Jones (Jones) woke up in her barracks naked and severely bruised. Blood was running down her leg, her breasts were badly mauled, and the date-rape drug she had unsuspectingly ingested the night before left her feeling groggy and confused. Unfortunately, Jones’s horrifying situation was only beginning. Surprisingly, what was about to happen to Jones would not only affect her. Her unsettling experience would also stoke a national debate in America and lead to an amendment to the United States’ national defense budget created practically in her honor. Moreover, Jones was about to be viewed by many U.S. lawmakers as a victim of a brutal gang rape and as a victim of an arbitration

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2. Id.

3. See, e.g., Wade Goodwyn, Rape Case Highlights Arbitration Debate, NAT’L PUB. RADIO, June 9, 2009, http://www.npr.org/templates/story/story.php?storyId=105153315. “Her breasts were so badly mauled that she is permanently disfigured.” Id. As a result of the assault and rape her breast implants ruptured, her pectoral muscles were torn, and she would later need reconstructive surgery to repair the damage. See McGreal, supra note 1.


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culture in the U.S. legal system that denied her both justice and her rightful
day in court.6

This article examines Jones v. Halliburton Co.,7 the “Al Franken Amendment” to the 2010 U.S. Defense Department Budget (Franken Amendment) that was created in response to Jones,8 and the impact that both could have on mandatory arbitration clauses in employment contracts in the future. Part II recounts the troubling events that led to Jones and the inclusion of the Franken Amendment in the 2010 Defense Department Budget. Part III details the arguments made for and against the inclusion of the Franken Amendment. Part IV analyzes the impact that the Franken Amendment could have on mandatory arbitration clauses in contacts in the future. Part V concludes this article.

II. BACKGROUND

A. Jamie Leigh Jones

On July 21, 2005, Jones signed an employment contract with Overseas
Administrative Services (OAS), a foreign, wholly-owned subsidiary of
Halliburton/Kellogg, Brown & Root (Halliburton/KBR).9 Jones was hired by OAS for employment as a clerical worker in Baghdad, Iraq.10 The relevant portion of Jones’ contract stated:

You . . . agree that you will be bound by and accept as a condition of your employment the terms of the Halliburton Dispute Resolution Program which are herein incorporated by reference. You understand that the Dispute Resolution Program requires, as its last step, that any and all claims that you might have against Employer related to your employment, including your termination, and any and all personal injury claim[s] arising in the workplace, you have against other parent or affiliate of Employer, must be submitted to binding arbitration instead of to the court system.11

6. See, e.g., Parkinson, supra note 4. Senator Patrick Leahy (D-Vermont) stated at the Senate Judiciary Committee hearing about Jones, “There are no juries or independent judges in the arbitrations industry. There is no appellate review. There is no transparency. And . . . [for] Jamie Leigh Jones there is no justice.” Id. Senator Al Franken (D-Minnesota) argued, “Contractors are using fine print to deny women like Jamie Leigh Jones their day in court.” McGreal, supra note 1.

7. Jones v. Halliburton Co., 583 F.3d 228 (5th Cir. 2009).


9. See Jones, 583 F.3d at 231. Jones had already been employed by Halliburton/KBR since 2004 as an administrative assistant in Houston, Texas. See id. at 230. Jones alleged that while she was employed at Halliburton/KBR in Houston she was sexually harassed by her supervisor, and as a result demanded that she be relocated to another department. See id. at 230-31.

10. See id. at 231.

11. Id. (emphasis added).
1. Jones in Iraq

Jones arrived in Baghdad on July 25, 2005. Halliburton/KBR provided housing for Jones as determined in her employment contract. Jones asked for, and claimed that she was guaranteed, “a private billeting area to be shared only with women.” Instead, she was housed in barracks predominantly occupied by male employees.

Jones alleged that she was immediately subjected to unwelcome sexual harassment in her barracks. On July 27, after just two nights in her barracks, Jones asked Halliburton/KBR managers to move her to a safer housing location because of the “sexually hostile” environment that pervaded her current housing situation. Despite her requests, Halliburton/KBR managers would not relocate Jones. Then, late the next day, just three days after her arrival in Iraq, Jones was allegedly “drugged, beaten, and gang-raped by multiple Halliburton/KBR employees in her barracks bedroom” following a social gathering near her barracks.

The incorporated [Dispute Resolution Program] provided:

‘Dispute’ means all legal and equitable claims, demands, and controversies, of whatever nature or kind, whether in contract, tort, under statute, or regulation, or some other law, between persons bound by the Plan or by an agreement to resolve Disputes under the plan . . . including, but not limited to, any matters with respect to . . . any personal injury allegedly incurred in or about a Company workplace.

Jones’s assignment in Baghdad was located in the United States Army’s Central Command Area of Operations, an area within the “Green Zone.” This area was initially the center of the Coalition Provisional Authority after America’s invasion in Iraq. Jones was stationed at Camp Hope, which Jones alleged “was under the direct control and authority, collectively, of the United States Departments of State and Defense, and Halliburton/KBR.”

The barracks were also “some distance from her workplace.”

Jones alleged that Halliburton/KBR did not take any steps to move her to a different location; rather “she was, instead, allegedly advised to ‘go to the spa.’”

The last thing Jones remembers about the night of her alleged rape was taking two sips of a drink given to her by a co-worker. See Goodwyn, supra note 3. Jones was raped vaginally and anally. See, e.g., Brian Ross, Maddy Sauer & Justin Rood, Victim: Gang-Rape Cover-Up by U.S., Halliburton/KBR, ABC News, Dec. 10, 2007, http://abcnews.go.com/blotter/story?id=3977702&page=2. Though Jones was raped repeatedly, she does not know for certain how many men actually raped her. See Goodwyn, supra note 3. Some sources, however, have reported that as many as seven male employees were involved in Jones’s
Jones reported the rape to Halliburton/KBR medical personnel the next morning.\(^{20}\) She was administered a rape-kit and given an examination at a U.S. Army-operated hospital.\(^ {21}\) What purportedly followed this examination was a series of terrifying events for Jones. Jones was placed under armed-guard by Halliburton/KBR employees, locked in a shipping container, and not permitted to leave.\(^ {22}\) Jones was also “interrogated by [Halliburton/KBR] management and human resource personnel for hours and was told that if she chose to return to the United States, she would not have the guarantee of a job upon [her] return.”\(^ {23}\) In addition, Halliburton/KBR refused to allow Jones to contact her family until she convinced a compassionate guard to allow her to telephone her father.\(^ {24}\) Jones’s father called his U.S. Congressman, Representative Ted Poe (R-Texas). Representative Poe called the U.S. State Department, and the State Department dispatched agents from the U.S Embassy in Baghdad to rescue Jones and ensure her safe return to the United States.\(^ {25}\)

2. Jones at Trial

Upon her return to the United States, Jones brought an action against Halliburton/KBR.\(^ {26}\) The U.S. Department of Justice declined to investigate alleged gang-rape. See Parkinson, supra note 4. Jones’s numerous physical injuries included torn pectoral muscles that would later require reconstructive surgery to repair. See Jones, 583 F.3d at 232. She also had lacerations to her vagina and anus. McGreal, supra note 1.

\(^{20}\) See, e.g., Jones, 583 F.3d at 231. When she woke up, Jones found one of her alleged perpetrators lying in the lower bunk of her bedroom. See id. at 231. “At that time he allegedly admitted to having unprotected sex with her.” Id. at 231-32. According to Jones, “he knew he was beyond the reach of any jurisdiction, so he was still brazen enough to be there.” Goodwyn, supra note 3. Given the U.S. Department of Justice’s inaction in Jones’s case, Jones’s point is a strong one. See infra note 27 and accompanying text.

\(^{21}\) See, e.g., Jones, 583 F.3d at 232. Jones alleged that Halliburton/KBR mishandled the rape kit after it was administered to her. Id. For example, when the forensic evidence of her rape from her examination was given to investigators two years later, “crucial photographs and notes were missing.” McGreal, supra note 1.

\(^{22}\) See, e.g., Jones, 583 F.3d at 231. Jones described the container as “sparingly furnished with a bed, table and lamp.” See Ross supra note 19. Jones was left in the container for at least twenty-four hours without food or water. Id.


\(^{24}\) See, e.g., Jones, 583 F.3d at 232.

\(^{25}\) See Ross, supra note 19. Representative Poe said in an interview, “‘We contacted the State Department first, and told them of the urgency of rescuing an American citizen’—from her American employer.” Id.

\(^{26}\) See Jones, 583 F.3d at 232. Jones first filed a complaint with the Equal Employment Opportunity Commission, who determined that Jones had been “sexually assaulted by one or more
Jones’ claims; therefore, she was limited to a civil action against her former employer.27 The problematic issue facing Jones, however, was that before leaving for Iraq she had signed the contract that provided that all claims against Halliburton/KBR would be settled through arbitration and not through litigation in the court system.28 Consequently, when Jones filed an action against Halliburton/KBR in the Southern District of Texas in May 2007,29 Halliburton/KBR “moved to compel arbitration of Jones’s claims and stay the proceedings.”30

The district court concluded that a valid agreement to arbitrate existed between Jones and Halliburton/KBR.31 But, the court also found that the
arbitration provision in the contract was “very broad.” 32 Because of the broadness of the provision, the court ruled that the four claims related to Jones’s alleged rape (assault and battery; intentional infliction of emotional distress; negligent hiring, retention, and supervision of the employees involved; and false imprisonment) fell “beyond the outer limits of even a broad arbitration provision” and were “not related to Ms. Jones’s employment.” 33 Consequently, the district court compelled arbitration for all of Jones’s claims except for the four claims related to her alleged rape. 34 The Fifth Circuit Court of Appeals affirmed and remanded the case in September 2009. 35 In December 2009, a federal judge set a date for Jones’s trial on the four issues surrounding her rape claim for February 7, 2011. 36

B. The “Al Franken” Amendment

Prompted by Jones, in 2009 the U.S. Congress looked to pass a measure that would prevent private defense contractors from compelling their employees to use arbitration to resolve cases of sexual assault. 37 Congress wanted to pass this measure even though the Fifth Circuit Court of Appeals had already ruled in favor of Jones by allowing her rape-related claims against Halliburton/KBR to go to trial. 38 Accordingly, then newly-elected Minnesota senator, 39 Al Franken, introduced an amendment to the 2010

rejected Jones’s claims that “there was no meeting of the minds; the arbitration clause was fraudulently induced; the provision was contrary to public policy; and enforcing the agreement would be unconscionable.” Jones, 583 F.3d at 233. The district court also rejected Jones’s claim that the arbitration agreement should not be enforced based on the equitable doctrine of unclean hands. Id.

32. Jones, 625 F. Supp. 2d at 352; see also Jones, 583 F.3d at 233.


34. See Jones, 583 F.3d at 233.

35. Id. at 242. To view the court’s reasoning in affirming and remanding the case, see id. at 233-42 (utilizing a two-part analysis to determine whether a party should be compelled to arbitrate a claim).


37. See, e.g., Dlouhy, supra note 5.


39. Senator Franken was elected after a drawn out process with Norm Coleman after recounts and legal battles postponed Minnesota from declaring victory for either candidate for months. See John W. Mashek, Franken Finally Nearing Victory over Coleman in Minnesota Senate Race, U.S.
Defense Appropriations Bill which would have barred the U.S. Department of Defense from working with any private defense contractor that required their employees to settle all discrimination claims, including those of sexual assault, through mandatory arbitration. Because Senator Franken authored the amendment, it became known as the “Al Franken Amendment.” From its inception the Amendment was controversial. Support for, and opposition against, the Amendment fell almost strictly along party lines.

The original Amendment, as passed in the Senate, was a short, strict prohibition on the Department of Defense from employing any private defense contractors that included mandatory arbitration clauses in their contracts with employees. However, neither the Department of Defense nor President Barack Obama and his administration fully supported the...
strong language of the Amendment. Both the Defense Department and the White House expressed concern that the Amendment was overbroad and could be unenforceable. The Defense Department was particularly worried that “the Pentagon and its contractors ‘may not be in a position to know’” whether private defense companies that they subcontracted with utilized mandatory arbitration clauses in their employees’ contracts.

In response to these concerns, members of the House and Senate narrowed the final language of the Franken Amendment in two ways: (1) arbitration was to be allowed in cases where the defense secretary or a deputy “personally determines [it] necessary to avoid harm to the national security interests of the United States”; and (2) the scope of the Amendment was limited so that only companies that had contracts with the federal government that are worth one million dollars or more were required to comply with the mandate.

President Obama signed the Department of Defense Appropriations Act 2010, including the revised Franken Amendment, into law in December 2009. A review of the Amendment demonstrates how influential Jones’s claims against Halliburton/KBR may have been to this legislation, as many of her tort claims against Halliburton/KBR are specifically listed in the Amendment.

The pertinent part of the final version of the Amendment reads:

(a) None of the funds appropriated . . . by this Act may be expended for any Federal contract for an amount in excess of $1,000,000 . . . unless the contractor agrees not to:

(1) enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising . . . out of sexual assault or harassment, including

44. Rosen, supra note 43. The Obama Administration would only support the “intent” and not the “content” of the amendment. Id. Senator Daniel Inouye (D-Hawaii), chairman of the Senate Appropriations Committee, also “raised concerns that it could leave defense contractors vulnerable.” Dlouhy, supra note 5.

45. See Parker, supra note 38.

46. Id. The Department of Defense wrote a letter to numerous senators stating that the Pentagon and its contractors “may not be in a position to know about such things. Enforcement would be problematic.” Id. The Defense Department additionally stated, “It may be more effective to seek a statutory prohibition of all such arrangements in any business transaction entered into within the jurisdiction of the United States, if these arrangements are deemed to pose an unacceptable method of recourse.” Id.

47. Dlouhy, supra note 5.


49. See H.R. 3326, 111th Cong. § 8116 (2009). See also Rosen, supra note 43.
assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or

(2) take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention . . . .

(d) The Secretary of Defense may waive the application of subsection (a) or (b) to a particular contractor or subcontractor for the purposes of a particular contract or subcontract if the Secretary or the Deputy Secretary personally determines that the waiver is necessary to avoid harm to national security interests of the United States, and that the term of the contract or subcontract is not longer than necessary to avoid such harm. 50

III. ANALYSIS

A. The Arguments in Favor of the Franken Amendment

Mandatory arbitration clauses in employment contracts certainly suffered a “black eye” after the negative publicity that they received throughout Jones and the Franken Amendment enactment process. 51 The holding of Jones itself evinces a potential weakening of mandatory arbitration clauses in employment contracts because the court allowed some of Jones’s claims to be litigated even though the contract called for them to be resolved through arbitration. 52 Consequently, a valid question arises as to why Congress felt it necessary to enact legislation that reigns in mandatory arbitration clauses in employment contracts if they are already losing public and legal support.

1. Preempt the Courts

One reason why Congress may have wanted to enact the Franken Amendment is because in Jones, both the district court and the Fifth Circuit disagreed with an analogous case that the same district court had ruled on

51. See generally Parkinson, supra note 4; McGreal, supra note 1 (highlighting the arguments used against mandatory arbitration clauses in employee contracts).
52. See Jones v. Halliburton Co., 583 F.3d 228, 242 (5th Cir. 2009).
just over a year before in Barker v. Halliburton Co.\(^{53}\). Thus, Congress may have wanted to preempt the Fifth Circuit from overturning its own decision again.\(^{54}\) Congress also might have wanted to extend the ruling from Jones so that it applied to other courts in the country as well.\(^{55}\)

In Barker, the district court reviewed arbitration language in an employment contract similar to the arbitration language in Jones.\(^{56}\) Like Jones, the plaintiff in Barker, Tracy Barker, brought suit against Halliburton for claims stemming from alleged sexual harassment she experienced while working for Halliburton in Baghdad.\(^{57}\) However, unlike in Jones, the Barker court concluded that Barker’s claims did fall within the scope of the mandatory arbitration provision in her employment contract.\(^{58}\) The court’s logic in so holding was that Barker’s claims were “predicated on the failure of the Halliburton defendants’ employees to follow company policies regarding, among other things, sexual harassment.”\(^{59}\) As an example of this predication, the court specifically pointed to Barker’s negligent-undertaking claim because in that claim Barker herself alleged that Halliburton “negligently undertook to provide proper training, adequate and sufficient safety precautions . . . [and] adequate sufficient policies in the recruitment,

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\(^{53}\) See Barker v. Halliburton Co., 541 F. Supp. 2d 879 (S.D. Tex. 2008) (granting defendant Halliburton’s motion to compel arbitration against an employee who filed a complaint claiming that the defendant retaliated against her following her reporting sexual harassment). The trial court in Jones distinguished Jones from Barker on the grounds that the perpetrators’ conduct was outside the scope of the arbitration clause, stating, “Just because an assailant’s actions happen to be in violation of his employer’s policies, and those policies also govern plaintiff’s behavior, does not necessarily render the assault related to plaintiff’s employment for purposes of arbitration.” Jones v. Halliburton Co., 625 F. Supp. 2d 339, 353 (S.D. Tex. 2008).

\(^{54}\) See generally Franken, supra note 40. Compare Jones, 583 F.3d at 242 (ruling that the rape-related claims were not arbitrable), with Barker, 541 F. Supp. 2d at 890 (holding that the rape-related claims were arbitrable).

\(^{55}\) See Franken, supra note 40.

\(^{56}\) See Barker, 541 F. Supp. 2d at 883. The arbitration clause at issue read:

> You also agree that you will be bound by and accept as a condition of your employment the terms of the Halliburton Dispute Resolution Program which are herein incorporated by reference . . . . [A]ny and all claims that you might have against Employer related to your employment, including your termination, and any and all personal injury claim[s] arising in the workplace, [or claims] you have against [any] other parent or affiliate of Employer, must be submitted to binding arbitration instead of the court system.

\(^{57}\) Id. at 882. Barker’s complaints were “negligence, negligent undertaking, sexual harassment and hostile work environment, retaliation, fraud, and intentional infliction of emotional distress, arising from, inter alia, an alleged sexual assault by a State Department employee while in plaintiff's living quarters in Iraq.” Id. at 887.

\(^{58}\) Id.

\(^{59}\) Id.
training, and placement of personnel in Iraq.” 60 Thus, inapposite to Jones, the Barker court ruled that the plaintiff employee’s complaints were arbitrable. 61

2. Protect Future Employees

Because both cases brought nearly identical claims against the same company, Barker and Jones may also be indicative of the frequency with which mandatory arbitration clauses are utilized in employment contracts. 62 Thus, though some may argue that mandatory arbitration clauses are losing public and legal support, the regularity with which companies still utilize them may evince that such claims are either erroneous or insignificant. Jones and Barker give credence to the argument made by proponents of the Franken Amendment that Jones’s and Barker’s claims are not unique; therefore, legislative action was necessary to protect future employees from any unfair effects of mandatory arbitration clauses that could arise given their continued, incessant use. 63

60. Id. In holding these conclusions, the court in Barker noted the unique nature of Barker’s overseas work environment. See Jones v. Halliburton Co., 583 F.3d 228, 238 (5th Cir. 2009). The court commented that there is no bright line between work and leisure time. See id. The court in Jones, however, disagreed with this approach and did not utilize it. See id.

61. See Jones, 583 F.3d at 238. The Fifth Circuit Court of Appeals also distinguished Barker from Jones by noting that Jones, unlike Barker, made a claim that Halliburton/KBR was vicariously liable for the assault. Id. This fact, the court stated, “coupled with our concluding that the district court in this action properly analyzed and deemed as non-arbitrable claims that overlap with those analyzed in Barker . . . strengthens our holding that Jones’s claims were beyond the scope of the arbitration clause regarding the ‘related to’ portion.” Id. But cf. Gentry v. Superior Court, 165 P.3d 556 (Cal. 2007) (limiting the strength of class arbitration waivers in consumer contracts). See also, Michael B. Cooper, Class-Less? An Analysis of the California Supreme Court’s Denial of Employers’ Right to Use Class Arbitration Waivers in Employment Agreements in Gentry v. Superior Court, 2 PEPP. J. BUS. ENTREPRENEURSHIP & L., 459 (2009) (discussing cases wherein the California Supreme Court has limited the validity of arbitration in consumer contracts).

62. See generally McGreal, supra note 1 (outlining other sexual assault claims made by women against Halliburton/KBR). “If Jones’ case is remarkable, the fact that arbitration is involved is not. In the past [twenty] years it has become a dominant feature in the legal relationship between American corporations, their employees, and their customers.” Goodwyn, supra note 3.

63. See Franken, supra note 40. For example, Mary Beth Kineston, a former KBR employee in Iraq who also made allegations of sexual assault against KBR told The New York Times, “At least if you got in trouble on a convoy, you could radio the army and they would come and help you out. But when I complained to KBR, they didn’t do anything. I still have nightmares. They changed my life forever, and they got away with it.” McGreal, supra note 1. Linda Lindsey, another former KBR employee in Iraq reported that “male supervisors regularly offered promotions and other
For example, in outlining his support for the Franken Amendment, Senator Leahy estimated that “at least [thirty] million workers have unknowingly signed employment contracts and waived their constitutional rights to have their civil rights claims resolved by a jury.”64 In addition, Jones’s attorney, Todd Kerry, argued: “I’ve received upwards of [forty] calls to my office [about assault cases] in the last two years. A good number of them had been disposed of under arbitration.”65 Kerry further contended that if there had “been public scrutiny to prevent [assault] and these cases [were] taken to court, [the sexual assaults] might not have been repeated. Instead one of the men who raped Jamie was so confident that nothing would happen that he was lying in the bed next to her the morning after.”66 By forcing previous cases of assault into arbitration, according to Kerry, private defense firms created a climate “in which some workers came to believe they could get away with sexual assaults and other crimes.”67 Consequently, Congress may have felt it was necessary to take the decision to compel arbitration claims away from the courts by deciding the issue legislatively.

3. Narrow Targeting

Another argument made by proponents of the Franken Amendment was that arbitration may in fact have a proper place in the U.S. legal system, but that place does not include claims of sexual assault or violations of civil rights.68 These proponents raised concerns about the lack of transparency that exists in arbitration procedures.69 For example, they pointed to characteristics of arbitration such as no jury of peers and no establishment of precedent as examples of a lack of transparency.70 They argued that by

64. Parkinson, supra note 4.
65. McGreal, supra note 1.
66. Id.
67. Id.
68. See, e.g., Franken, supra note 40. Senator Franken argued, “For two companies haggling over the price of goods, arbitration is an efficient forum, and the arbitrator will undoubtedly have the appropriate expertise. The privacy that arbitration offers can protect their proprietary business information.” Id. “Arbitration does have its place in our system, but handling claims of sexual assault and egregious violations of civil rights is not its place.” Id. Senator Leahy argued before the Senate Judiciary Committee that arbitration was “meant to ‘provide sophisticated businesses an alternative venue to resolve their disputes’ but instead has ‘become a hammer for corporations to use against their employees.’” Parkinson, supra note 4.
69. See, e.g., Parkinson, supra note 4.
70. See Franken, supra note 40. Senator Leahy argued, “There is no rule of law in arbitration. There are no juries or independent judges in the arbitrations industry. There is no appellate review. There is no transparency. And [for] Jamie Leigh Jones there is no justice.” Parkinson, supra note 4.
determining cases under such conditions, the arbitration system could lead to individuals compromising their civil rights.\textsuperscript{71} Therefore, according to proponents of the Franken Amendment, the Amendment was created to “narrowly target the most egregious violations” in contracts where “women are the most vulnerable and least likely to have support resources.”\textsuperscript{72}

\subsection*{B. Arguments Against the Franken Amendment}

Those who challenged the passage of the Franken Amendment placed themselves in an unenviable position. By criticizing the Amendment, these opponents risked appearing as though they did not support policies that protect women and that they actually encouraged rape.\textsuperscript{73} Nonetheless, opponents of the Franken Amendment made several arguments against its enactment.

\subsubsection*{1. The Court Already Determined the Issue}

The opponent’s first argument was that the Franken Amendment was unnecessary because the courts had previously ruled on the issue; thus the law already protected defense contract employees from overbroad mandatory arbitration clauses in employment contracts.\textsuperscript{74} The Franken Amendment opponents argued that the Fifth Circuit had already ruled in Jones that torts arising out of sexual assault cases cannot be arbitrated.

\footnotesize{\textsuperscript{71} See Franken, supra note 40. Specific concerns about arbitration procedures in sexual assault and civil rights claims included the fact that arbitration is performed in private, behind closed doors; there is no jury of peers in arbitration; no precedent is established through arbitration; and arbitration does not “bring persistent, recurring and egregious problems to the attention of the public.” Id.

\textsuperscript{72} Franken, supra note 40. According to Senator Franken, the Amendment was meant to apply to “defense contracts, many of which are administered abroad, where women are the most vulnerable and least likely to have support resources.” Id. Senator Franken continued by arguing that the Amendment was to apply to “many contractors that have already demonstrated their incompetence in efficiently carrying out defense contracts, and have further demonstrated their unwillingness and their inability to protect women from sexual assault.” Id.

\textsuperscript{73} See Parker, supra note 38. For an example of criticisms of the legislators who voted against the Franken Amendment, see The Daily Show with Jon Stewart (Comedy Central broadcast Oct. 14, 2009), available at http://www.thedailyshow.com/watch/wed-october-14-2009/rape-nuts. Perhaps the most difficult criticism of the legislators who opposed the Franken Amendment in the Senate was that all thirty senators were white, Republican males. See, e.g., Parker, supra note 38.

\textsuperscript{74} See Rosen, supra note 43. Rosen’s concern was that “[f]ederal law already precludes arbitration for such serious crimes, and the amendment would sweep in all manner of ordinary employment disputes.” Id.}
because they are not related to a worker’s employment and accordingly they fall outside of the scope of mandatory arbitration agreements. Consequently, according to some, "the very relief that Franken’s amendment [sought] to provide already exist[ed] under federal law: Employees cannot be required to arbitrate civil actions stemming from criminal conduct."76

2. Financial Costs

An alternative problem opponents of the Franken Amendment raised was the financial cost of the Amendment.77 According to these opponents, more employment tort cases would be litigated in the courts rather than resolved through arbitration.78 As such, there were two reasons that the Amendment would prove to be financially costly: (1) litigation in the courtroom is more expensive than arbitration outside of the courtroom;79 and (2) because juries tend to be more sympathetic to plaintiff employees than are arbiters, juries are more likely to award large sums in damages to plaintiff employees, even in cases that are arguably frivolous.80 The problem with higher damage awards is that these costs to the private defense contractors would get passed along to the Defense Department.81 These additional costs to the Defense Department would in turn be transferred to the taxpayers.82 Franken Amendment opponents argued, “if labor costs increase across the board for all contractors, bids will be higher and taxpayers will shell out more for the same goods and services.”83 Other opponents pointed not only to the heightened cost to taxpayers that could result from the Franken Amendment, but also to the heightened cost to plaintiff employees wishing to bring an action against their employers as well.84 This concern would be particularly true if the courts interpret the Franken Amendment to mean that even if employees want to arbitrate their sexual assault claims they are precluded from doing so. Mark

75. See id.
76. Id. Rosen included torts such as battery, false imprisonment, and intentional infliction of emotional distress in his list of torts arising out of sexual assault that could not be arbitrated. See id. Rosen also acknowledged that while the Fifth Circuit is the only Circuit to have addressed this issue recently, the Fifth Circuit is “considered the most conservative of the courts of appeals.” Id.
77. See, e.g., id.
78. Id.
79. Id. This is due to the extra expenses that result from the cost of judges, juries, and "lengthy proceedings." Id.
80. Id.
81. Id.
82. Id.
83. Id.
84. See generally Parkinson, supra note 4.
de Bernardo, the executive director of the Council for Employment Law Equity defended the use of arbitration clauses before the Senate Judiciary Committee during its investigation of arbitration clauses as “decisively in the employees’ best interests” because it offers a less expensive alternative to pricey jury trials. He also stated before the Senate Committee that “[Alternative Dispute Resolution] is an effective tool for both management and employees . . . . The opponents of arbitration have simply not demonstrated that the drastic, sweeping changes they seek to enact are necessary [or] appropriate. To the contrary, for the average employee, the elimination of arbitration will do more harm than good.”

3. Other Arguments

Some opponents of the Franken Amendment dismissed it based on what they perceived as the impractical logistics of implementing it. Someone in the Defense Department will have to parse through the employment contracts of every single one of the Defense Department’s contractors and subcontractors at all tiers to ensure that they are in compliance with the Franken Amendment. This situation may have been what the Defense Department had in mind when it argued that the enforcement of the Franken Amendment would be problematic.

Finally, other opponents of the Franken Amendment attacked the Amendment not based on the merits of the Amendment, but based on what they charged were Senator Franken’s ulterior motives for creating the Amendment. These opponents alleged that Senator Franken and those who supported the Amendment did so strictly to reward members of the legal profession who want to abolish arbitration clauses for supporting their campaigns. However, this criticism is only brought up in the interest of

85. *Id.*
86. *Id.*
87. *Id.* Senator Franken and de Bernardo clashed frequently throughout the Senate Judiciary Committee meeting. *Id.* Franken is reported as stating, “[Jones] has not had her day in court, she has litigated for four years to have her day in court. She was drugged, she was raped, and she had to have reconstructive surgery. If that’s a better workplace, what was the workplace like before?” *Id.*
88. See generally Rosen, supra note 43.
89. See *id.*
90. See *id.*
91. See, e.g., *id.*
92. See *id.* Between 2005 and 2009, Senator Franken received over $1.2 million in campaign contributions from the members of the legal industry. *Id.* That total is more contribution than from
highlighting all the reservations of those against the Amendment, and will not be analyzed because of its political, rather than legal, nature.

IV. IMPACT

A. No Employees May Have Mandatory Arbitration Agreements in Their Contracts

The immediate impact of the Franken Amendment will be most strongly felt by private defense contractors who want to contract with the Department of Defense. This is because the reach of the Amendment is especially broad. The Amendment applies “with respect to all of a federal defense prime contractor’s employees and contract workers.” It is not limited to “employees or independent contractors assigned to a covered Department of Defense contract.” In other words, even employees of private defense contractors who do not work on any projects for the Defense Department must not have a mandatory arbitration clause in their contract if the defense contractor wants to obtain a contract with the Defense Department.

B. Any Claim Under Title VII

Another major impact that the Franken Amendment will have on Department of Defense contracts stems from the Amendment’s significant scope. In the original version passed by the Senate, the Amendment specifically stated that its purpose was “intended to prevent government contractors from requiring the victims of alleged sexual assault [to] submit their claims to mandatory arbitration.” However, the final version of the Amendment expanded the scope of coverage. The enacted Franken Amendment includes “a broad reference to ‘any claim’ that arises under Title VII.” Accordingly, the language of the Amendment appears to cover any other industry group. In addition, Senator Mary Landrieu (D- Louisiana), who co-sponsored the Amendment in the Senate with Senator Franken, raised over four million dollars from lawyers. This was “four times more money than she raised from any other industry.” See Ronda Brown Esaw & Melissa L. Taylormoore, New Mandatory Arbitration Restrictions for Federal Contractors Signal Things to Come, MARTINDALE.COM, Jan. 8, 2010, http://www.martindale.com/government-contracts-law/article_McGuireWoods-LLP_887518.htm.

93. See id.
94. Id.
95. “However, for covered defense subcontractors, limits on mandatory arbitration only apply to individuals performing work on a covered subcontract.” Id.
96. See id.
97. See, e.g., id.
98. Id. See also supra note 43 and accompanying text.
99. Esaw, supra note 93. See also supra note 50 and accompanying text.
all claims that arise under Title VII, not only claims that arise based on charges of sexual assault as the language of the original amendment described.\textsuperscript{100}

C. A Harbinger of Future Legislation

Moreover, even though the short, strict language in the Senate version of the Franken Amendment was tempered by the two provisions included in its final version,\textsuperscript{101} the Franken Amendment is still significant for the shift in labor policy that it represents.\textsuperscript{102} The Franken Amendment has been called the harbinger of future legislation in the mandatory arbitration clause area.\textsuperscript{103} Some commentators have predicted that though the Franken Amendment is currently limited to federal defense contractors, “other federal contractors should be wary that legislation and amendments like the Franken Amendment will be added to more general appropriations bills in the future, imposing similar mandatory arbitration restrictions on all federal contractors and subcontractors.”\textsuperscript{104}

The best example of legislation for which the Franken Amendment may be a harbinger is the Arbitration Fairness Act of 2009.\textsuperscript{105} The Arbitration Fairness Act of 2009 is currently before Congress,\textsuperscript{106} and it would hold invalid or unenforceable any pre-dispute arbitration agreement in contracts in any employment, consumer, franchise, or civil rights dispute.\textsuperscript{107} The Act contends that the original Federal Arbitration Act (FAA)\textsuperscript{108} “was intended to apply to disputes between commercial entities of similar sophistication and

\begin{footnotes}
\item[100] See Esaw, supra note 93. Furthermore, Esaw also cautioned other federal contractors to be wary that similar legislation could target their industries as well. \textit{Id.}; see infra note 104 and accompanying text.
\item[101] See supra note 47 and accompanying text.
\item[102] See Esaw, supra note 93.
\item[103] See \textit{id}.
\item[104] \textit{Id}.
\item[105] See \textit{id}.
\item[106] There is a House and a Senate version of the bill. For the House version, see H.R. 1020, 111th Cong. (2009). For the Senate version, see S. 931, 111th Cong. (2009).
\item[107] See H.R. 1020, 111th Cong. (2009); S. 931, 111th Cong. (2009). The actual text of the proposed act reads, “Notwithstanding any other provision of this title, no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, franchise, or civil rights dispute.” \textit{Id.} “The Arbitration Fairness Act has not moved out of committee. However, given the passage of the Franken Amendment, some form of the Arbitration Fairness Act may proceed in the upcoming year.” Esaw, supra note 91.
\end{footnotes}
power,” but decisions of the Court have changed the FAA’s meaning so that “it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes.”109 Supporters of the Arbitration Fairness Act hope to restore to consumers and employees their choice in disputes about whether to take their case to court.110 Notably, Jones has been a major supporter of the Act, and she has testified on Capitol Hill to bring about its passage.111

In April 2009, Senator Russ Feingold (D-Wisconsin) introduced a modified version of the Arbitration Fairness Act in the Senate to quell criticisms that the proposed act was “overbroad and potentially detrimental to commercial arbitration.”112 The amended version makes clear that the Act will “only apply to protected classes of arbitrations and not to commercial arbitration,” but it “fails to address concerns about its impact on international arbitration and its retroactive applicability.”113 Consequently, if the Arbitration Fairness Act of 2009 is enacted into law, not only would employment contracts be affected as they were in the Franken Amendment, but consumer, commercial, and international contracts could be profoundly impacted as well.114

D. The Courts

The Franken Amendment and Jones should not be interpreted to mean that the courts will invalidate all mandatory arbitration clauses from now on. In three recent cases specifically citing Jones’s experience in Iraq, courts have upheld and enforced mandatory arbitration clauses in employee contracts. First, in Coffey v. Kellogg Brown & Root, an employee of KBR brought suit against KBR for claims stemming from injuries he received in Iraq when another employee crushed his finger with a wrecker’s boom.115 The plaintiff employee explicitly referenced Jones to make his case that “the claims raised in his complaint [were] not within the scope of the arbitration

110. See Goodwyn, supra note 3.
113. Id. Even though the Act in the Senate has been altered, the House version remains unchanged. Id.
114. Id.
provision outlined in his [e]mployment [a]greement.” 116 Without ruling on the “correctness of the outcome in Jones,” 117 the court determined that Jones was “clearly distinguishable from [the] [p]laintiff’s allegations” in this case. 118 The court reasoned that unlike Jones, who was in her barracks when her assault took place, the plaintiff in Coffey was “working on a military base in Iraq recovering vehicles,” performing functions that he and his co-worker were hired to do. 119 The court stated, “[i]t is hard to imagine an injury any more closely related to Plaintiff’s workplace than this,” 120 and accordingly granted KBR’s motion to dismiss and compel arbitration. 121

The two other recent cases involve commercial arbitration, so it is less surprising that the courts upheld the arbitration clause because courts and legislators tend to view commercial arbitration clauses more favorably than employment and civil rights arbitration clauses. 122 Nonetheless, the courts cited Jones, and thus the courts’ reasoning is instructive. The Fifth Circuit Court of Appeals, inapposite to their decision in Jones, affirmed a district court’s decision to compel arbitration in Bell v. Koch Foods of Mississippi, LLC. 123 Quoting language directly from Jones, the court noted that in determining if a party must be compelled to arbitrate, the court needed to consider: “(1) whether there is a ‘valid agreement to arbitrate the claims and

116. Id. at *13. Paragraph 26 of the plaintiff employee’s employment agreement reads:

Employee also agrees that they will be bound by and accept as a condition of employment the terms of the KBR Dispute Resolution Program which are herein incorporated by reference. Employee understands that the dispute resolution program requires, as its last step, that any and all claims that employee might have against the company . . . for personal injuries arising in the workplace, be submitted to binding arbitration instead of the court system.

Id. at *3.

117. Id. at *14.

118. Id.

119. Id.

120. Id. The court also reasoned, “This, clearly, is not a situation of an injury that occurred outside of normal working hours, not at the place of employment (although in a living space provided by the employer), and perpetrated by tortfeasors most certainly not performing their job functions.” Id.

121. Id. at *15. The court additionally found that the employee plaintiff’s “claims that his harm was ‘not within the job description’ or that the incident was ‘patently outside the norm for any wrecker’ [were] wholly unavailing.” Id. at *14.

122. See Franken, supra note 40. See also supra note 68 and accompanying text.

whether] the dispute in question fall[s] within the scope of that arbitration agreement.”124 In Bell, twenty-two poultry growers brought suit in district court against Koch Foods for breach of contract and state law violations.125 Koch Foods “filed a motion to compel arbitration, pursuant to the arbitration clause[s] that [were] contained in each of the agreements.”126 The court denied both of the plaintiffs’ arguments regarding why the arbitration agreements were invalid127 and compelled arbitration between the two parties.128

Most recently, in Lake Texoma Highport, LLC v. Certain Underwriters at Lloyd’s of London,129 the District Court for the Eastern District of Texas stated, “In Jones, the Fifth Circuit noted that ‘courts distinguish narrow arbitration clauses that only require arbitration of disputes’ arising out of’ the contract from broad arbitration clauses governing disputes that ‘relate to’ or ‘are connected with’ the contract.”129 The court then used this language to reject the plaintiff’s claims that the arbitration agreement it signed with the insurance company was invalid.130 The court held that the arbitration clause was broad enough to be valid because the agreement stated that any dispute “of any kind . . . arising out of or in any way related to this

124. Id. at *501.
125. See id. at *500.
126. Id. at *501. The arbitration clause was the same in each of the agreements. It stated:

‘All disputes or controversies arising under this agreement, including termination thereof, shall be determined by a three member arbitration panel,’ in accordance with the rules and procedures of the American Arbitration Association. The findings of the panel are binding on the parties. The agreements provide that each party shall pay the costs associated with one of the three arbitrators and that the parties shall share equally the costs associated with the third arbitrator. Also, '[i]n the event of a final adjudication by the panel, all fees, costs, and expenses incurred by the successful party as a result of the dispute, including attorney’s fees and arbitrator fees, shall be born [sic] by the unsuccessful party.’ The clause also stipulates ‘that the business of raising, processing, and producing poultry products is extensively involved in interstate commerce,’ ‘that the Federal Arbitration Act is applicable to this agreement,’ and that the arbitration clause provides a complete defense to any proceeding before a court or administrative tribunal.

127. The poultry growers initially charged that the arbitration agreements were not properly authenticated and consequently were “not evidence of a valid agreement to arbitrate between the parties.” Id. Alternatively, the poultry growers argued “that if the arbitration agreements were properly authenticated, the agreements [were] not valid because they were fraudulently procured.”

128. Id. at *505.
130. Id. at *7-8.

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agreement” was subject to arbitration, and in this case the dispute arose directly out of the agreement. Therefore, the three cases indicate that despite legislative enactments otherwise, there are still cases in which mandatory arbitration clauses in employment contracts will pass judicial scrutiny.

V. CONCLUSION

The assault and subsequent alleged mistreatment that Jamie Leigh Jones suffered in Iraq changed the way legislators and courts in the United States view mandatory arbitration clauses in employment contracts. Her distressing experience directly influenced the enactment of the Franken Amendment and its attendant restrictions on defense a contractor’s use of arbitration to settle employee claims. This Amendment could induce the enactment of other legislation, such as the Arbitration Fairness Act of 2009, which would further reduce the validity of arbitration clauses in franchise, consumer, civil rights, and other types of contracts. Consequently, one woman’s tragic experience has brought new fuel to America’s debate about the benefits and detriments of the arbitration culture in the U.S. legal system.

131. Id. at *7.
132. See supra notes 37-50 and accompanying text.
133. See supra notes 105-14 and accompanying text.
Waiving Rights Goodbye: 
Class Action Waivers 
in Arbitration Agreements After 
_Stolt-Nielsen v. AnimalFeeds International_

Diana M. Link & Richard A. Bales

I. INTRODUCTION

The popularity of arbitration as a means of alternative dispute resolution has dramatically increased since the enactment of the Federal Arbitration Act (FAA) in 1925. The Act represents a strong congressional policy in favor of arbitration. In arbitration, parties contractually agree to submit disputes to an arbitrator rather than pursuing them in court. Arbitration is considered preferable in many situations because it is quicker, less expensive, simpler, and less formal than the traditional judicial process. Despite all of these benefits, courts have experienced problems with some specialized or uncommon issues that are not addressed by the FAA or prior arbitration jurisprudence.

In particular, courts have been inconsistent in their interpretation of arbitration agreements that prohibit parties from bringing class actions in arbitration or in court. Class action waivers in arbitration agreements come in a variety of forms. Many arbitration agreements prohibit any litigation in court at all, which some courts have construed to necessarily preclude class

4. See generally Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006); Johnson v. West Suburban Bank, 225 F.3d 366 (3rd Cir. 2000); Gentry v. Superior Court, 165 P.3d 556 (Cal. 2007); Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).
action certification in court.\textsuperscript{5} Other arbitration agreements expressly prohibit class arbitration in addition to prohibiting any claims in court.\textsuperscript{5} The inconsistencies among the language of class action waivers themselves may be part of the reason courts have ruled inconsistently on their validity. While some courts have held that section 2 of the FAA allows such agreements to be disregarded under basic contract principles,\textsuperscript{7} other courts have found that class mechanisms are merely procedural and can be waived in a valid arbitration agreement.\textsuperscript{8} An April 2010 United States Supreme Court case, \textit{Stolt-Nielsen v. AnimalFeeds International Corp.}, held that a party to an arbitration agreement cannot be compelled to submit to class arbitration unless there is some contractual basis demonstrating an intention to do so.\textsuperscript{9}

Rather than resolving the class arbitration issue, \textit{Stolt} obfuscates it even further. A main reason for the discrepancy among the courts may be the fact that the FAA is silent on the issue of class actions in arbitration.\textsuperscript{10} As a result of this inconsistency, some parties with potentially valid claims have been effectively foreclosed from bringing an action because of the costs and risks associated with proceeding with an individual claim in a situation where a class action would arguably be more appropriate.\textsuperscript{11}

This article first argues that to determine the enforceability of a class action waiver, courts should take a “totality of the circumstances” approach rather than adopting a bright-line rule. A set of defined factors that also allows courts to consider real-world issues facing litigants will provide a substantial framework for courts to interpret this area of the law and will lead to more consistent and well-reasoned outcomes in the future. These factors include: the probable size of each class member’s individual recovery, the potential for retaliation against class members, the awareness of potential class members that their rights have been violated, and other factors such as cost and convenience.\textsuperscript{12} Second, this article argues that the

\textsuperscript{5} Johnson, 225 F.3d at 369-71.
\textsuperscript{6} Discover Bank, 113 P.3d at 1103.
\textsuperscript{7} Id. at 1100; Kristian, 446 F.3d at 25; Gentry, 165 P.3d at 556.
\textsuperscript{8} Johnson, 225 F.3d at 366.
\textsuperscript{10} Discover Bank, 113 P.3d at 1110. See Federal Arbitration Act, 9 U.S.C. § 9 (2006). This section of the FAA concerns arbitral procedure, but does not contain a provision regarding class actions. It seems logical that if class actions were included in the Act, it would be in section 9.
\textsuperscript{11} Johnson, 225 F.3d at 374-75 (in which the court acknowledges that class action is more attractive to plaintiff, but denies relief by relying on the FAA’s strong presumption in favor of enforcing arbitration agreements).
\textsuperscript{12} See Gentry, 165 P.3d at 556.
FAA should be amended to include a provision that directly addresses the
issues that arise surrounding class action arbitration and class action waivers.

Part II of this article provides a general background in the jurisprudence
of arbitration. The basic issues presented by the cases are (1) the
enforceability of class action waivers, and (2) whether or not statutory rights
are adequately vindicated in the absence of a class mechanism. After
gaining an understanding of the judicial history of these two questions
separately, Part II then explores the varying decisions courts have reached
on class action issues in arbitration, including the recent Stolt decision.
Some courts have found class certification inappropriate, reasoning that
procession as a class is merely a procedural right that can be validly
waived. Other courts have held the opposite, arguing that although class
mechanisms are technically procedural, they have many substantive
implications and should be allowed in certain circumstances.

Part III of this article argues that to synthesize these varying opinions
and find a way to move forward in a more consistent way, courts should
apply a set of several factors to determine whether to enforce a class action
waiver. This method will allow courts to reach a well-reasoned result that is
still within the limits of previous courts’ decisions and the directives of the
FAA.

Part IV of this article proposes an amendment to the FAA that will
resolve the issues that surround class action arbitration and provide courts
with a statutory basis for future decisions. Before this, however, it is
important to understand the way courts determine the enforceability of
arbitration agreements and, more specifically, the arbitrability of statutory
claims.

II. BACKGROUND

A. Common-Law Interpretation of FAA Section 2

The FAA was enacted in 1925. As a holdover from the English
common law courts that disfavored arbitration agreements, American courts
had also disfavored arbitration agreements before the enactment of the

13. See, e.g., Johnson, 225 F.3d at 366.
14. See, e.g., Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006); Discover Bank, 113 P.3d
   at 1100.
15. See Gentry, 165 P.3d at 556.
With the enactment of the FAA, and particularly section 2 of the Act, came a congressionally mandated policy in favor of enforcing arbitration agreements. However, like any contract, not all agreements to arbitrate pass muster under state contract law principles. The text of section 2 of the Act states: “An agreement in writing to submit to arbitration . . . shall be valid, irrevocable, and enforceable, [as a matter of federal law] save upon such grounds as exist at law or in equity for the revocation of any contract.”

The Supreme Court’s opinion in Perry v. Thomas succinctly defines when courts should and should not enforce agreements to arbitrate. Perry interprets section 2 of the Act to mean two things. First, any state law, judge-made or statutory, that concerns the “validity, revocability and enforceability of contracts generally” may be used to invalidate an arbitration agreement. Second, any state law that is specifically aimed at arbitration agreements (as opposed to all contracts generally) may not be used to abrogate or invalidate an arbitration agreement that would otherwise be valid. The first holding of Perry requires that arbitration agreements be interpreted the same as all other contracts, and permits them to be voidable under such state-law principles as unconscionability, duress, fraud, and coercion. The second holding is based on the constitutional principle of preemption, which requires that the federally enacted FAA preempts any state law that may conflict with it.

At the time the FAA was enacted, class action litigation was not a common method for resolving disputes, and presumably for that reason, the FAA contains no provision expressly regarding class action in an arbitration context.

B. Arbitrability of Statutory Claims Generally

Each of the cases presented in this article are based on a statutory claim arising under an arbitration agreement. In each case, the litigants argue that these statutory claims cannot be properly resolved absent a class mechanism.

21. Id. at 492 & n.3.
22. Id.
24. Perry, 482 U.S. at 484.

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Therefore, the cases generally pose a twofold inquiry: (1) Is the class action waiver contained in the agreement valid and enforceable?; and (2) Will statutory rights be vindicated as completely on an individual basis as in a class action? To fully understand the holdings of the cases in this article, a background in the arbitrability of statutory claims in general is necessary.

Before arbitration became as widespread as it is today, there was some question as to whether the FAA applied only to non-statutory contract claims. The Supreme Court has held on several occasions that the FAA does not prevent parties from arbitrating statutory claims. Gilmer v. Interstate/Johnson Lane Corporation provides a summary of the state of the law on this subject.

Gilmer, a 1991 United States Supreme Court case, determined that claims under the Age Discrimination in Employment Act (ADEA) are arbitrable. Interstate Johnson/Lane Corporation hired Robert Gilmer as a Manager of Financial Services in 1981. Upon being hired, Gilmer registered with the New York Stock Exchange (NYSE) as a securities representative. His registration with the NYSE contained a clause that provided for arbitration of “any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative.” Johnson/Lane Corporation subsequently fired Gilmer in 1987 at the age of sixty-two.

In response, Gilmer filed an age discrimination claim with the Equal Employment Opportunity Commission (EEOC) and thereafter brought suit in United States District Court alleging age discrimination in violation of the ADEA, and seeking to avoid the arbitration agreement for several reasons.

28. Id. at 23.
29. Id.
30. Id.
31. Id.
32. Id.
33. Id. at 27, 30-33 (finding arbitration inconsistent with the statutory framework of the ADEA; the ADEA is meant to further important social policies; discovery is inadequate in arbitration; arbitration panels will be biased; lack of public knowledge because arbitrators do not issue written opinions; judicial review is too limited; arbitration does not allow broad equitable relief and class actions; and unequal bargaining power exists between employers and employees).
Gilmer made two main arguments. First, he argued that arbitration is inconsistent with the statutory framework of the ADEA. Second, he argued that the ADEA was enacted to further important social policies, which would not be served if claims were arbitrated rather than heard in court.

Before this case came to the Supreme Court, United States Courts of Appeals were split in their opinions of Gilmer's first claim regarding the legislative intent and history of the ADEA. Gilmer argued that the ADEA protects claimants from waiving a judicial forum in favor of arbitration. In consideration of Gilmer's first argument, the Court noted the long history of judicial distaste for arbitration agreements dating back to English common law and carrying over into the United States. The Court emphasized that the FAA was enacted to combat this judicial distaste and to "place arbitration agreements upon the same footing as other contracts." After summarizing the history of its opinions on the particular issue of the arbitrability of statutory claims, the Court found no compelling reason why statutory rights could not be vindicated in an arbitral forum just as well as in a court.

Based on a prior holding on the issue, the Court determined that no substantive rights are lost when a statutory claim is arbitrated rather than heard in a court, and that if Congress intended for certain or all statutory claims not to be arbitrated that intent would be evident in the text and legislative history of the particular statute or the FAA. In applying this rule, the Court placed the burden of proof on Gilmer to establish that legislative intent or history precluded a waiver of a judicial forum for ADEA claims. The Court concluded that Gilmer did not meet this burden, and that therefore his ADEA claim was properly arbitrated.

Gilmer's second argument was that the ADEA was enacted to "further important social policies." Gilmer argued that if his ADEA claim had been heard in an arbitral forum rather than in court, the decision would not have

34. Id. at 23.
35. Id.
36. Id. at 24.
37. See generally id. at 33.
38. Id. at 24.
39. Id.
40. Id. at 26.
41. Id. (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).
42. Id.
43. Id. at 27.
44. Id.
its intended social policy impact in reaching others who were discriminated against and setting future precedent for cases like his.\textsuperscript{45} However, the Court found that the distinction between a statute's social purposes and adjudicating private grievances was irrelevant for purposes of determining whether or not to enforce an agreement to arbitrate because no inconsistency existed between the two purposes.\textsuperscript{46} The Court reasoned that agreements to arbitrate should be upheld whenever they are validly entered into and as long as arbitration allows rights to be fully vindicated.\textsuperscript{47} In so holding, the Court determined that “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”\textsuperscript{48} The Court ultimately determined that the public policy purposes of a statute should be considered subordinate to individual vindication of rights so long as the two do not conflict.\textsuperscript{49}

\textit{Gilmer} is often cited in cases interpreting agreements to arbitrate statutory claims. There are two main holdings of \textit{Gilmer} for purposes of later interpretation by courts. First, when a right conferred upon citizens by a statute is capable of being vindicated by arbitration, there is no public policy to support a refusal by the court to uphold an arbitration agreement.\textsuperscript{50} Second, even though a statute may have social policy implications which might be more appropriately heard in court, a valid agreement to arbitrate will be upheld as long as litigants’ individual rights will be fully vindicated in the arbitral forum regardless of any social policy purposes that may not be as well-served.\textsuperscript{51}

\textbf{C. The Pre-\textit{Stolt} Split}

In determining the enforceability of class action waivers, courts have been inconsistent in their holdings as well as their reasoning. Some courts have taken the stance that class mechanisms are purely procedural and have

\textsuperscript{45} Id. at 27-28.  
\textsuperscript{46} Id. at 27.  
\textsuperscript{47} Id. at 28 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)).  
\textsuperscript{48} Id.  
\textsuperscript{49} Id.  
\textsuperscript{50} Id. at 26.  
\textsuperscript{51} Id. at 28.
no bearing on the full vindication of litigants’ rights. This group reasons that the right to proceed as a class can be waived in a valid agreement to arbitrate. Other courts have held that class mechanisms have significant substantive implications and that litigants’ right to bring an action may be completely foreclosed absent a class mechanism. The main difference between the two groups is the courts’ interpretations of the role class mechanisms play in the vindication of rights.

1. Denial of Class Certification

The Third Circuit Court of Appeals denied class certification in the 2000 case Johnson v. West Suburban Bank. In Johnson, the court determined under the principles announced in Gilmer that a claim arising from the Truth in Lending Act (TILA) was arbitrable and that the arbitration agreement at issue necessarily precluded the right to proceed as a class. Terry Johnson procured a short-term loan from the County Bank of Rehoboth Beach. The loan was for $250, but included a finance charge of $88, which constituted an annual percentage rate of 917% and was undisclosed by the bank in an alleged violation of the TILA. Johnson sought to bring a class action suit in court against County Bank of Rehoboth Beach and other defendants who were engaging in similar practices. The defendants responded that the claim was required to be arbitrated under the agreement Johnson signed when he procured the loan. The agreement provided in pertinent part: “NOTICE: YOU AND WE WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE DISPUTES THROUGH A COURT BUT HAVE AGREED INSTEAD TO RESOLVE DISPUTES THROUGH BINDING ARBITRATION.”

The main issue before the court was whether Johnson’s statutory claims could be arbitrated when he was seeking to bring a class action in court on behalf of multiple claimants. Johnson’s main arguments echoed those

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52. See Johnson v. West Suburban Bank, 225 F.3d 366, 378 (3rd Cir. 2000).
53. Id.
54. See Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006); Gentry v. Superior Court, 165 P.3d 556 (Cal. 2007); Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).
55. Johnson, 225 F.3d at 366.
56. Id. at 369.
57. Id.
58. Id.
59. Id. at 370.
60. Id.
61. Id.
62. Id. at 368-69.
made by Gilmer. His first argument was that the statutory framework of the TILA inherently conflicted with arbitration, and therefore his statutory rights under the TILA could not be vindicated in an arbitral forum.

Second, Johnson argued that the TILA’s public policy goals precluded enforcement of the arbitration agreement.

Johnson’s first argument rested on a portion of the TILA that specifically mentions class actions as a method of enforcement. Based on this provision, Johnson argued that an inherent conflict existed between the arbitration agreement, which prohibited any type of litigation in court, and the TILA, which specifically mentioned class action litigation. In considering his argument, the court first recognized that Johnson’s claim was one of first impression in federal courts. The court then noted that the arbitration agreement itself did not explicitly deny class actions, either in arbitration or in court. However, relying on the strong preference for arbitration expressed in Gilmer, the court determined that even though the arbitration agreement made no mention of class actions, it necessarily prohibited them because it required all claims to be submitted to arbitration.

In Gilmer, the Supreme Court held that statutory claims are generally arbitrable unless it appears from an analysis of the text and legislative history or an inherent conflict between arbitration and the statute’s purposes that Congress intended particular statutory claims not to be arbitrable. Therefore, the court in Johnson concluded that if Johnson were to prevail in his attempt to avoid the arbitration agreement, it would have to be based upon a finding that there was an inherent conflict between the purposes of the TILA and the arbitration of claims under the Act.

To determine if there was an inherent conflict, the court analyzed the statutory language and legislative intent, noting that the TILA specifically

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64. Johnson, 225 F.3d at 368.
65. Id. at 369.
66. Id. at 371 (stating that “the statute specifically addresses the damages available in a class action, limiting the maximum potential recovery”).
67. Id. at 368.
68. Id.
69. Id.
70. Id. at 370-71.
71. Id. (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)).
72. Id. at 371.
mentions class actions in at least one place. However, the court narrowly interpreted the statutory language to find that even though the statute referentially mentioned class actions, it did not explicitly state that TILA claimants had any particular right to proceed on a class basis. To demonstrate legislative intent, Johnson produced a Senate committee report on the TILA that expressed concerns that recovery caps might be set too low for class actions, thus frustrating the enforcement of the statute. Johnson argued that this report proved the “centrality of class actions to the TILA’s effective enforcement.” The court disagreed, finding no legislative intent to exempt class action TILA claims from the force of the FAA. Although the court noted that the Senate report did promote class actions as a TILA enforcement mechanism, the report fell “short of demonstrating irreconcilable conflict between arbitration and the TILA.” The court determined that although Congress may have intended for class actions to be a method of enforcement of the TILA, equal weight should also be given to Congress’s intent in enacting the FAA that all valid arbitration agreements be enforced in their terms. The court then extended its interpretation to find that the class action mechanism is merely a procedural right and not one that is related to the vindication of claims arising under the TILA.

Next, the court considered Johnson’s second claim that the public policy goals of the TILA required the availability of class action litigation. Johnson argued that because there are frequently minimal actual damages suffered by consumers in schemes like defendants’, the goal of the TILA is not exclusively to reimburse individual consumers, but to discourage unfair credit practices in general. Johnson further argued that the TILA as a whole was enacted for public policy purposes rather than to address private grievances. Johnson’s arguments, while forceful, were ultimately unable to persuade the court that class actions were necessary to the remedial and deterrent goals of the TILA. The court relied exclusively on Gilmer to

73. Id. (stating that “the statute specifically addresses the damages available in a class action, limiting the maximum potential recovery”).
74. Id.
75. Id. at 372-73.
76. Id. at 373.
77. Id.
78. Id.
79. Id. at 376.
80. Id.
81. Id. at 369.
82. Id. at 373.
83. Id.
84. Id.
determine that all of Johnson’s claims about the public policy of the statute were foreclosed. The court provided further support for its decision by citing to a TILA provision that allowed for administrative enforcement of TILA violations by the Federal Trade Commission.

In a short footnote based on the case Champ v. Siegel Trading Co., the Johnson court determined that class actions could not be pursued in arbitral forums unless the arbitration agreement contemplated it. The court came to this conclusion despite acknowledging that the Third Circuit had never addressed whether class arbitration could be pursued in a situation like Johnson’s.

This case presents an overwhelmingly strong preference for arbitration and a very narrow interpretation of both the statute and arbitration clause at issue. This case relies heavily on prior decisions without engaging in much original analysis. Although the issues remain largely the same throughout the circuit split, the next set of cases demonstrates the ways other courts have decided them.

2. Allowance of Class Action

The California Supreme Court and the First Circuit Court of Appeals have taken a different approach than the Johnson court when considering class action waivers in arbitration agreements. These courts have invalidated class action waivers by relying on state contract principles and the important substantive implications of class mechanisms to the full vindication of statutory rights.

a. Allowance of Class Arbitration Founded Upon State Contract Principles

The California Supreme Court decided Discover Bank v. Superior Court in 2005. In Discover Bank, the court invalidated a class action waiver
contained in an arbitration agreement based upon state contract principles. 92 The case involved a claim under the Delaware Consumer Fraud Act and a challenge to the validity of an arbitration agreement between Discover and its cardholders that purported to completely bar any arbitration as a class. 93 The arbitration agreement said: “NEITHER YOU NOR WE SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS, OR ARBITRATE ANY CLAIM AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY.”94 The plaintiff cardholders alleged that Discover was engaging in a deceptive practice with regard to the imposition of late fees upon all cardholders.95 Each cardholder suffered a minimal amount of damage as a result of this practice, but Discover profited greatly in the aggregate.96 For this reason, the plaintiffs sought to pursue classwide arbitration despite the arbitration agreement that expressly forbade class arbitration.97

The court agreed with the plaintiffs that the class action waiver was invalid, and provided three reasons for this ruling.98 First, the court found that the class action waiver was both procedurally and substantively unconscionable.99 Second, the court cited to a California statute that prohibits any party to a contract from immunizing itself from liability.100 Third, the court distinguished its holding from those of Johnson and Gilmer by noting the serious substantive implications of class mechanisms.101

First, in its determination that the class action waiver was unconscionable, the court looked to the then-recent California Court of Appeals decision in Szetela v. Discover Bank.102 The facts in Szetela were essentially identical to the facts of Discover Bank.103 The Szetela court held a class action waiver unenforceable on grounds of procedural and substantive unconscionability.104 Procedural unconscionability existed

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92. Id. at 1103.
93. Id. at 1103-04.
94. Id. at 1103.
95. Id.
96. Id.
97. Id.
98. Id. at 1104.
99. Id. at 1107.
100. Id. at 1108.
101. Id. at 1113-14.
103. Discover Bank, 113 P.3d at 1104.
104. Id. at 1107 (citing Szetela, 118 Cal. Rptr. 2d at 867).
because the class waiver was contained in a contract of adhesion. 105 Substantive unconscionability existed because the class action waiver was one-sided and oppressive to the consumer. 106 The court noted that in both cases, Discover’s class arbitration waiver provision was not the two-sided agreement that it purported to be; it would be difficult to imagine a scenario when credit card companies proceeded together as a class to sue their cardholders. 107 For this reason, it was apparent that by including the class arbitration waiver, Discover intended to effectively immunize itself from liability for any number of offenses it might commit against its cardholders. 108 The court reasoned that by imposing the class action waiver on its customers, Discover had essentially “granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies, and that any remedies obtained will only pertain to that single customer without collateral estoppel effect.” 109

Second, the Discover Bank court relied on California Civil Code section 1668 to invalidate the class arbitration waiver. 110 Section 1668 provides that “[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.” 111 The court found invalidation to be acceptable under the FAA section 2, which disavows any arbitration agreements that violate principles of state contract law. 112 Even though the FAA requires the arbitration agreements’ terms to be enforced, enforcement is limited by basic contract principles that would invalidate any contract. 113 Under the principles of Perry, if California Civil Code section 1668 pertained solely to arbitration agreements, the FAA would preempt it. 114 But because it applies to all contracts, arbitration agreements or otherwise, section 1668 constitutes a general state contract law for purposes

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105. Id. (citing Szetela, 118 Cal. Rptr. 2d at 867).
106. Id. (citing Szetela, 118 Cal. Rptr. 2d at 867).
107. Id. at 1109.
108. Id. at 1107-08.
109. Id. at 1108.
110. Id.
111. Id. (quoting CAL. CIV. CODE § 1668 (2010)).
113. Discover Bank, 113 P.3d at 1110.
114. Id. at 1111.
of section 2 of the FAA. The court was careful to limit this holding by ensuring that not every class arbitration waiver is presumptively invalid, but “[s]uch one-sided, exculpatory contracts in a contract of adhesion, at least to the extent [that] they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable.”

Third, the court distinguished its holding in Discover Bank from the opinions in Johnson and Gilmer. In its discussion of the Johnson holding, the court found that the substantive implications of proceeding as a class were largely ignored and that the Johnson court focused too much on the procedural aspect of class actions. The Discover Bank court disagreed with the Johnson rationale, finding that “[a]ffixing the ‘procedural’ label on such devices understates their importance and is not helpful in resolving the unconscionability issue.” In distinguishing its holding from that in Gilmer, the court relied upon a few key factual differences between the statutes at issue in the two cases. The court found that claims such as Gilmer’s under the ADEA commonly proceed on an individual basis with large awards. In contrast, consumer fraud claims such as those made in Discover Bank almost never proceed on an individual basis because individual damages are simply not large enough to make up for the extremely high litigation costs associated with such complex claims. In making its comparison between the two situations, the court concluded, “classwide arbitration is only justified when ‘gross unfairness would result from the denial of opportunity to proceed on a classwide basis.’” Gilmer’s claim under the ADEA did not present the circumstances of “gross unfairness” that the court considered to be present in the consumer fraud case of Discover Bank.

In sum, the Discover Bank court based its holding mainly on state contract principles espoused in both case law and in the California Civil Code. The Discover Bank court also emphasized the serious substantive implications of a class mechanism in a consumer credit context where each

115. Id.
116. Id. at 1109.
117. Id. at 1109, 1113-14.
118. Id. at 1109.
119. Id.
120. Id. at 1113-14.
121. Id.
122. Id. at 1107-08.
123. Id. at 1113 (quoting Keating v. Superior Court, 645 P.2d 1192, 1209 (Cal. 1982)).
124. Id.
125. Id. at 1108.
claimant suffers only minimal damages and the incentive to bring individual suit is low because of high litigation costs and low damage awards.\textsuperscript{126}

\textit{b. Severing Class Action Waiver and Allowing Class Arbitration}

The next case represents a slightly different method that courts have employed to invalidate class action waivers. This case applied the principles of \textit{Discover Bank} and expanded them to include an analysis based on the full vindication of statutory rights on a class action versus an individual basis.\textsuperscript{127} The First Circuit Court of Appeals decided \textit{Kristian v. Comcast Corp.} in 2006.\textsuperscript{128} The \textit{Kristian} court severed a class action waiver based on a “vindication of statutory rights” framework.\textsuperscript{129}

\textit{Kristian} concerned the validity of an arbitration agreement that was provided as an insert enclosed with the bills of Comcast subscribers in the Boston area.\textsuperscript{130} The provision of the arbitration agreement, which waived the right to proceed as a class, read as follows:

\begin{quote}
\texttt{THESE SHALL BE NO RIGHT OR AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED ON A CLASS ACTION OR CONSOLIDATED BASIS OR ON BASES INVOLVING CLAIMS BROUGHT IN A PURPORTED REPRESENTATIVE CAPACITY ON BEHALF OF THE GENERAL PUBLIC (SUCH AS A PRIVATE ATTORNEY GENERAL), OTHER SUBSCRIBERS, OR OTHER PERSONS SIMILARLY SITUATED UNLESS YOUR STATE'S LAWS PROVIDE OTHERWISE.}\textsuperscript{131}
\end{quote}

The complaints alleged that Comcast was involved in anticompetitive practices perpetrated via “swapping agreements” in which cable companies traded territories, effectively eliminating competition in certain geographical areas.\textsuperscript{132} The plaintiffs sought to bring a class action in state court alleging violations of public policy and unconscionability, and in federal court under federal antitrust law.\textsuperscript{133}

The plaintiffs argued that the arbitration agreement in the bill stuffer prevented them from vindicating their statutory rights because it did not

\textsuperscript{126} \textit{Id.} at 1107-08.

\textsuperscript{127} \textit{Kristian v. Comcast Corp.}, 446 F.3d 25, 53-64 (1st Cir. 2006).

\textsuperscript{128} \textit{See generally id.}

\textsuperscript{129} \textit{Id.} at 64.

\textsuperscript{130} \textit{Id.} at 30.

\textsuperscript{131} \textit{Id.} at 53.

\textsuperscript{132} \textit{Id.} at 29-31.

\textsuperscript{133} \textit{Id.} at 31.
allow for a class mechanism. The court agreed with the plaintiffs, giving three reasons for their invalidation of the class action waiver under a “vindication of statutory rights” framework. First, the court stressed the substantive implications of class action mechanisms. Second, the court distinguished the Kristian case from the holding in Johnson. Third, the court applied the principles of Discover Bank to its “vindication of statutory rights” framework. Based on this analysis, the court determined that severance of the class arbitration waiver was appropriate.

First, in its determination that class mechanisms have important substantive implications, the court addressed Comcast’s argument that class mechanisms are a procedural rather than a substantive right and thus are capable of being validly waived. In response to Comcast’s arguments, the court turned to the vindication of rights analysis and cited several cases in support of the proposition that in certain circumstances, in the absence of a class mechanism, no injured parties will proceed on an individual basis. The court noted that the reason for having a class mechanism in place is to address situations in which numerous plaintiffs each have small damages and therefore lack incentive to bring an action on their own, but when grouped together can effectively vindicate their rights. The court quoted famous language from Carnegie v. Household International, Inc., which bluntly stated, “only a lunatic or a fanatic sues for $30.00.” The court gave some credence to Comcast’s argument that class actions are a procedural mechanism but ultimately concluded that the substantive implications of the technically procedural class mechanism could not be ignored. The court compared each individual Comcast subscriber’s recovery of a few hundred to a few thousand dollars to the fees for attorneys and expert witnesses in such a case, which it estimated could go into the millions. This comparison brought the court to the conclusion that “the

134. Id. at 37 (stating that “arbitration agreements prevent them from vindicating their statutory rights because the agreements: (1) provide for limited discovery; (2) establish a shortened statute of limitations period; (3) bar recovery of treble damages; (4) prevent recovery of attorney’s fees; and (5) prohibit the use of class mechanisms”).
135. Id. at 55.
136. Id. at 56-57.
137. Id. at 60-61.
138. Id. at 64.
139. Id. at 54.
140. Id. (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997)).
141. Id. (quoting Amchem, 521 U.S. at 617).
142. Id. (quoting Carnegie v. Household Int’l, Inc., 376 F.3d 656, 661 (7th Cir. 1997)).
143. See id.
144. Id.
class mechanism ban—‘particularly its implicit ban on spreading across multiple plaintiffs the costs of experts, depositions, neutrals’ fees, and other disbursements’—forces the putative class member to assume financial burdens so prohibitive as to deter the bringing of claims . . . .’ 145

Second, the court acknowledged that the Third Circuit upheld an arbitration agreement that waived class actions in Johnson v. West Suburban Bank, but distinguished its Kristian holding in three ways. 146 First, the court noted that the statutes involved were different, and the importance of a class mechanism to the vindication of rights under federal antitrust law is far greater than under the TILA.  147 Second, the Johnson court relied on the availability of attorney’s fees as an incentive to bring individual claims under the TILA, however, in the federal antitrust context attorney’s fees can reach into the millions and it would be extremely unlikely for an attorney to be able to justify full recovery of those fees if the plaintiff’s award was only in the hundreds or thousands of dollars. 148 Third, the court in Johnson relied on the administrative enforcement provisions of the TILA to justify its holding that private enforcement via class actions were to be prohibited. 149 The Kristian court spoke to this point in the federal antitrust context by finding that “Congress envisions a role for both types of enforcement. Otherwise, Congress would not have provided for both. Weakening one of those enforcement mechanisms seems inconsistent with the Congressional scheme. Eliminating one of them entirely is surely incompatible with Congress’ choice.” 150

The Kristian court’s third reason for invalidating the class action waiver was that the plaintiffs’ statutory rights could not be completely vindicated in the absence of a class mechanism. 151 This reasoning was based on an application of the “vindication of statutory rights” analysis to the principles announced in Discover Bank. The court quoted Discover Bank in support of its finding that class arbitration should be allowed: “[C]lass actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights.” 152 In its application of the

145. Id. at 55.
146. Id. at 56-57.
147. Id. at 58.
148. Id. at 58-59.
149. See id. at 59.
150. Id.
151. See id. at 60.
152. Id. at 60 (quoting Discover Bank v. Superior Court, 113 P.3d 1100, 1109 (Cal. 2005)).
principles laid out the year before in *Discover Bank*, the court ultimately found that if the class action waiver were to be enforced, Comcast would effectively avoid liability for offenses perpetrated against all of its customers.\textsuperscript{153} The court found that without a class mechanism, plaintiffs’ rights would not be vindicated and the goals of the federal antitrust laws would be frustrated by the “enforcement gap” created by the de facto liability shield.\textsuperscript{154} The court noted that although its analysis was based on a “vindication of statutory rights” framework, it would have been identical if it had proceeded on a state law unconscionability basis, as the court in *Discover Bank* did.\textsuperscript{155} The class action waiver in *Discover Bank* was unconscionable because it prevented the plaintiffs from vindicating their statutory rights.\textsuperscript{156}

After explaining its reasons for invalidating the class action waiver, the court determined whether the entire arbitration agreement should be invalidated or if the offending clause could be severed.\textsuperscript{157} The court found that the last sentence of the class arbitration waiver, “UNLESS YOUR STATE’S LAWS PROVIDE OTHERWISE,” allowed for that portion of the clause to be invalidated and severed from the rest of the arbitration agreement.\textsuperscript{158} The court acknowledged a judicial preference of either wholly invalidating contracts or enforcing them in all their terms and general judicial hesitance to sever agreements because they do not want to re-write the private contracts of the parties.\textsuperscript{159} The court here found severance of the class waiver permissible because of the savings clause in the last line that provided for the severance of provisions not in accordance with state law.\textsuperscript{160} Thus, the court allowed the plaintiffs to proceed as a class in the arbitral forum rather than in court, upholding as much of the arbitration agreement as was consistent with the law.\textsuperscript{161}

c. A Multi-Factor Analysis for Determining Enforceability of Class Action Waivers

A recent case concerning the issue of class action waivers provided a multi-factor analysis that synthesized the various holdings of the other cases

\textsuperscript{153} See id. at 61.
\textsuperscript{154} Id.
\textsuperscript{155} See id. at 63-64.
\textsuperscript{156} Id.
\textsuperscript{157} See id. at 61-62.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 62.
\textsuperscript{160} Id. at 62-63.
\textsuperscript{161} Id. at 63.
in the split. In the 2007 case of *Gentry v. Superior Court*, the California Supreme Court applied a four-factor analysis to determine the validity of a class action waiver. These factors include: (1) potentially modest individual recoveries, (2) the possibility of retaliation against class members, (3) the fact that some potential class members may not even know their rights were abridged, and (4) “other real world obstacles to the vindication of class members’ right[s].” This case differs from the others presented in this article because it arose in an employment contract rather than a consumer fraud context. *Gentry* involved an employment contract between Robert Gentry and his employer, Circuit City. Gentry sought to proceed in arbitration to recover overtime pay from Circuit City with a class of workers similarly situated. The arbitration agreement that Gentry signed when he began employment forbade such proceedings, stating, “The Arbitrator shall not consolidate claims of different Associates into one proceeding, nor shall the Arbitrator have the power to hear arbitration as a class action.”

In determining whether to enforce the class action waiver at issue, the *Gentry* court identified four factors that should be considered. The court explained that if, in light of the factors, class arbitration would be more effective at vindicating the rights of employees than individual arbitration, the waiver should not be enforced. The court deduced that the four most important factors in determining the validity of a class action waiver were: (1) potentially modest individual recoveries, (2) the possibility that Circuit City would retaliate against class members, (3) the fact that some Circuit City employees may not even know their rights were abridged, and (4) “other real world obstacles to the vindication of class members’ right[s].” After analyzing each factor individually, the court concluded that the class action waiver was procedurally unconscionable. *Gentry* was decided very soon after *Discover Bank*, and it applied largely the same framework as

163. Id. at 568.
164. Id. at 559.
165. Id.
166. Id. at 560.
167. Id.
168. Id. at 568.
169. Id.
170. Id. at 560-62.
Discover Bank to hold the waiver procedurally unconscionable. The California Supreme Court then remanded the case to the Court of Appeals to determine whether or not the class action waiver was substantively unconscionable.

D. The Supreme Court’s Stolt Decision

The United States Supreme Court decided Stolt-Nielsen v. AnimalFeeds International Corp. on April 27, 2010. In a 5-3 decision with Justice Sotomayor not participating, Stolt held that a party to an arbitration agreement cannot be compelled to submit to class arbitration unless the arbitration agreement itself demonstrates an intent to do so. The case involved a dispute between a shipping company, Stolt-Nielsen, and one of its customers, AnimalFeeds International. AnimalFeeds alleged that Stolt-Nielsen was engaging in an illegal price-fixing conspiracy. When contracting to ship its goods with Stolt-Nielsen, AnimalFeeds signed a standard shipping contract which contained an arbitration clause. The contract and the arbitration clause were governed by maritime law, and both parties stipulated that the arbitration clause was silent on the issue of class actions.

In 2005, AnimalFeeds served Stolt-Nielsen with a demand for class arbitration. The demand was thereafter submitted to a panel of arbitrators to determine whether the arbitration clause allowed for class arbitration. The panel determined that nothing in the arbitration clause demonstrated an intent to preclude class arbitration, and that arbitration therefore was allowed. The arbitrators then stayed the proceedings so Stolt-Nielsen could seek judicial review of the arbitrators’ decision in the Southern District of New York; eventually, that court vacated the arbitrators’ decision based on the conclusion that the decision was made in manifest disregard of federal maritime law. The court reasoned that contracts under maritime law...

171. Id. at 560.
172. Id. at 575.
174. Id. at 1775.
175. Id. at 1764.
176. Id. at 1765.
177. Id.
178. Id. at 1766.
179. Id. at 1765.
180. Id. at 1766.
181. Id.
182. Id.
In answering “no” to that question, Justice Alito, writing for the Court, stressed two unique facts of the case before it and ultimately concluded that the arbitrators’ decision was “fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.” The first fact the court stressed was that the contract at issue was governed by the “custom and usage” of maritime law. This was the same point that the Southern District of New York relied on to vacate the arbitrators’ decision. The Supreme Court agreed with the Southern District of New York in its finding that there was no custom and usage of class arbitration in maritime arbitration agreements. The second fact the court relied upon to deny class arbitration was that both parties were sophisticated business entities. To support its conclusion that the FAA principle of consent is fundamentally at odds with requiring a party to submit to class arbitration in absence of a contractual basis for doing so, the Court noted three key differences between bilateral and class arbitration. First, the Court pointed out that class arbitration resolves disputes between many parties instead of only two. Second, class arbitration does not provide the same presumption of “privacy and confidentiality” that bilateral arbitration does. Third, class arbitration binds not only the two parties to the
contested agreement, but other absent parties as well. The Court concluded that these differences were too great for “arbitrators to presume, consistent with their limited powers under the FAA, that the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.” Despite this conclusion, the Court noted that its decision did not determine precisely what contractual basis would support a conclusion that the parties had agreed to class arbitration.

Justice Ginsburg, joined by Justices Stevens and Breyer, dissenting, argued that “[w]hen adjudication is costly and individual claims are no more than modest in size, class proceedings may be ‘the thing’ i.e., without them, potential claimants will have little, if any, incentive to seek vindication of their rights.” She then pointed out two “stopping points” in the majority’s holding. First, the Court did not require an express contractual authorization of class action arbitration. Second, by noting that the parties in this case were sophisticated business entities, the Court apparently spared consumer contracts of adhesion from its holding.

Although this case did not concern a class arbitration waiver, it has strong implications for all issues surrounding class action arbitration. It presents a narrow interpretation of the FAA that seems to mark a step back in the Court’s stated policy of encouraging arbitration.

III. ANALYSIS

Each case presented above has taken a different approach in its interpretation of class action issues in arbitration. For this reason, this section will evaluate the strengths and weaknesses of each to establish a cohesive approach for future courts to apply. The first section of Part III will analyze the arguments in favor of upholding class action waivers. The next section will explore the arguments in favor of invalidating class action waivers. The final section of Part III will propose a four-factor analytical framework for future cases.
A. Arguments in Favor of Upholding Class Action Waivers

Both the FAA and subsequent Supreme Court decisions have expressed a strong presumption in favor of the validity of arbitration agreements in general.\(^{201}\) The Johnson court enforced the arbitration agreement at issue exactly as it was written and agreed to by the parties, even though it did not contain a class action waiver and was silent on the issue of class arbitration.\(^{202}\) The Stolt court employed a very similar analysis.\(^{203}\) There are three reasons why courts may want to follow this approach in future cases: (1) the ease of application, (2) the legislative intent of the FAA, and (3) minimal judicial role.

First, a per se rule upholding all class action waivers or denying class actions when the agreement is silent on the issue would be simple and easy to apply. It simplifies the court’s role in the arbitration process and arguably stays true to the principle that contracts should be enforced on their terms. Thomas Wilmowski argues in favor of this approach in an article discussing the validity of class action waivers.\(^{204}\) Wilmowski contends that courts regularly enforce contracts of adhesion and should not apply special rules to class action waivers.\(^{205}\) This approach puts class action waivers on the same footing as all other contract terms and would invalidate a class action waiver only when it found the arbitration agreement as a whole invalid.

Second, this approach seems truest to Congress’s intent in enacting the FAA because it embodies the strong presumption in favor of enforcing arbitration agreements that Congress wished to achieve with the FAA. Because Congress has expressed such a clear intent in favor of arbitration, it can be argued that courts that invalidate class action waivers are dispensing with congressional intent. However, the FAA is silent on the specific issue of class arbitration, so some room is left for debate.\(^{206}\) The alternative argument could be made that, as Justice Ginsburg suggests in her Stolt dissent, class action waivers may make it impossible for consumers to pursue small-dollar claims in any forum at all.\(^{207}\) This does not result in

\(^{202}\) Johnson v. West Suburban Bank, 225 F.3d 366 (3rd Cir. 2000).
\(^{203}\) Stolt, 130 S. Ct. at 1758.
\(^{204}\) Thomas Wilmowski, A Little Fish in a Big Sea: Should Consumer Protection Statutes Override Class Arbitration Waivers?, 2007 J. DISP. RESOL. 313, 322.
\(^{205}\) Id.
\(^{206}\) Johnson, 225 F.3d at 366.
\(^{207}\) Stolt, 130 S. Ct. at 1776.
more arbitrations as Congress intended with the FAA; rather, these claims go nowhere at all. Wilmowski argues that if Congress wishes to take a position on the issue, it should amend the FAA to either allow or prohibit class action waivers.  

Third, the decisions by the courts in Johnson and Stolt fully embody a judicial hands-off policy in the arena of arbitration agreement, which was Congress’ intent in enacting the FAA. The Johnson court analyzed Johnson’s claims on an individual level and found that his rights would be no better vindicated in litigation than they would be in arbitration. Because the arbitration agreement was also found to be valid and enforceable, the court determined that proceeding with class litigation was merely a procedural right that did not interfere with the vindication of Johnson’s personal statutory rights. The Stolt Court concluded that because the parties did not manifest an intent to submit to class action arbitration, an arbitration panel could not impose it upon them. The merit in this approach is in its simplicity and ease of application to cases with varying fact scenarios.

B. Arguments in Favor of Invalidating Class Action Waivers

Although there are several arguments in favor of upholding class action waivers, there are also compelling arguments in favor of invalidating class action waivers. The Discover Bank and Kristian cases taken together represent a strong argument that class action waivers in arbitration agreements may be unconscionable because they do not allow for the full vindication of statutory rights. Unlike the court in Johnson, the court in Discover Bank and Kristian viewed the class action waivers at issue as waivers of substantive rights and not as waivers of procedural rights. In viewing the agreements through this lens, the courts came to predictably different conclusions than did the Johnson court.

The courts in Discover Bank and Kristian based their conclusions on three main arguments. The first argument is that section 2 of the FAA requires arbitration agreements to be invalidated if they violate state contract principles. The second argument is that class action mechanisms have

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208. Wilmowski, supra note 204, at 323.
210. See supra Part II.C.1.
211. Johnson, 225 F.3d at 376.
212. See supra Part II.D.
213. See supra Part II.C.2.a-b.
214. See supra Part II.C.2.a-b.
important substantive implications and rights may not be fully vindicated in
their absence.215 The third argument is that class waivers should be severed
instead of invalidating the agreement as a whole.216

The courts’ first argument is that section 2 of the FAA requires
arbitration agreements to be invalidated if they violate state contract
principles.217 This is a straightforward interpretation of the FAA, which
states that agreements to arbitrate should be enforceable “save upon such
grounds as exist at law or in equity for the revocation of any contract.”218
Although the act does represent a strong policy in favor of arbitration
generally, section 2 was written to provide relief to parties who entered into
an agreement that did not comply with state-law contract principles. Many
of the class action waivers discussed in this article were presented on a take-
it-or-leave-it basis by a large company with significantly greater bargaining
power than its customers.219 For this reason, courts have applied section 2 to
deem class action waivers of this nature unconscionable and therefore
unenforceable.220

The second argument, that class mechanisms are a substantive right,
focuses on real-world concerns instead of applying a strict construction of
arbitration agreements that were not freely bargained for. The argument,
relied upon in Discover Bank and Kristian, posits that even though class
mechanisms can be viewed as merely procedural mechanisms, substantive
rights can be violated without any remedy in their absence.221 The Gilmer
decision has been criticized by the D.C. Circuit Court for placing too heavy
an emphasis on the procedural and substantive labels.222 The D.C. Circuit
Court concluded that substantive rights depend for their enforcement upon
the existence of at least minimal procedures.223 At a minimum, then,
“statutory rights include both a substantive protection and access to a neutral
forum in which to enforce those protections.”224 A lopsided arbitration

215. See supra Part II.C.2.a-b.
216. See supra Part II.C.2.a-b.
217. See supra Part II.C.2.a-b.
219. See supra Part II.C.2.a-b.
220. See supra Part II.C.2.a-b.
221. See supra Part II.C.2.a-b.
223. Id. at 1482.
224. Id. (citing Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1246-48 (9th Cir. 1994);
JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 144-45 (1983)).
agreement that effectively waived the employee’s ability to enforce the statutory law would effectively waive the employee’s substantive rights, contrary to the Supreme Court’s prescription in *Gilmer*.225

Furthermore, the Supreme Court has stated on several occasions that arbitration is not a waiver of substantive rights—it is just an agreement to have those rights resolved in a different forum.226 In the context of a group of consumers each with a small dollar claim, being forced to arbitrate on an individual rather than a class basis does require a waiver of substantive rights. In that situation, there is no ability to pursue the claim at all.

Viewing the right to proceed as a class as substantive rather than procedural creates a more flexible approach that allows courts to meaningfully weigh the options of the potential class members. Both the court in *Discover Bank* and the court in *Kristian* found that the plaintiffs’ statutory rights would effectively be left unaddressed if they were not allowed to proceed on a class basis in some form.227 In taking a realistic view of the individual facts of each case, the courts found that it would not be economically feasible for the plaintiffs to proceed on an individual basis for the following reasons: the high attorneys’ and expert fees associated with the type of claim involved, the low amount of actual damages, or some combination of those and other factors.228

The third argument, that class waivers should be severed instead of invalidating the agreement as a whole, also serves the purposes of the FAA and minimizes judicial interference.229 Severing only an unconscionable class action waiver while upholding the rest of the arbitration agreement is consistent with the intent of the FAA to promote arbitration.230 The courts in *Discover Bank* and *Kristian* took pains not to invalidate the arbitration agreements in their entirety; instead, the courts severed only those portions incompatible with state contract principles.231 This approach is attractive because it evaluates claims on an individual basis and arguably produces a more fair result.232

225. *Id.*
227. *See* Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006); Discover Bank v. Superior Court, 113 P.3d 1100, 1109 (Cal. 2005).
228. *See supra* Part II.C.2.a-b.
229. *See Discover Bank*, 113 P.3d at 1111.
230. *See id.* at 1110-11.
231. *See id.* at 1104; *Kristian*, 446 F.3d at 61-62.
232. *See Discover Bank*, 113 P.3d at 1104-05.
C. Courts Should Apply a Multi-Factor Test to Determine the Validity of Class Action Waivers

Although the Discover Bank and Kristian courts reached well-reasoned results, both courts came to their conclusions in a piecemeal and inconsistent way. In an article discussing the enforceability of class action waivers, Heather Bromfield argues that all class action waivers should be invalidated on principles of unconscionability. However, this approach suffers from many of the same defects as arguments in favor of blindly enforcing all class action waivers. Invalidating all class action waivers would defeat the purpose of arbitration—that two parties may contract to resolve their disputes in a way that is mutually agreeable to them. If courts were to simply invalidate every class action waiver, it would impose judicial constraints on the subject matter of personal contracts, something that is most certainly not the intention of the FAA. The best approach to take is not all-or-nothing in either direction, but rather an easily applied test that can be customized to the individual facts of a case while still maintaining consistent results across the board.

The California Supreme Court case Gentry v. Superior Court provides a solid framework of analysis that courts should apply in future challenges to the validity of class action waivers. This framework applies the principles of Discover Bank and Kristian in a more easily accessible and methodical way by utilizing a set of four factors to determine the validity of class action waivers in arbitration agreements.

The first factor the Gentry court identified was the probable size of each individual class member’s recovery. The smaller the individual recovery, the less likely a person is to go through the hassle and expense of pursuing arbitration on an individual level. This factor can be easily applied to the cases discussed in the pre-Stolt split. In Gilmer, the court found that individual recovery in ADEA claims is typically substantial; therefore, it was not a significant hindrance to proceed individually rather than on a

233. See generally id. at 1100; Kristian, 446 F.3d at 25.
235. See Kanowitz, supra note 3, at 255.
236. See Gentry v. Superior Court, 165 P.3d 556, 568-70 (Cal. 2007).
237. See id. at 560-70.
238. Id. at 564.
239. See id. at 561.
classwide basis. In *Discover Bank* and *Kristian*, the arbitration agreements at issue arose from consumer contracts between creditors and their customers. These cases involved allegations that the creditor’s practices were unfair to all of their customers, but no single customer incurred substantial monetary loss. In these cases, the court found that the likely small recovery for individual claimants would not outweigh the hassle and expense of proceeding on an individual basis. A similar situation occurred in *Stolt*, but between parties to a shipping contract rather than a consumer transaction.

The second factor the *Gentry* court identified was the potential for retaliation against members of the class. Because *Gentry* was an employment case, the court considered whether an individual who proceeded against his employer alone would face more potential future retaliation than a group of employees who proceeded together. Although this does not directly parallel the consumer credit context, consumers could reasonably contemplate retaliation against them either by having credit revoked or being unable to secure future loans. It would seem significantly less likely that these negative consequences would materialize if the plaintiffs had the benefit of proceeding as a class. This could also occur in the shipping context, as presented in *Stolt*. If one shipping company is engaging in allegedly anti-competitive practices and only one of its customers challenges it in arbitration, that customer could simply be blacklisted by the shipper. However, if all of the company’s customers were able to proceed as a class, the company would be forced to comply with the law or face losing all of its business.

The third *Gentry* factor to be considered is whether potential class members exist that may be “unaware that their legal rights have been violated.” The court reasoned that if there are people who are unaware that their rights have been violated, they might never get a remedy in the absence of a class action because they will never know to pursue an individual claim. This factor can be applied in even more consumer credit situations than employment situations. Particularly in the cases of *Kristian*

240. See supra Part II.C.1.
241. See *Kristian* v. Comcast Corp., 446 F.3d 25, 29 (1st Cir. 2006); *Discover Bank* v. Superior Court, 113 P.3d 1100, 1103 (Cal. 2005).
242. See *Kristian*, 446 F.3d at 58; *Discover Bank*, 113 P.3d at 1122.
243. See supra Part II.C.2.a-b.
244. See supra Part II.D.
246. See *id.* at 579.
247. *Id.* at 566.
248. *Id.* at 566-67.
and Discover Bank, the defendant companies engaged in practices that affected all or nearly all of their customers. Most likely, a large portion of those customers had no knowledge that their rights were being violated. Similarily in Stolt, the shipping company’s customers may not all have been aware of the anti-competitive practices that were driving up shipping costs. If the arbitrators had determined that potential class members did exist, they could have ordered that class representatives give notice to all potential class members, which Federal Rule of Civil Procedure 23 requires in traditional litigation, before commencing class arbitration.

The fourth factor that Gentry identifies acts as a catchall for any other circumstances that the individual facts of a case might present. The court described this fourth category as “other real world obstacles to the vindication of a class members’ rights.” These real world obstacles are likely to include those discussed in the circuit split cases, such as the amount of attorney’s fees associated with bringing an individual claim, the cost to hire expert witnesses, and the public policy goals of the statute that the plaintiff argues was violated. This fourth category presents a flexible way for the court to consider circumstances that are not easily addressed by rigid rules and formulas, and it could tip the scale either in favor of or against procession as a class.

Each of these factors should be considered in light of the statutory requirements of the FAA and the individual statute at issue in the case. By no means should a court fashion its own version of justice by ignoring the relevant statutory requirements. These factors are meant to aid the court in its interpretation of section 2 of the FAA and the overall legislative intent of both the FAA and the statute at issue in a case.

In addition to the application of the four Gentry factors, courts should always seek to uphold the portions of the arbitration agreement that do not violate state contract law. For this reason, it is unlikely that courts will face many situations where proceeding with class litigation is appropriate. Only in situations where the court finds the entire arbitration agreement unenforceable should the court allow a group of plaintiffs to proceed with a class action in court. Instead, in most situations, the court will determine whether or not to sever an unconscionable class arbitration waiver from an

249. Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006); Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).
250. See FED. R. CIV. P. 23(c)(2).
251. Gentry, 165 P.3d at 567.
otherwise valid arbitration agreement. In those situations, the court should apply the *Gentry* factors. If it determines that class arbitration would be the only way to fully vindicate the rights of the plaintiffs, and that individual arbitration would give the plaintiffs less-comprehensive vindication of their rights, it should sever the class action waiver and compel arbitration on a classwide basis.

IV. PROPOSED FAA AMENDMENT

Although the multi-factor framework will provide courts with a way to fairly and lawfully settle class arbitration issues, it is only a band-aid for a larger problem. The FAA does not currently contain any provision addressing class action issues in arbitration. To fully correct the problem presented by this article, Congress should amend the FAA to include a provision addressing these issues. This provision should accomplish three goals. First, it should establish class action arbitration as an accepted mode of arbitration under the FAA. Second, it should provide instruction to parties and courts on how to interpret class action waivers. Third, it should set a standard for arbitration agreements that are silent on the issue of class arbitration.

A. What the Amendment Should Accomplish

The proposed amendment should be added to the end of Chapter One as section 17 of the FAA. The first subsection should contain a general statement endorsing class arbitration and providing a procedural structure for arbitrators to follow. This section would be the foundation for courts and parties to point to when seeking to proceed with class arbitration. It would also allow class arbitration to be conducted in a uniform manner, thus avoiding the need for judicial review of procedural mechanisms.

The second subsection would address how courts and arbitrators should interpret varying class action waivers. This section should be broken down into agreements between sophisticated bargaining parties and contracts of adhesion presented on a take-it-or-leave-it basis. For parties that are sophisticated business entities or for individuals who engage in meaningful bargaining, the waiver should be upheld. This flows from the principle emphasized in *Stolt* that arbitration is fundamentally founded upon the consent of two parties.

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The rules for contracts of adhesion should be considerably more flexible. The amendment should give arbitrators discretion to allow or deny class arbitration based on the four \textit{Gentry} factors. Because contracts of adhesion are not freely bargained for, class action waivers could potentially disadvantage parties to the point of extinguishing their claims entirely. Contracts of adhesion are typically found in consumer transactions between a large business entity and its several customers. If the business perpetrates a small fraud on all of its customers, it could profit greatly in the aggregate while only disadvantaging each customer minimally. This leaves the customer in the position of mounting a potentially costly action against the company to recover a comparably small amount. In these situations, class actions are necessary to vindicate the rights of any of the wronged consumers. Here, the proposed amendment should presume the unconscionability of the waiver and adopt the four \textit{Gentry} factors. The arbitral panel should decide whether an application of the \textit{Gentry} factors overcomes the presumption of unconscionability. If the presumption of unconscionability is overcome, the class action waiver should be upheld. If the presumption is not overcome, the class action waiver should be severed from the agreement, leaving intact as much of the agreement as remains conscionable. This process would be consistent with principles of section 2 of the FAA, allowing arbitration agreements to be invalidated if they violate basic state contract principles.\footnote{Federal Arbitration Act § 2.}

The third section of the proposed FAA amendment should provide guidance for arbitration agreements that are silent with respect to class arbitration. Here, the arbitrator should be required to determine whether the arbitration agreement was freely bargained for or presented as a contract of adhesion. Then, the arbitrator should analyze each of the four \textit{Gentry} factors, but without the presumption of unconscionability that is in place for class action waivers. This section of the amendment should seek to uphold the arbitration agreement as written as much as possible, only departing from it if justice so requires.

\textbf{B. Proposed Language}

The amendment should contain the following provisions:
§ 17. Class Arbitration

(a) Class arbitration is an acceptable mode of arbitration under this Act. The procedure for class arbitration shall be the same as the procedure proscribed in Federal Rule of Civil Procedure 23. The decision of whether and when to move forward with arbitration shall be made only by the arbitrator. Only upon complete resolution of the class arbitration process may a decision of the arbitrator be appealed to a court pursuant to §16 of this Act.

(b) Class action waivers
   (1) Class action waivers that are freely bargained for between sophisticated parties shall be upheld on their terms.
   (2) Class actions waivers presented on a take-it-or-leave-it basis as part of a contract of adhesion will be presumed to be unenforceable. Arbitrators shall apply the following four factors to determine if the presumption of unenforceability is overcome:
      (i) the probable size of each class member’s individual recovery,
      (ii) the potential for retaliation against members of the class,
      (iii) whether potential class members may be unaware that their rights have been violated,
      (iv) real world obstacles to the full vindication of rights by class members.
   (3) If after applying the four factors listed in (b)(2)(i)-(iv), the arbitrators find that the presumption of unenforceability has been overcome, the class action waiver shall be upheld. If the arbitrators find that the presumption of unenforceability has not been overcome, the arbitrators shall deem the class action waiver unenforceable, sever it from the arbitration agreement, and enforce the remaining conscionable portions of the agreement.

(c) Arbitration agreements silent on the issue of class actions
   (1) When an arbitration agreement is silent on the issue of class actions, arbitrators shall determine whether the arbitration agreement was freely bargained for or presented as a contract of adhesion.
   (2) Once the determination in (c)(1) is made, arbitrators shall apply the factors listed in (b)(2)(i)-(iv), but without the presumption of unenforceability.
   (3) Arbitrators shall determine whether to allow or deny class arbitration based on the factors listed in (b)(2)(i)-(iv).
V. CONCLUSION

This article has highlighted the split of authority between circuit courts on the issue of class action waivers in arbitration agreements. The April 2010 Supreme Court case Stolt-Nielsen v. AnimalFeeds International did little to resolve this split of authority, and it actually obfuscated the issue even further. Class action waivers in arbitration agreements can come in many forms, and some agreements do not contain them at all. These inconsistencies in language and form may be a large part of the reason courts have held so inconsistently on their validity. Some courts have allowed class action waivers to be invalidated under section 2 of the FAA, which disavows any agreement that does not comport with basic contract principles such as unconscionability. Others have found that class mechanisms are merely procedural and can be waived in a valid agreement to arbitrate.

By applying the Gentry factors enumerated above and with the enactment of the proposed FAA amendment, courts will have more definitive guidelines to aid in their interpretation of class action waivers. By severing a class action waiver that does not comport with the factorial analysis instead of invalidating the entire arbitration agreement, courts will continue to serve the statutory purposes of the FAA without sacrificing state contract principles applicable to all contracts. This approach provides courts with a meaningful framework of analysis that remains within the bounds of both federal and state law while also allowing for more consistent judicial treatment of class action waivers in the future.

255. See generally Stolt, 130 S. Ct. at 1758.
256. See Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006); Gentry, 165 P.3d at 556; Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).
257. See Johnson v. West Suburban Bank, 225 F.3d 366 (3rd Cir. 2000).
Teaching the Ethical Values Governing Mediator Impartiality Using Short Lectures, Buzz Group Discussions, Video Clips, a Defining Features Matrix, Games, and an Exercise Based on Grievances Filed Against Florida Mediators

Paula M. Young*

I. INTRODUCTION

A mediator in a civil case calls one of the defendants a “spoiled brat” and identifies the defendants as “poor slobs” who would never be recognized in court. The same mediator decides that the offer made by the plaintiff is acceptable and then attempts to impose the settlement on the defendants. When the defendants indicate that they will not settle at mediation, the mediator does not terminate the mediation at the parties’ request. In another civil case, the mediator tells one party that “if you go to court, you need to

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be on medication and heavy drugs.” Another mediator, in a family mediation, acts “very aggressive[ly] and condescending[ly]” towards one party, yells at that party, and uses profanity when speaking to her. The mediator also tells the party that she will “lose in court” and that she makes a terrible witness. In another family mediation, the mediator shares her own personal story of divorce and then exhibits bias against men. She is rude, short, and impatient with the husband during the mediation process.

A mediator in an eleven-hour, single-session, family mediation threatens the wife with contempt of court, coerces her into staying past the time when she can bargain effectively, will not allow her to obtain food when she requests it, and uses verbal assaults to obtain an agreement. In a mediation involving a contractual dispute, the mediator advises the parties that the owner of the corporation facing bankruptcy has signed the contract in his individual capacity and thus can be sued individually. Up to that time, neither party has raised the issue. In a small claims case, the mediator advises the parties that the defendant’s wife has been “wrongfully named in the suit.” Another mediator explodes in anger when one of the parties asks that an additional term be included in the mediated settlement agreement.

A family mediator conducts a mediation for two married friends who plan to divorce. In another case, the law partners of a mediator have an ongoing relationship with the one of the mediating parties. During another mediation, the mediator invites one party and his counsel out for a drink without inviting the other party. After a failed divorce mediation, the mediator serves as legal counsel for the wife in the divorce proceedings.

These allegations appear in grievances filed against Florida mediators. Whether true or not, they provide examples of mediator relationships, attitudes, or conduct that indicate the mediator has lost his or her impartiality towards one of the parties. Alternatively, the allegations indicate the mediator’s bias in favor of a particular substantive outcome, even if that outcome is simply to settle the dispute. They illustrate how mediator bias—actual or perceived—can directly affect the parties’ self-determination and the quality of the process that parties experience. Most of the grievances suggest significant lapses both in procedural justice, especially in terms of the parties’ ability to voice their concerns and preferences, and in providing even-handed, respectful treatment by the neutral.

These grievances offer new mediators and seasoned practitioners opportunities to identify, analyze, and discuss different sources of mediator bias. In this article, I describe a workshop presentation in which I used these grievances, other resources, and active learning techniques to teach the ethical values governing mediator impartiality.

1. See infra Appendix B.
II. THIS ARTICLE

In an earlier article—Teaching Professional Ethics to Lawyers and Mediators Using Active Learning Techniques—I discussed the barriers to learning about professional ethics (especially in the law school context), possible approaches to teaching professional ethics including the objectives of a course, the stages of learning in the context of professional ethics training, the design of an active or interactive learning environment, and various teaching methodologies. I then focused on several professional ethics courses in which the professors used active learning techniques to impart the knowledge, skills, and values of the legal profession. Finally, I surveyed the best practices for assessing student learning and reviewed the assessment techniques used in several professional ethics courses. The article concluded that we can create enthusiasm in students for professional ethics by providing well-designed training programs that use active learning techniques.

Teaching Professional Ethics to Lawyers and Mediators Using Active Learning Techniques will serve as the first article in a series of articles I have planned on the use of active learning techniques to teach the core values of mediation: mediator impartiality, party self-determination, confidentiality, and quality of the process/mediator competence. This article is the second article in that series. In Section III, I summarize the first article in the series. In Section IV, I describe the role of mediator impartiality as a core value of the mediation field. I evaluate the definitions of mediation found in several ethics codes as they relate to mediator impartiality. Next, I discuss the value of impartiality in building trust between the mediator and the parties, and its role in supporting party self-determination. I then discuss the views of leading authors in the field who express skepticism about the existence of mediator impartiality and its unchallenged (or at least unexamined) status as a core value of mediation. I then discuss the overlap between elements of procedural justice and mediator impartiality.

3. Id. at 132–48.
4. Id. at 148–65.
5. Id. at 168–73.
6. Id. at 174.
I devote the majority of Section IV to a description of the active learning or interactive teaching methodologies I use to teach the ethical values governing mediator impartiality in a workshop environment. These techniques include short lectures, buzz group discussions, video clips, a defining features matrix or analytical grid, and an exercise based on grievances filed against Florida mediators. It develops “Another Grid for the Perplexed,” which conceptually organizes possible sources of mediator bias. This section distills and organizes the thinking of many leaders in our field on the topic of mediator impartiality.

Section V illustrates how an instructor can assess student learning by using the exercises based on grievances filed against Florida mediators. Section VI provides an analysis of the learning objectives met in the workshop, a consideration of the limits to the scope of the workshop given the time available for the course, a description of how I have scaled the workshop for use in my law school courses, a summary of the evaluations provided by workshop participants, and an acknowledgement that the workshop provides an opportunity to interact with true adult learners. In Section VII, I conclude that the conceptual framework provided by “Another Grid for the Perplexed” allows mediators to quickly and effectively resolve ethical dilemmas arising in the moment. I also conclude that instructors should work creatively to design ethics courses that use active learning techniques.

Appendix A provides a copy of “Another Grid for the Perplexed,” illustrating examples of the different sources of mediator bias. Appendix B provides copies of thirteen exercises based on the grievances filed by parties against Florida mediators. This article makes these grievances available to ethics trainers for the first time in this format.


8. See infra note 116 and accompanying text.
III. SUMMARY OF FIRST ARTICLE IN THE SERIES

A. Commitment to Teaching Professional Ethics Effectively

As I noted in the first article in this series, the legal academy has given teaching theory and methodology greater attention.9 Even so, professors teaching professional ethics courses in law schools tend to use more traditional methods of teaching, especially lecture and Socratic dialogue.10 The ABA standards governing law schools do not press for the use of more active learning techniques.11 I also noted in that earlier article that the mediation field could be accused of even less concern for mediation ethics, including how, or whether, we teach the subject.12 Only seventeen states have a mandatory ethics code for mediators.13 Very few states impose any requirement that instructors include a discussion of mediation ethics in courses designed to train new mediators.14 Similarly, very few states require mediators to obtain additional ethics training as a condition to remaining certified, registered, or rostered.15

9. See Young, Teaching Professional Ethics, supra note 2, at 148.
10. Id. at 135.
12. See Young, Teaching Professional Ethics, supra note 2, at 149.
13. See Paula M. Young, Take It or Leave It. Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field, 21 OHIO ST. J. ON DISP. RESOL. 721, 736–37 n.48 (2006) [hereinafter Young, Take It or Leave It].
14. ABA SECTION OF DISPUTE RESOLUTION, TASK FORCE ON CREDENTIALING, REPORT ON MEDIATOR CREDENTIALING AND QUALITY ASSURANCE § 1(C), at 3–6 (Discussion Draft Oct. 2002), http://www.abanet.org/dispute/taksforce_report_2003.pdf (recommending that the task force develop “model standards for mediator preparation programs [and] [o]utline one or more model systems of mediator credentialing . . . focusing initially on the accreditation of mediator preparation programs”).
15. For example, by Administrative Order, the Florida Supreme Court has imposed continuing mediator education (CME) requirements on all certified mediators. Fla. Sup. Ct. Admin. Order No. A0SC08-23 (June 30, 2008), at 10-13, available at http://www.ficourts.org/gen_public/adr/index.shtml. It requires certified mediators to complete sixteen hours of CME, including four hours of ethics training, in each two-year certification renewal cycle.

The Georgia Commission on Dispute Resolution (GODR) sets standards for continuing mediation education that appear in Appendix A to the ADR Rules. GA. SUP. CT., UNIFORM RULES FOR DISPUTE RESOLUTION PROGRAMS, app. A (1993), http://www.godr.org/pdfs/CURRENT%20ADR%20RULES%20COMPLETE%203-28-08.pdf. This same appendix declares that “neutrals must be competent.” Id. at R. 5.4. The rules require six hours of additional CME during every two-year registration renewal cycle. GA. SUP. CT., UNIFORM

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I noted that “the rules governing confidentiality in mediation make it difficult for mediators to talk with others about ethical dilemmas that arise in a particular mediation.” \textsuperscript{16} We typically work alone, in small conference rooms, under potentially stressful, dynamic, and emotionally-charged conditions. I argued that as a field, we should care deeply about whether mediators understand their ethical obligations, whether they can resolve ethical dilemmas “in the moment,” and whether poor experiences in mediation undermine the public’s trust in the judicial system. \textsuperscript{17}

As I noted in my earlier article:

Most mediators learn the theory and skills of mediation through highly interactive experiential teaching methods, including discussion, role-plays, video clips, and performance feedback. Accordingly, instructors will face little resistance to using these types of methodologies when teaching mediation ethics. In fact, these adult learners may expect a more interactive learning environment. \textsuperscript{18} Even so, my experience suggests that, at least in basic mediation training, instructors rely heavily on lecture to discuss ethics with trainees. They do so because of the time constraints existing in most courses. \textsuperscript{19}

I hope this series of articles will offer trainers some additional methods for conveying this important knowledge, set of skills, and professional values.

\textbf{B. Methods for Teaching Mediation Ethics}

As noted in my first article in the series, “Thompson suggests that instructors teaching mediation ethics should focus on four ‘competency areas’: (1) self-awareness of potential sources of bias; (2) knowledge of professional standards; (3) analysis of ethical dilemmas and development of

\begin{itemize}
  \item \textbf{RULES FOR DISPUTE RESOLUTION PROGRAMS, app. B (1993).} The rule does not require, however, additional ethics training. \textit{Id.} at 16–17. The GODR can remove a neutral from the registry if he or she fails to meet the requirement. \textit{Id.} at 16.
  \item The Virginia Supreme Court requires mediators to obtain re-certification every two years. Mediators seeking re-certification must complete an additional eight hours of training, including two hours of mediation ethics instruction. \textit{Training Guidelines for the Training and Certification of Court-Referred Mediators § G (effective Jan. 1, 2000)}, http://www.courts.state.va.us/drs/main.htm. The Virginia Ethics Committee, on which I served, revised these guidelines. Virginia’s DRS office has not yet implemented the revisions. However, provisions cited in this article may be different by the time of its publication.
  \item \textit{Id.} at 151-52 (citing Linda Morton, Janet Weinstein & Mark Weinstein, \textit{Not Quite Grown Up: The Difficulty of Applying Adult Education Model to Legal Externs}, 5 CLINICAL L. REV. 469, 475–77, 496 (1999)). \textit{Best Practices} provides a long list of other teaching methodologies that instructors can use in the design of a professional ethics course. \textit{ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 132–33} (Clinical Legal Education Association 2007) [hereinafter \textit{BEST PRACTICES}].
  \item \textit{Id.} at 151-52.
\end{itemize}
skills to decide on a course of action; and (4) performance in the moment when the mediator faces an ethical dilemma." In that earlier article, I described in some detail several of the active learning techniques she uses to teach mediator ethics. I found only Thompson’s article on techniques for teaching mediation ethics. Otherwise, mediation instructors cover the topic from time to time at the major dispute resolution conferences. In the face of this gap in the literature, I considered by analogy the articles about active learning in innovative law school courses designed to teach legal and judicial professional ethics. My earlier article also discussed active learning techniques in general.

C. Assessing Student Learning

The first article also discussed in detail methods for assessing student learning. I noted that the authors of *Best Practices* devote over thirty pages to the principles governing student assessment. The authors identify the best practices for assessing student learning as (1) being clear about the goals of each assessment; (2) assessing whether students learned what the instructor taught (as opposed to testing topics not taught by the instructor); (3) conducting criteria-referenced assessments, rather than norm-referenced assessments (also known as reliability of the assessment method); (4) using assessments to inform students of their level of professional development; (5) being sure the assessment is feasible in light of the subject, time, training required to implement the assessment, equipment or technology needed, number of assessments required, and financial cost; (6) using multiple assessment methods; (7) distinguishing between formative and summative assessments; (8) conducting formative assessments throughout the term of the course; (9) conducting multiple summative assessments throughout the term of the course, when possible; (10) ensuring that summative assessments also serve as formative assessments; and (11) requiring students to compile

20. *Id.* at 143 (citing Mary Thompson, *Teaching Ethical Competence*, DISP. RESOL. MAG., Winter 2004, at 23 (describing several types of interactive training exercises designed to teach mediation ethics)). In the text of this article, I have used only last names in identifying referenced authors.

21. *Id.* at 131 n.12.

22. *Id.*

23. *Id.*

educational portfolios. Thus, instructors may want to separately focus on ways to accurately gauge whether trainees have understood the basic values of and ethical guidelines that apply to the mediation field.

IV. TEACHING THE ETHICAL VALUES GOVERNING MEDIATOR IMPARTIALITY USING SHORT LECTURES, BUZZ GROUP DISCUSSIONS, VIDEO CLIPS, A DEFINING FEATURES MATRIX, GAMES, AND AN EXERCISE BASED ON GRIEVANCES FILED IN FLORIDA AGAINST MEDIATORS

This section of the article describes the approach I took in teaching both new and experienced mediators about the ethical values governing mediator impartiality at a two hour workshop sponsored by the Virginia Mediation Network (VMN), a statewide organization of mediators that offers two training conferences each year. Each conference offers at least two credit hours of ethics training. In describing the lesson plan for this workshop, I also intend to “think-out-loud” about how and why I developed each component of the workshop. In this section, I quote extensively from the original sources so instructors can use these quotes in their training programs, if they like.

A. Short Lecture on the Core Values of Mediation

I start most workshops with a short, Power Point lecture to allow students to absorb some of the basic knowledge about mediator neutrality.

25. Id. at 239–64. See also Young, Teaching Professional Ethics, supra note 2, at 168-69 (describing assessment tools used in innovative law school courses on legal ethics).

26. For a discussion of the thinking out loud teaching technique in the grade school context, see Think Aloud Strategy (Teacher Vision), http://www.teachervision.fen.com/skill-builder/problem-solving/48546.html. It allows the expert to show the novice the expert’s thinking and problem-solving methodology by saying aloud what the professor is thinking as he or she takes each step to solve the problem. The professor illustrates the reasoned approach to the problem.

27. See DONALD A. BLIGH, WHAT’S THE USE OF LECTURES? (2000). The research on lecture as a teaching methodology shows: (1) student attention and concentration during lectures declines after fifteen to twenty minutes; (2) students cannot listen to an entire lecture effectively; (3) lectures no more effectively transmit information than other teaching methodologies; (4) lecture less effectively promotes thought or change in attitudes than other teaching methods; (5) a lecture’s effectiveness depends on the educational level of the audience; (6) students do not pay attention to the lecture 40% of the time; (7) students retain 70% of the information in the first ten minutes of the lecture, but in the last ten minutes of the lecture they retain only 20% of the information; and (8) “four months after taking a traditional lecture oriented introduction to psychology course, students knew only 8% more than a control group of students who had never taken the course.” James E. Groccia & Marilyn S. Miller, Creating Interactive Learning Environments, Program for Excellence in Teaching, University of Missouri School of Law 2–3 (Sept. 1996) (unpublished presentation notes, on file with author). See also Young, Teaching Professional Ethics, supra note 2, at 135 n.32.
As a “top-down” learner, I like to convey the big picture to students and trainees so they have a broader context in which to put the more specific information they will learn in the workshop. The first slide summarizes the “core values” of mediation: party self-determination, mediator impartiality, and confidentiality of mediation communications. To that list, I have added “quality of the process/mediator competence.” Obviously, a workshop on mediator impartiality will relate directly to the second core value on this list.

1. Definitions of Mediation

These core values find expression in the various definitions of mediation. For example, the 2005 Model Standards define mediation as “serv[ing] various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify
interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.”

The Florida Supreme Court defines mediation as “a process whereby a neutral and impartial third person acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and non-adversarial process intended to help disputing parties reach a mutually acceptable agreement.”

Virginia statutes define mediation as “a process in which a mediator facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and to reach a mutually agreeable resolution to their dispute.” These definitions emphasize the facilitative nature of the mediator’s process interventions and party control over the outcome.

2. Perspectives on Mediator Impartiality

a. Code Definitions of Mediator Impartiality

All mediation ethics codes attempt to define the nature of mediator impartiality. The 1994 Model Standards of Conduct for Mediators—adopted by the ABA, the AAA, and the Society of Professionals in Dispute Resolution—defined mediator impartiality as “freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all participants as opposed to any one individual.” This statement focuses on the objective behavior of the mediator. In contrast, the revised 2005 Model Standards define the concept differently: “Impartiality means freedom from favoritism, bias, or prejudice.” This iteration of the standard shifts the focus to the subjective attitude of the mediator towards the parties or the outcome of the mediation. As one of my Virginia colleagues has noted, how would you determine whether a mediator had violated this subjective standard?

33. VA. CODE ANN. § 8.01–581.21 (West 2007) (emphasis added).
35. Telephone Interview with Samuel S. Jacks, Jr., Adjunct Professor of Law, Georgetown University Law Center, in McLean, Va. (May 14, 2008).
some sort of bias. This colleague suggested that any code of ethics should instead focus on the objective behavior of the mediator. Another standard in the 2005 Model Standards takes this approach. It provides: “A mediator shall conduct the mediation in an impartial manner and avoid conduct that gives the appearance of partiality.” The subsections of this standard similarly focus on the objective behavior of the mediator. Thus, an instructor may wish to point out this distinction to trainees.

b. Other Descriptions of Mediator Impartiality

Well-known mediators and professors teaching mediation have provided their own perspectives on this topic. Benjamin, a well-known Oregon mediator, suggests that the term “neutrality” has many meanings:

In the classic sense of the term “neutral,” the mediator: (1) will not intervene in the substance of the dispute; (2) is indifferent to the welfare of the clients; (3) has no previous or present relationships with the parties outside the mediation; (4) will not attempt to alter perceived power variances; (5) is disinterested in the outcome; and (6) is unconcerned with the impact of the settlement on unrepresented parties . . . . The ambiguity of the term is even more confusing for clients in conflict, many of whom come to mediation with the preconceived notion that a mediator is or should be just like a judge.

One author has described mediator impartiality as a “basic principle[] of the mediation process . . . and quite frequently included as integral elements of codes of ethics for mediators.” Other authors call mediator impartiality a “longstanding characteristic[] of Western mediation practice,” “essential,” an “assumption built into the problem-solving model,” “a

37. Id.
38. Id.
41. KIMBERLEE K. KOVACH, MEDIATION IN A NUTSHELL 151–52 (2003) [hereinafter KOVACH].
43. FORREST S. MOSTEN, MEDIATION CAREER GUIDE: A STRATEGIC APPROACH TO BUILDING A SUCCESSFUL PRACTICE 25 (2001) (“While appearing neutral is important, actually maintaining neutrality is essential. Both being neutral and appearing that way are easier said than done.”).
foundational claim of the field,44 and “deeply imbedded in the ethos of mediation, even though observers disagree about the meaning and achievability of the notion.”45 Some authors note the importance of a mediator’s impartiality to the process of building trust with the parties and in supporting party self-determination. Several experienced mediators explain that:

Trust is attained and maintained when the mediator is perceived by the disputants as an individual who understands and cares about the parties and their disputes, has the skills to guide them to a negotiated settlement, treats them impartially, is honest, will protect each party from being hurt during the mediation . . . and has no interests that conflict with helping to bring about a resolution which is in the parties’ best interest.46

Other authors agree saying that: “In order to gain the disputants’ trust and confidence, a mediator should assure the disputants of the mediator’s impartiality about the dispute and the individuals involved.”48 Richardson, a mediator and Dean of the School of Architecture and Planning at the University of New Mexico, calls impartiality “a keystone in building trust, establishing ongoing relationships, and working effectively with participants . . . . I hold a sacred ‘contract’ with a group to act in an impartial manner.”49 Stulberg explains further:

If the mediator is neutral and remains so, then he and his office invite a bond of trust to develop between him and the parties. If the mediator’s job is to assist the parties to reach a resolution, and his commitment to neutrality ensures confidentiality, then, in an important sense, the parties have nothing to lose and everything to gain by the mediator’s intervention . . . . [T]here is no way the mediator could jeopardize or abridge the substantive interest of the respective parties.50

The authors of a family mediation book assert that:

One of the goals of mediation is to return control of the settlement process to the parties. In order to accomplish this goal, mediation statutes may define the role of the mediator as someone who is neutral in regard to the parties’ interest and whose purpose is to facilitate

44. JOHN WINSLADE & GERALD MONK, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION 35–36 (2000) (agreeing with many critics that mediator impartiality does not truly exist).
47. STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 113 (5th ed. 2007).
the attainment of parties’ goals, whatever they may be. Neutrality therefore becomes a
critical assumption of the mediation process . . . .

Other authors suggest that: “Mediator neutrality, later incorporated in all
mediation ethics codes, anchored its success and confirmed the dominant
conception of mediation as a process designed to facilitate dialogue among
negotiating parties.”52 In summary, these authors indicate that mediator
impartiality provides parties with confidence in the mediator and the
process, and preserves party self-determination.

c. Impartiality as an Aspirational, and Unachievable, Goal

Many scholars and practitioners acknowledge the difficulty of
maintaining actual neutrality or impartiality in mediation. Several authors
challenge whether mediator impartiality can exist. One author calls it a
“folklore.”53 Cobb and Rifkin also put it in the class of “folk concepts.”54
They call mediator neutrality “transparent” and “opaque.”55 “[T]ransparent
because it operates on the basis of widely held assumptions about power and
conflict, and opaque because it is exceedingly difficult to raise questions
about the nature and practice of neutrality from within this consensus.”56

The 2002 draft of the Model Rule for the Lawyer as Third-Party Neutral,
prepared by the CPR-Georgetown Commission on Ethics and Standards in
ADR, explicitly states that “absolute neutrality is unobtainable even under
the best of circumstances.”57 Its drafters believed, however, that rules
against conflicts of interest served two objectives: “(i) to protect parties from
actual harm suffered by conflicts of interest, and (ii) to protect the process,
the public, and the parties from the ‘appearance’ of improper influences [or
self-interest].”58 Hinshaw notes: “Practically speaking . . . once a mediator

51. Connie J. A. Beck et al., Research on the Impact of Family Mediation, in DIVORCE AND
FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 471 (Jay Folberg et al. eds., 2004).
52. ALFINI ET AL., supra note 48, at 12.
53. Id. at 35.
54. Sara Cobb & Janet Rifkin, Practice and Paradox: Deconstructing Neutrality in Mediation,
55. Id. at 35.
56. Id. at 37 (emphasis in original).
57. CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS OF PRACTICE IN ADR,
requiring broad and continuing disclosures of any circumstances potentially affecting the mediator’s
neutrality and suggesting that the mediator make the disclosures in writing).
58. Id. at 17 (discussing Rule 4.5.4 governing conflicts of interest).
makes it past the mechanical conflicts check and the mediation begins, it is often difficult for the mediator to be completely impartial due to the relational nature of the mediator’s task.” Moore concludes: “No one can be entirely impartial.”

Mayer, a partner at CDR Associates, suggests: “[T]he term neutral is associated with being inactive, ineffective, or even cowardly . . . . In the middle of intense conflict, many do not believe anyone can or should be neutral.” Another author states: “Neutrality is an illusion; there is no such thing as a detached or objective observer.” Cloke argues that: “[T]here is no such thing as genuine neutrality when it comes to conflict. Everyone has had conflict experiences that have shifted his or her perceptions, attitudes, and expectations, and it is precisely these experiences that give us the ability to empathize with the experiences of others.” Cloke recommends that mediators shift their focus from the concept’s emphasis on “formality, perspective, objectivity, logic, or dispassionate judgment” to the concept’s “concern for fairness and lack of selective bias.” He argues that parties seek a mediator who is “honest, empathetic, and ‘omnipartial,’ meaning on both parties’ sides at the same time.” Rather than ignoring his or her past experiences, the mediator should instead use them “to gain an open, honest, humble perspective on the present [conflict].”

Alfini, Press, Sternlight, and Stulberg acknowledge that mediators are not neutral “with regard to everything.” They state:

Each of us has preferences, interests, commitments to certain moral principles and to an evolving philosophy of life which, when challenged or transgressed, will prompt us into advocating and acting in a manner that is faithful to these dictates. There is clearly no reason to be apologetic or hesitant about defending or advocating such considered judgments. It is also true, however, that mediation as a dispute settlement procedure can be used in a variety of contexts, not all of which would meet approval with everyone’s

59. Hinshaw, supra note 29, at 281.
60. CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 52 (2d ed. 1996) [hereinafter MOORE].
63. KENETH CLOKE, MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION 12–13 (2001) (stating that “[j]udges have the most intractable bias of all: the bias of believing they are without bias”).
64. Id. at 13.
65. Id. Other authors call for mediators to “hold themselves equidistant from each of the parties.” Beck et al., Research on the Impact of Family Mediation, supra note 51, at 472.
66. CLOKE, supra note 63, at 13.
67. ALFINI ET AL., supra note 48, at 166.
considered judgments. What is important is that one keep distinct his personal posture of judgment from the rule defined practice of the mediator and act accordingly.

Beck, a professor in the Psychology and Law Program of the University of Arizona, and her co-authors report that individuals most likely maintain impartiality when the mediator’s “cognition (thoughts), affect (feelings), and behavior are neutral.”

In the divorce mediation context:

[T]he mediator should hold no prior attitudes toward the couple or issues in the divorce, have no preexisting negative or positive feelings concerning the mediation process with the couple or the specifics of the proposed divorce, and no prior experiences relevant to the mediation.

None of these three contingencies is likely to occur in mediation. Mediators do have prior experiences, thoughts, and feelings that all have been shown to influence their mediation responsibilities. Mediators work with divorcing couples every day, expressing attitudes and building cognitions—which make these two individual-level variables most likely to predict mediator behavior. With repetition, these attitudes and cognitions become easily accessible to the mediator and are likely reflected in his or her work. This is a problematic dynamic . . . . [A]ttitudes often become more extreme when they are expressed frequently.

Honeyman and several other scholars express concern that a mediator will not be aware of his or her biases. Accordingly, he or she will not keep them out of the interventions they make in the process. Lerner, writing in the context of legal ethics, says that values, intuitions, expectations, and needs “operate below the radar of our consciousness, automatic, ‘emotional’ reaction, rather than thoughtful, reasoned analysis [and so they] may drive our responses to stressful questions of ethics and professional responsibility.” Accordingly, even with the use of best practices and holding the best intentions to remain impartial, mediators still harbor biases that may, or do, affect the process.

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68. Id. (thus referring to the Quadrant 3 sources of bias discussed infra Part IV.E.3).
70. Id. (citations omitted).
d. Mediator Impartiality as a “Straightjacket”

Still other authors suggest that mediator impartiality can adversely affect the mediation in unwanted ways. For instance, Kraybill, a professor in the Conflict Transformation Program at Eastern Mennonite University, asserts: “Neutrality is never a necessary or constructive goal in conflict, particularly in relation to issues of justice.”73 Beck and her co-authors express even greater concern. “If, for whatever reason, litigants presume mediator neutrality but then perceive mediator bias at one or many points throughout the process, their level of frustration and dissatisfaction with the process is likely to increase substantially.”74 Mediators create party presumptions about mediator impartiality in their agreements to mediate, their opening orientation monologues, and in joint session behaviors. In addition, a mediator’s caucus behaviors can severely undermine the parties’ perceptions about his or her impartiality. “Ironically, both litigants may end up equally distrusting of and frustrated by the mediator, if he or she engages in these apparently highly supportive private conversations with one or both parties.”75

Benjamin credits the techno-rational belief system and methods of scientific inquiry for the attractiveness of the term “neutral.”76 However, the etymology of the word shows its ties to the word “neuter.”77 He suggests that we should consider as its opposite not “partisan” or “partial,” but “involved” and “engaged.”78 He writes:

In many other cultures, the last person people want to help them settle their conflict is a remote, unfamiliar neutral. Even in our own culture, parties in conflict may think they want a neutral, but when questioned, they are really looking for a third party who will hear and validate their concerns.

He notes the increasing use of the term “balanced” in describing the mediator’s role.80 By using this term, a mediator can avoid party misunderstanding and a potential ethics grievance.81 Hinshaw, apparently agrees, saying:

73. KRAYBILL ET AL., supra note 62, at 19.
75. Id.
76. Benjamin, Risks of Neutrality, supra note 40, at 2.
77. Id.
78. Id.
79. Id.
80. Id.
81. Id. See infra notes 311–32 and accompanying text (discussing grievances filed against mediators based on allegations of bias, conflicts of interest, or other breaches of impartiality).
During this process, the mediator may engage in what are considered legitimate mediator moves that may favor one side over the other at any given moment as the mediator spends time focusing on each party’s interests and aspirations. The challenge is to cultivate the relationship necessary for a successful mediation without compromising the mediator’s professional distance from the parties.82

Hinshaw calls this limited bias the phenomenon of “equidistance,” in which the mediator creates symmetry between the parties when gauged by the process as a whole.83

Benjamin also argues that neutrality, when practiced to the extreme, “can straitjacket and constrain the use of strategies necessary to manage difficult conflicts. Neutrality . . . [can] disincline[] mediators . . . to sense and respond to the natural feel of conflict and to over rely on structured protocols and formulaic practice approaches.”84

Brunet and his co-authors also suggest that the notion of mediator impartiality reflects American culture. In other cultures, parties expect mediator activism and involvement.

For example[,] in both the Navajo Peacemaker Court and the Filipino Katarungang Pambbarangay system . . . the mediators have confidence in their own knowledge of the community values which all participants are assumed to share. Two aspects of these mediations mark them especially: (1) the mediators openly inject concerns larger than the participants themselves; for example, community harmony and even spiritual guidance which they understand the parties share; and (2) the mediators are rarely ever strangers or unknown volunteers or professionals even though they are not to be biased towards one side or the other.85

Cloke also finds neutrality in conflict resolution problematic. He says:

Neutral language is bland, consistent, predictable, and homogeneous; it is used to control what cannot be controlled. When confronted with something unique, or with paradox, contradiction, or enigma, a stance of neutrality makes us incapable even of observing without denying or destroying the very thing being observed, which is often a conflict that is riddled with paradoxes, contradictions, and enigmas.86

82. Hinshaw, supra note 29, at 281.
83. Id.
86. Cloke, supra note 63, at 13.
Finally, Gunning worries that “[t]he American model of mediation emphasizes ‘neutrality’ in a mediator and generally defines neutrality as requiring non-intervention on the part of the mediator.”87 But when parties come to mediation with imbalances of power reflecting broader issues of racism or other societal power imbalances, the mediator’s silence, rather than indicating neutrality, reinforces the more powerful person’s interpretative framework.88 Grillo expressed similar concerns about sexism’s power in mediation when the mediator reinforces gender-based stereotypes, power imbalances, and outcomes, while seeming to act with impartiality.89

Menkel-Meadow has summed up these various thoughts about mediator impartiality by asking whether a mediator “should be totally ‘neutral’ or merely ‘unbiased’ or actually ‘enmeshed’ in and knowledgeable about the dispute or disputants.”90

As discussed below, participants in the VMN workshop reflected this range of opinions about the role and value of mediator impartiality.

B. Buzz Group Discussion of Procedural Justice in Mediation

In an attempt to get workshop participants to begin the processing (second) stage of learning,91 I ask them to consider why we should concern ourselves with mediator impartiality. I ask if mediator impartiality is a nice theoretical value or if it actually affects the experience of parties in mediation. In the VMN workshop, I next give a short lecture about the research on procedural justice.92 That research shows that parties look for four essential elements in any dispute resolution process—whether in court,

88. Id. at 80–81.
90. Carrie Menkel-Meadow, From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context, 54 J. LEGAL EDUC. 7, 24 (2004) [hereinafter Menkel-Meadow, From Legal Disputes].
91. Learning theory suggests that students must complete four stages of learning: (1) absorbing information, (2) processing information, (3) retaining and recalling information, and (4) transferring the information to a new situation and solving problems. See Young, Teaching Professional Ethics, supra note 2, at 144 n.78.
92. Thus, I am giving a new concept to participants to absorb. For a summary of the robust research on procedural justice, see Robert J. MacCoun, Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness, 1 ANN. REV. L. & SOC. SCI. 171 (2005).
in arbitration, or in mediation. First, parties need to feel that they have sufficient time and opportunity to tell their stories about the dispute, voice their concerns, and offer evidence in support of their views. They also need to have some control over the presentation of this information. The literature has called this component of procedural justice “voice.” Second, parties need to feel that the third-party—whether a judge, an arbitrator, or a mediator—has considered those stories, concerns, and the evidence. Third, disputing parties need to feel that the third-party neutral has treated the parties even-handedly. Finally, parties must feel that the third-party neutral treated them with respect and dignity.

No research explains why parties look for these elements of procedural fairness. Three hypotheses—the “social exchange” hypothesis, the “group values” hypothesis, and the “fairness heuristic” hypothesis—may explain the importance of procedural justice. The first hypothesis suggests that procedural justice, especially adequate voice, serves the disputants’ goals of
reaching favorable outcomes by enhancing the likelihood of getting a favorable outcome.\textsuperscript{101} The second hypothesis posits that procedural justice gives disputants the message that they are valuable members of society.\textsuperscript{102} It conveys to them messages about their status in society, which, in turn, bolsters their self-esteem and self-respect. Procedural justice may demonstrate to disputants that courts “recognize their own role as that of ‘public servants and [recognize] . . . . the role of citizens as clients who have a legitimate right to certain services.”\textsuperscript{103} The last hypothesis asserts that people fear being exploited by authoritative decision-makers.\textsuperscript{104} Their positive evaluations of procedural justice provide a mental shortcut reassuring them that they have not been exploited.

The research also shows that procedural justice affects parties’ perceptions about the justice of the substantive outcome.\textsuperscript{105} It also affects their compliance with those outcomes. And, it affects their perceptions of the legitimacy of the authorities producing those outcomes.\textsuperscript{106} Welsh explains:

If disputants perceive that the third party is treating them and their dispute in a procedurally just manner, then it becomes somewhat easier to trust that the third party’s decision will be based on all relevant information and that the third party will attempt to make a substantively just decision.\textsuperscript{107}

I pause here to ask the workshop participants to discuss in buzz groups\textsuperscript{108} the following question that appears on a Power Point slide: “Why should we worry about procedural justice in the context of mediation?” I explain that at the end of the five minutes I have allotted for this discussion, one person in the buzz group will report the comments of the group.\textsuperscript{109} This instruction allows one buzz group member to take notes of the conversation. Using buzz groups, even in a workshop involving over 100 people, changes the pace, energy, and focus of the learning process. Buzz groups allow the

\begin{thebibliography}{99}
\bibitem{101} See \textit{id.} at 821–23.
\bibitem{102} \textit{Id.} at 823–26.
\bibitem{103} \textit{Id.} at 824; Deborah R. Hensler, \textit{Suppose It’s Not True: Challenging Mediation Ideology}, 2002 J. DISP. RESOL. 81, 93 (“According ‘due process’ to individuals is equivalent to recognizing their status as members in good standing in their social group . . . .”).
\bibitem{104} Hensler, \textit{supra} note 103, at 93.
\bibitem{105} Welsh, \textit{Making Deals, supra} note 93, at 791–92 (“Ultimately, insuring that mediation comes within a procedural justice paradigm serves some of the courts’ most important goals—delivering justice, delivering resolution, and fostering respect for the important public institution of the judiciary.”).
\bibitem{106} \textit{Id.} at 818.
\bibitem{107} \textit{Id.} at 830.
\bibitem{108} For a discussion of the use of buzz groups, see \textit{BEST PRACTICES, supra} note 18, at 132. I usually ask trainees to work in buzz groups of three or four people.
\bibitem{109} This time allocation assumes I am conducting a two-hour workshop.

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learners to share their own expertise and experiences. It shifts the focus from the “sage on the stage” to the learners themselves, with the instructor playing the role of “guide on the side.”

Moreover, buzz groups generate discussion without much effort on my part. Participants have already had the chance to test their ideas within a small group of colleagues. More fearful, shy, or introverted participants may feel more comfortable contributing to the discussion in these small groups, especially if they know that a more extroverted member of the group will report the comments or ideas of the group members to the workshop participants. Finally, in these buzz groups, participants engage in the second step of learning: processing.

I give warning signals to the participants to let them know when two minutes remain in the discussion period, when one minute remains, and when time has elapsed. These warnings allow all members in the buzz group an opportunity to make comments before the discussion time has elapsed. I then ask for each buzz group to give me two comments. By limiting the scope of the report from each buzz group, I typically can allow every buzz group to make a contribution to the discussion. In some circumstances, by the time I get to the buzz groups on the opposite side of the room from where I began to solicit the comments, earlier buzz groups have captured and reported all the ideas or comments. For that reason, the next time I ask for a buzz group report, I will start on the opposite side of the room and alternate reporting sides for the remaining time in the workshop. In that way, no buzz group feels consistently left out. After hearing from all the buzz groups, I will open the floor to any remaining comments or ideas. Sometimes, depending on the goal of the segment of the workshop, I will record the ideas on a flip chart or overhead. Other times, I will simply repeat or paraphrase them to ensure that all workshop participants can hear the comment or idea. If I am tied to a microphone, I will try to make sure the buzz group reporter speaks into it.

At the end of this discussion of procedural justice, I note that even when the neutral, like a mediator, has no (or should have no) control over the

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111. I add this parenthetical because unskilled or arguably unethical mediators do exercise control over the outcome in mediation. Lela P. Love & John W. Cooley, The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary, 21 OHIO ST. J. ON DISP. RESOL. 45, 58, 66–71 (2005) (describing the dangers to the core values of mediation from mediator evaluations and suggesting precautions mediators should take when shifting to an evaluative role;
substantive outcome of the process, parties still want the mediator to show “consideration” and to treat the parties even-handedly.

C. Short Lecture on Research About Party Grievances Filed Against Mediators

To reinforce the lessons of this section of the presentation, I share some of the findings of my empirical research about grievances filed against mediators in five states.112 At this stage in the workshop, I have looped back. I am asking students to again absorb (first-stage learning) some additional information. My 2005 empirical research revealed that of the three types of mediator conduct that most frequently trigger grievances against mediators from unhappy participants in the mediation process, conduct which makes a party believe that the mediator has lost his or her impartiality leads as a reason for the complaints. It is the most frequently cited reason for filing a complaint in Virginia and Maine.113 It appears as the second most frequently raised allegation in Florida, Georgia, and Minnesota.114 Clearly, problems with mediator impartiality can affect the quality of the process for some participants.

mediator should engage in evaluation of legal issues only after: (1) giving an early and clear warning of the risks of evaluative interventions; (2) providing the basis and context for the evaluation; (3) urging the parties to get independent legal advice; and (4) going to the library to do adequate research). See also L. Randolph Lowry, To Evaluate or Not: That Is Not the Question!, 38 FAM. & CONCILIATIONCTS. REV. 48, 48–50, 55–58 (2000) (proposing that all mediators employ evaluative techniques and should understand when and how to use them rather than avoiding their use); James H. Stark, The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator, 38 S. TEX. L. REV. 769, 774 (1997) (suggesting evaluation happens along a continuum of interventions); Joseph B. Stulberg, Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock, 24 FLA. ST. L. REV. 985, 989 (1997) (suggesting a mediator should be able to move quickly between the orientations to engage the parties in constructive conversation); Samuel J. Imperati, Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation, 33 WILLAMETTE L. REV. 703, 709–12 (1997) (discussing how mediators shift between facilitative interventions and other interventions identified with other models of mediation and advocating the use of the different approaches, including evaluative interventions, as long as the parties are informed of the role the mediator plays in a particular session).

112. Young, Take It or Leave It, supra note 13, at 748–76 (appendices to the article provide data for two more states that came to light after I had submitted the article for publication). I have also learned that Tennessee has implemented a mediator grievance system. See, e.g., Tenn. Office of the Court, Tenn. Alternative Disp. Resol. Comm’n’s Formal Grievance Decisions, http://www.tsc.state.tn.us/GENINFO/programs/ADR/adrdir.asp (last visited Jan. 30, 2009).

113. Young, Take It or Leave It, supra note 13, at 774-75.
114. Id.

Interference with a party’s self-determination, by offering legal advice, by giving legal opinions, by recommending settlement, or by engaging in more overt acts of coercion
D. Short Lecture on Some Attributes of Mediator Bias

1. Introduction

The next part of the workshop allows participants to consider the elements of mediator impartiality beginning, as if at the top of a wide-mouth funnel, with its more general attributes and moving to more specific attributes of the concept. This part of the workshop also lets participants gain greater understanding of my explanations, review examples of mediator partiality or bias, and make comparisons between different aspects of mediator partiality or bias by using “Another Grid for the Perplexed.”

I begin with a short lecture on the general nature of mediator partiality or bias. It can be actual, potential, or in appearance only. Next, I identify the possible sources of bias: (1) a mediator’s relationships with the parties or their lawyers; (2) a mediator’s reaction to conduct or attributes of the parties or their lawyers; (3) the relationship the mediator may have to the substantive outcome in the dispute; and (4) conduct of the mediator that indicates bias in favor of a particular outcome. As part of this lecture, I show an uncompleted “Another Grid for the Perplexed” containing four quadrants that correspond to the sources of conflict I have just identified. A copy of the completed grid appears in Appendix A of this article.

formed the most frequent allegation [lodged against mediators] in Florida and Georgia and the second most frequent allegation in Virginia. Poor quality of the process or an ineffective mediator style formed the most frequent allegation in Minnesota, the second most frequent allegation in Maine, and the third most frequent allegation in Virginia. Surprisingly, breaches of confidentiality got traction only in Minnesota as a basis for a complaint. These complaints arise apparently because some parenting consultants misunderstand how much confidential information they may reveal to the appointing court.

Id. Descriptions of the complaints filed against mediators in seven states appear at Appendices C to I of my article.

115. Jacobson would call this a “top-down” sequencing approach to organizing information. See Jacobson, supra note 28, at 162 (processing “information best if they have the general concepts first as an anchor to the facts that come later”).

116. I have borrowed the name of the grid from Leonard Riskin, although I acknowledge that this is “another” grid for the perplexed. See Leonard L. Riskin, Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 HARV. NEGOT. L. REV. 7, 17–38 (1996).

117. For other examples of the use of uncompleted or partially completed matrices or outlines, see Kevin C. McMunigal, Diagramming Crimes, THE LAW TEACHER, Fall 2004, at 1, available at http://lawteaching.org/lawteacher/2004fall/lawteacher2004fall.pdf; Charles B. Sheppard, The
I borrowed the idea for the grid, an amazingly useful analytical tool, from Firestone, a Florida mediator, who spoke about mediator impartiality and neutrality at the October 2003 conference of the ACR. He suggested that the mediation field think about these issues along two dimensions that create four quadrants on a grid. On one side of the grid are the terms “parties” and “outcome.” On the other side of the grid are the terms “relationship” and “conduct.” The resulting four quadrants are the following: “relationship-parties,” “conduct-parties,” “relationship-outcome,” and “conduct-outcome.”

2. Unnecessary Distinction Between “Neutrality” and “Impartiality”

In his conference presentation, Firestone made a distinction between mediator impartiality and neutrality. His use of the two terms may reflect the distinction made in the Model Standards of Practice for Family and Divorce Mediation. These standards define “impartiality” as “freedom from favoritism or bias in word, action[,] or appearance, and includes a commitment to assist all participants as opposed to any one individual.” These standards define “conflicts of interest” as “any relationship between the mediator, any participant[,] or the subject matter of the dispute, that

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118. Greg Firestone, Florida Mediator, Impartiality and Neutrality: Are These Concepts Still Relevant to the Practice of Mediation at ACR Third Annual Conference: The World of Conflict Resolution: A Mosaic of Possibilities (Oct. 15-18, 2003), [hereinafter Firestone Conference Presentation] (audio tape on file with author). The discussion in this article builds on and modifies the approach to the grid taken by Firestone. I continue to revise it. A copy of the completed grid appears as Appendix A to this article.


120. See infra Appendix A.

121. Firestone Conference Presentation, supra note 118.

122. Id.

123. See MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION Standard IV.A. (2000). This definition of “impartiality” suggests a Quadrant 2, 3, or 4 bias, as discussed infra Part IV.E.2-4.
compromises or appears to compromise the mediator’s impartiality.” Kovach explains:

According to the standards, impartiality refers to the specific conduct of the mediator with regard to the participants. This means that the mediator will not act with favoritism or bias toward either party. On the other hand, neutrality is used to describe the nature of the relationship between the mediator and the parties, particularly the mediator’s freedom from prejudice in conducting the process. Essentially, neutrality demands that the mediator withdraw if she is unable to remain neutral throughout the process.

Several other authors also recognize a distinction in the terms, but their use of the terms is not consistent. Moore, for instance, states: “Impartiality refers to the absence of bias or preference in favor of one or more negotiators, their interests, or the specific solutions that they are advocating.” Neutrality, on the other hand, refers to the relationship or behavior between intervenor and disputants.” Nolan-Haley also seeks to preserve the distinction in the use of the terms. She says: “[S]cholars use the term impartiality interchangeably with neutrality, and this confluence has caused considerable confusion in practice. Impartiality implies an absence of bias or favoritism. Strictly speaking, a neutral mediator has no power over the parties and no personal stake in the outcome.” Folberg, Milne, and Salem also recognize a distinction in the terms, saying: “Neutrality can be seen as impartiality on the part of the mediator towards both parties.

124. See Model Standards of Practice for Family & Divorce Mediation Standard IV.B. (2000) (emphasis added). This definition suggests a Quadrant 1 or 3 bias, as discussed infra Parts IV.E.1, IV.E.3.
125. With its focus on conduct, this definition of “impartiality” suggests a Quadrant 2 or 4 bias, as discussed infra Parts IV.E.2, IV.E.4.
126. With its focus on the relationship with the participants, this definition of “neutrality” suggests a Quadrant 1 bias, as discussed infra Part IV.E.1.
127. Kovach, supra note 41, at 152.
128. This definition of “impartiality” suggests a Quadrant 1, 2, or 3 bias, as discussed infra Part IV.E.1-3.
129. Moore, supra note 60, at 52 (emphasis added). This definition suggests a Quadrant 1, 2, 3, or 4 bias, as discussed infra Part IV.E.1-4. See also Rachael Field, Neutrality and Power: Myths and Reality, ADR Bulletin, May/June 2000, at 16, available at http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1089&context=adr (using “neutrality” to describe the “mediator’s sense of disinterest in the outcome of the dispute” and using “impartiality” as referring to “an even-handedness, objectivity[,] and fairness towards the parties during the mediation process”).
130. This definition of “impartiality” suggests a Quadrant 1, 2, or 3 bias, as discussed infra Part IV.E.1-3.
131. Nolan-Haley et al., supra note 42, at 306 (emphasis added). This definition of “neutrality” suggests a Quadrant 3 or 4 bias, as discussed infra Part IV.E.3-4.
Under this definition, there should be an absence of mediator bias, such that his or her attitudes and values do not impinge on the mediation process or settlement agreement.”

Other authors, including myself, consider the terms interchangeable. In fact, the terms are not consistently defined and do not consistently tie to the “grid” discussed below. Practitioners, trainers, authors, and scholars also reflect the distinctions made in many ethics codes between conflicts of interest and impartiality, further confusing the discussion. Going further, one scholar suggests that talking about mediator impartiality in the frame of “conflicts of interest” imports some values and concerns expressed in the lawyer ethics codes that are not relevant to mediation practice. No matter how an ethics code defines these terms, trainers can use “Another Grid for the Perplexed” without adhering to any distinction in the definitions of “impartiality” or “neutrality.”

132. Beck et al., Research on the Impact of Family Mediation, supra note 51, at 471 (showing how the use of the terms can shift between actions towards the parties and attitudes about the outcome and be used in the same sentence to define each other).

133. See Kovach, supra note 41, at 151–52 (“both [terms] describe basic principles of the mediation process”).

134. Laura J. Cooper et al., ADR in the Workplace 745–55 (2d ed. 2005) (“[T]he same phrase used in ethics for attorneys where it has a different meaning and a well-developed body of law [causes] some [to] jump[] to the erroneous conclusion that a mediator has a conflict of interest because she formerly was a partner of one of the attorneys in the mediation, or she formerly represented one of the parties in the mediation. Neither of these relationships constitutes a conflict of interest for a mediator, but they should be disclosed.”). See also Leonard L. Riskin, Toward New Standards for the Neutral Lawyer in Mediation, 26 Ariz. L. Rev. 329 (1984) [hereinafter Riskin, Toward New Standards]. Riskin correctly noted that:

The traditional approach [to lawyer ethics] . . . saddles the lawyer with the burdens of the notion of representation. The idea of undivided loyalty to an individual client is inconsistent with a neutral posture toward all the parties. The vision of a lawyer working for the self-conceived interests of a client, usually in opposition to the interests of others, contrasts starkly with the actual and appropriate orientation of a lawyer who acts as mediator or impartial advisory attorney. Second, because the traditional approach is informed by such a limited notion of what lawyers do, it is of no help whatever in encouraging or guiding neutral lawyers who do not have a lawyer-client relationship with the parties.

Id. at 342. Since Riskin wrote this article, state bar associations have revised the rules governing lawyer mediators. See, e.g., Va. Rules of Prof’l. Conduct R. 2.10 (2004). See also Model Rules of Prof’l. Conduct R. 2.4(b) (2008) (discussing the role of lawyers serving as third-party neutrals).
E. Use of “Another Grid for the Perplexed”

1. Quadrant 1: Mediator Bias Based on Relationships with the Parties or Their Lawyers

As the last section indicates, ethics codes often deal with the mediator’s impartiality towards the parties in provisions governing conflicts of interest. Alfini and his co-authors suggest that “[m]ost people will conclude that the mediator is impartial if the mediator does not know either of them and has no preconceived notion about the dispute.”\(^{135}\) Kovach further explains that:

[The danger is that one party may believe any previous dealings between the mediator and the other party may create a bias. The intensity, frequency, and duration of such prior relationships are factors which may impact such perceptions. Usually, the longer the relationship has lasted or the closer in time to the present mediation, the more difficult the problem becomes.\(^ {136}\)

Similarly, Schepard explains the risks of prior relationships with the parties:

While an experienced mediator may be able to separate prior professional services rendered from those now offered in mediation, the possibility of parties’ misperception is just as important as the reality of the mediator’s ability to function effectively, despite serving in a previous role. A mediator’s prior relationship with a participant may haunt the mediation process, if another participant perceives that the mediator is not acting in an impartial fashion due to information gleaned from the prior relationship. For example, a lawyer who has drafted a will for one or both of the participants may have had access to financial information that one participant believes may prejudice the mediator’s views about property division resulting from divorce.\(^ {137}\)

I suggest that parties also consider the nature of the mediator’s relationship. For example, serving on the board of trustees of the local Baptist church with one of the parties raises different concerns than a relationship limited to chit-chat at the coffee hour after the religious service.

Ethics codes do not bar mediators from serving when the mediator has a prior relationship with one of the participants to the mediation.\(^ {138}\) They

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\(^{135}\) ALFINI ET AL., supra note 48, at 115. For a discussion of a mediator’s preconceptions about the dispute, see infra Part IV.E.3.

\(^{136}\) KOVACH, supra note 41, at 156–57.

\(^{137}\) Andrew Schepard, The Model Standards of Practice for Family and Divorce Mediation, in DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 527 (Jay Folberg et al. eds., 2004). Schepard serves as the Director of the Center for Children, Families, and the Law, and is a Professor of Law at Hofstra University School of Law.

\(^{138}\) Kovach describes this type of absolute prohibition as “extremely difficult as well as unfair. As a practical matter, these kinds of relationships assist with business development. Currently, most
instead require disclosure of any relationships to the parties.\textsuperscript{139} If the parties waive the conflict of interest, the mediator may serve. Mediators should err on the side of over-disclosure of conflicts of interest or potential conflicts of interest. Arguably, if the situation permits, they should check for conflicts with the same care imposed on lawyers by legal ethics rules.

Mediators must also avoid creating any conflicts of interest during the course of the mediation—for instance, by buying stock in the company owned by one of the parties. One neutral describes a situation in which he helped a thirty-two member task force to develop a rate-moderation plan for an electric utility.\textsuperscript{140} The facilitated meetings occurred in the region where the utility planned to increase rates.\textsuperscript{141} The facilitators flew in the same plane to the location with the Public Service Commission (PSC) staff.\textsuperscript{142} A consumer, based on this in-flight relationship that arose during the facilitation, accused the facilitator of bias in favor of the PSC.\textsuperscript{143}

Finally, mediators should avoid creating an appearance of impropriety by representing parties in the future in the same or similar matter.\textsuperscript{144} Alfini and his co-authors note that a “mediator’s potential to be an adversary in subsequent legal proceedings would . . . curtail the disputant’s willingness to confide during mediation.”\textsuperscript{145} I discuss this issue in greater detail in the next section.

\begin{footnotesize}
\begin{enumerate}
\item situations involving prior relationships are resolved or determined on a case-by-case basis. KOVACH, \textit{supra} note 41, at 157.
\item Craver suggests that a mediator must first “assess how well he/she knows the individual and if this relationship raises any concerns for the mediator regarding his/her ability to remain impartial.” Based on that assessment, and erring on the side of caution, the mediator can serve after disclosure and party waiver, or he or she can decline to serve. Charles Craver, \textit{Negotiating Ethics: How to be Deceptive Without Being Dishonest/How to be Assertive Without Being Offensive}, 38 S. TEX. L. REV. 713 (1997). \textit{See also} Sandra A. Sellers & Gina Viola Brown, \textit{Ethics and Online Dispute Resolution}, in \textit{DISPUTE RESOLUTION ETHICS} 247 (“Short of complete independence from merchants or funders, how can the impartiality of [ADR] providers and the process be ensured? The focus should be placed on disclosing existing relationships . . . ”); Phyllis M. Hix, \textit{Mediation, or Is It? Everything You Thought You Knew, but Maybe Didn’t}, 65 DEF. COUNS. J. 256, 265 (1998) (advising mediators to “DISCLOSE, DISCLOSE, DISCLOSE”) (capitalization in original). A model rule suggests that the parties’ waive the conflict of interest in writing. CPR-GEORGETOWN COMM’N ON ETHICS AND STANDARDS IN ADR, \textit{MODEL RULE FOR THE LAWYER AS THIRD-PARTY NEUTRAL R. 4.5.3, cmt. 3} (2002).
\item See \textit{Best Practices: A Participant Accuses You, supra} note 49, at 2 (describing Ric Richardson’s experience).
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item ALFINI ET AL., \textit{supra} note 48, at 206. This comment arises in the context of rules governing confidentiality of mediation communications. They further explain: “Court testimony by a mediator, no matter how carefully presented, will inevitably be characterized so as to favor one
\end{enumerate}
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In light of concerns about conflicts of interest, Firestone suggests that parties should consider the following situations, by example, when choosing a mediator. Has the mediator served as an arbitrator in a case in which one party received an unfavorable award? Has the mediator represented a party in a legal matter previously? Has she provided therapeutic counseling to one of the lawyers? Does she play golf with one of the lawyers? Do their children play on the same soccer team? Does the mediator get most of his or her business from one company or firm? Can she remain impartial to the party who is not the repeat player in the referral system and an ongoing source of livelihood?

a. Buzz Group Discussion of Conflicts of Interest

In the training workshop, I indicate that conflicts of interest can be past, present, or created in the future, but I do not reveal the discussion of the topic set out above. Instead, I ask the buzz groups to answer the following question appearing on a Power Point slide: “What types of past relationships could give rise to actual bias, potential bias, or the appearance of bias?” As noted above, I will elicit a couple of comments or examples from each buzz group.

b. Video Clip for the Visual Learners

After the buzz groups report their comments or examples, I show a short video clip from the library of the Hamline University Law School Mediator Case Law Project. The clip shows how a mediator’s interaction with a side or the other. This would destroy a mediator’s efficacy as an impartial broker.” Id. Thus, rules that limit the ability of the lawyer-mediator from representing either party in the same or similar matter may also reassure parties that they can be candid with the mediator because they need not fear that the lawyer-mediator will have an adversarial relationship to the party sometime in the future.

146. Firestone Conference Presentation, supra note 118.
147. MOORE, supra note 60, at 53.
148. VA. RULES OF PROF’L CONDUCT R. 2.10(c), (d), (f) (2004).
149. Schepard, supra note 137, at 527 (“[A] mediator who provided marriage counseling [for one of the parties] may be perceived by a participant as having information about the personality and behaviors of an individual that may color the mediator’s views about his or her participation in mediation.”).
150. Moore would call this a tie to the party’s “ongoing social network.” MOORE, supra note 60, at 52.
“repeat player” can affect the other party’s perception of the mediator’s impartiality.152 It typically draws an excited response from the audience. After the clip, I ask the participants to discuss why the film has caused the response they have experienced. Up to this point in the training session, I have made few attempts to meet the information absorption styles of “visual” learners.153

I follow this discussion with three more rounds of buzz group discussion that respond to the following questions: What types of current (mid-mediation) relationships could give rise to actual bias, potential bias, or the appearance of bias? What types of future relationships could give rise to actual bias, potential bias, or the appearance of bias? Why should we worry about future relationships a mediator might have with a party?154


152. Hamline University School of Law, supra note 151. Instructors should put these film clips on a DVD because downloading them off the Hamline website during a training session can waste precious time.


154. I hope this question will elicit concerns about the possible damage to the reputation of mediation that could arise when mediators seem to use their mediation practices as “feeders” for work in their professions of origin. Rule 4.5.3(d) of the Model Rule for the Lawyer as Third-Party Neutral prohibits lawyer-neutrals from entering into “any financial, business, professional, family[,] or social relationship or acquire[] any financial or personal interest that is likely to affect impartiality or that might reasonably create the appearance of partiality or bias, without disclosure and consent of all parties.” CPR-GEORGETOWN COMM’N ON ETHICS AND STANDARDS IN ADR.
c. Short Lecture on Future Relationships with Participants in the Mediation

In a two-hour workshop, I devote a few minutes to discussing four examples of ethics codes that regulate the future relationships of mediators with parties. I intend to help participants think about the boundaries of the limitations, especially in terms of the length of the disqualification, the scope of the disqualification, and the persons with whom the mediator may not establish future relationships. Thus, the Alabama code states a narrow substantive disqualification, but a broad time limitation on future relationships with “parties.”\(^{155}\) The ethics code provides: “A mediator must avoid the appearance of a conflict of interest both during and after the mediation. Without consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a substantially related matter.”\(^{156}\)

In Florida, the ethics code states a broad substantive limitation, but places no express temporal limitations on future relationships. The language also suggests that it applies to all future relationships, including those with participants or lawyers, as well as with the parties.\(^{157}\) Somewhat oddly, it bans the solicitation of future relationships, presumably during the mediation process, but it does not expressly ban the relationships themselves.\(^{158}\) This language may reflect a concern that the mid-mediation solicitation of future business could directly affect one party’s perception of the mediator’s impartiality. In contrast, a ban of future relationships themselves seems designed to protect the perceived integrity and reputation of the mediation process, the court-sponsored mediation program, or the referring judge. The Florida ethics codes provides: “During the mediation process, a mediator shall not solicit or otherwise attempt to procure future professional services.”\(^{159}\)


\(^{156}\) Id. (emphasis added).


\(^{158}\) Id. at R. 10.330(c).

\(^{159}\) Id. at R. 10.340(d) (emphasis added).
The Georgia ethics code delegates to the mediator the decision about the proper substantive and temporal scope of the disqualification. It provides:

Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with the parties... the mediator should consider factors such as elapsed time following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.\textsuperscript{160}

The Massachusetts ethics code provides yet another approach. It restricts any future relationships related to the subject of the mediation, but allows them after one year if they do not relate to the subject of the mediation.\textsuperscript{161} The code provides:

(bb) A neutral may not subsequently act on behalf of any party to the dispute resolution process, nor represent one such party against another, in any matter related to the subject of the dispute resolution process.

(cc) A neutral may not subsequently act on behalf of any party to the dispute resolution process... in any matter unrelated to the subject of the dispute resolution process for a period of one year, unless the parties to the process consent to such action or representation.\textsuperscript{162}

I spend time discussing this aspect of a mediator’s potential conflicts of interest because mediators may overlook the specific code requirements that apply to them, or they may not have had a prior opportunity to consider the public policy issues that arise from future relationships with participants in mediation.

d. Learning Specific Code Provisions Governing Conflicts of Interest

If the time allocated for the training session allows, the instructor could then tie this more general discussion of the bias created by relationships to the parties or lawyers to specific provisions of an aspirational or mandatory


\textsuperscript{162} \textit{Id. at} R. 9(c)(iv)(bb)-(cc) (emphasis added).
code of ethics that applies to mediators. Rather than lecture further on the topic, the instructor could teach this specific code-related material in several ways. As noted in my first article of this series, my law school students especially enjoy playing Mediation Ethics Jeopardy. The instructor might pay particular attention to the information absorption needs of tactile, kinesthetic, or visual learners in choosing other teaching methodologies. For purposes of illustrating applicable law or rules, an instructor can use the provisions of the 2005 Model Standards, which I have discussed in my article analyzing the revised Model Standards.

2. Quadrant 2: Mediator Bias Based on the Conduct or Attributes of the Parties or their Lawyers

   a. Party Conduct or Attributes that Can Trigger Mediator Bias

   Next, Firestone urges mediation parties to consider whether the mediator can maintain, through his or her conduct, neutrality towards the parties. Will the mediator become frustrated, disrespectful, or heavy-handed if he or she believes a party or client is uncooperative? Does the mediator hold any racial, socioeconomic, or cultural biases? Can he...
work with people who express racial bias? Does she think in traditional ways that may impose gender biases or reinforce gender-role expectations in the mediation? Does the mediator hold internalized homophobia? Does

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173. I have noticed that my students express some dismissive mannerisms when I discuss a small claims mediation between an unmarried Appalachian couple who no longer wanted to live together. The man lived on his monthly disability check, and the woman lived on her minimum wage fast-food job. The parties negotiated over pets, poorly working televisions, a microwave stand they had purchased at Wal-Mart, a collection of glass horses, and a concrete cast of a deer. I reminded the students that these items represented important possessions for the parties, either from a financial standpoint or from an emotional standpoint. See also Andre R. Imbrogno, Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?, 14 OHIO ST. J. ON DISP. RESOL. 855 (1999); Carrie Menkel-Meadow, Do the “Haves” Come out Ahead, supra note 172, at 20. One of the exercises at Appendix B shows how socioeconomic bias can affect a mediator’s impartiality or at least a party’s perception of it.

174. Winslade and Monk pay particular attention to the risk that mediators will bring their own cultural frames to the mediation process and express them in favor of a certain person or outcome. It makes more sense to see mediators as unlikely to be able to stand outside time and space and their own culturally and historically located values. As they respond to people’s stories, mediators are likely to select for emphasis some perspectives over others, or to attune themselves to some people more than to others.

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175. Feminist authors express concern about the treatment of women in the mediation process because of potential cultural biases that affect the mediator’s interactions with the parties or the types of outcomes the mediator can envision for the parties in light of these cultural values. For a sample of the different perspectives on the gender bias issue, see Grillo, supra note 89, passim; Becky H. Hernstein, Women and Mediation: A Chance to Speak and to Be Heard, 13 MEDIATION Q. 229 (1996); Mori Irvine, Mediation: Is it Appropriate for Sexual Harassment Grievances?, 9 OHIO ST. J. ON DISP. RESOL. 27 (1993); David Maxwell, Gender Differences in Mediation Style and Their Impact on Mediator Effectiveness, 9 MEDIATION Q. 353 (1992); Cheryl Regehr, The Use of Empowerment in Child Custody Mediation: A Feminist Critique, 11 MEDIATION Q. 361 (1994). But see Menkel-Meadow, From Legal Disputes, supra note 90, at 22-23 (cautioning “litigation romanticists” to measure alternatives to litigation against the fairness and power distributions seen in litigation).

176. Allan E. Barsky, Mediating Separation of Same-Sex Couples, in DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 351 (Jay Folberg et al. eds., 2004). This author cautions mediators who work with gay, lesbian, and transgendered parties by saying, “Mediators are obviously entitled to their own views of homosexuality, but in a professional role, they are ethically obliged to serve clients without judgment or prejudice and without imposing values or beliefs.” Id. He also notes the effect the mediator may have on the parties by disclosing his or her own sexual orientation: “[W]hereas some mediators favor self-disclosure about their sexual orientation, others decide that such disclosure violates the notion of a mediator as a neutral third-party.” Id. at 365. He also recommends that mediators should not assume that a potential
anger make the mediator uncomfortable in a way that he may cut off a party’s expression of it? Does crying make the mediator uncomfortable in a way that he may suppress the expression of sadness, fear, vulnerability, regret, and other emotions expressed in this way or other ways? Can she work with borderlines, narcissists, sociopaths, and other high conflict personalities without those parties pushing her buttons or manipulating her?

Mosten would add the following questions to this self-awareness inventory:

When people treat each other badly, can [the mediator] nevertheless work with them?
When people act stupidly or self-destructively, do[es] [the mediator] bleed for them or wash [his] hands of them? Are there particular ethnic groups, lifestyles, cultures,

mediation party is married or has children. Instead, during the intake process, the mediator should use inclusive language or open-ended questions. For instance, she might ask: “Who was living in the family home prior to separation?”

177. ROGER FISHER & DANIEL L. SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE (2005); DANIEL GOLEMAN, HEALING EMOTIONS: CONVERSATIONS WITH THE DALAI LAMA ON MINDFULNESS, EMOTIONS, AND HEALTH (2003); Clark Freshman et al., The Lawyer-Negotiator as Mood Scientists: What We Know and Don’t Know About How Mood Relates to Successful Negotiation, 2002 J. DISP. RESOL. 1 (reviewing a variety of studies and giving some advice for legal negotiators); Daniel L. Shapiro, Emotions in Negotiation: Peril or Promise?, 87 MARQUETTE L. REV. 737 (2004). See also Nina R. Meierding, Managing the Communication Process in Mediation, in DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 243 (Jay Folberg et al. eds., 2004) (noting that a mediator who reframes the parties’ words to reduce the emotional intensity expressed by them faces some risks. “An angry party may feel that the mediator is taking sides, dismissing the passion or anger behind the statement, or invalidating the seriousness of the situation. The new language may feel neutered rather than neutral!”) (emphasis in original).


179. Kovach suggests: “When confronting neutrality issues, often the mediator’s first hurdle is self-analysis.” KOVACH, supra note 41, at 158. Similarly, Mosten says:

Being neutral doesn’t mean liking every participant or being devoid of biases in favor or against certain people. Don’t worry; mediators aren’t saints. Every professional mediator I know has biases and develops nonneutral feelings toward parties. The key is to be able to recognize those feelings, acknowledge them, and work to make sure they do not pollute the process by favoring one party over the other.

genders, or other categories of people whom [the mediator] just don’t like or with whom [she has] trouble working?180

Greer, describing one of his early mediations, admits: “I took an instant disliking to the owner because he was manipulative, loud, and generally obnoxious. He was skilled in the use of high-pressure tactics, and he did not wait long to try to intimidate me.”181 Another example of bias based on the conduct of the parties appeared on “The Lighter Side” page of Dispute Resolution Magazine. The mediator explained that he was resigning as the mediator in the dispute because one party’s “outbursts are too stressful for a man of my age . . . . I am retiring effective today . . . to preserve my sanity. Every time Mr. [] tries to be ‘helpful’ or provide ‘useful’ information, Mr. [] goes apeshit . . . . I just can’t take it.”182

Kovach suggests that a mediator’s attempt to correct imbalances in negotiating power or skills (attributes or behavior of the party) implicates mediator impartiality, because “he becomes an advocate for the weaker less capable party . . . .”183 The inclination to intervene can also arise when “some parties are more verbose and willing to participate than others . . . . Neutral behavior may require that the mediator allows the parties adequate time to speak and express themselves during the process.”184 Other authors note that:

[s]ometimes it is quite difficult not to agree with one party (the wife who is being left or the employee who clearly got passed over for a well-deserved promotion), but allowing those feelings to interfere with neutrality while running the process is deadly. The parties see it and lose trust in the mediator’s ability to let them make their own decisions.185

Another author cautions mediators about their caucus processes. A party may perceive bias or favoritism if the mediator spends more time in

182. A Mediator’s Retiring Words, DISP. RESOL. MAG., Winter 2004, at 32. The editors specifically disclaim the authenticity of the transcript, but acknowledge it as a description of one hazard of the field.
183. KOVACH, supra note 41, at 152. A mediator’s efforts to create a “fair” agreement by interventions on behalf of a weaker party can also create a Quadrant 3 bias. See infra Part IV.E.3.
184. KOVACH, supra note 41, at 154.
The mediator should advise parties in advance that he or she may need to spend more time with one party to gather helpful information or to formulate a settlement proposal. The extra time should not be construed as favoritism towards one party or bias against the other party.

Relationships that relate to how the mediator will be paid can affect a mediator’s impartiality and conduct towards the parties. Does the mediator accept referral fees from lawyers who regularly use her in mediation, therefore consciously or unconsciously creating a bias in favor of the referring attorneys and their clients? Is one party paying the full cost of the mediation so that the mediator may show bias in favor of that party? Is the party a repeat player—in other words, someone who uses the mediator’s services on a regular basis? Can the mediator remain even-handed knowing that she may be dependent on one party for her next referral? Arguably, the fee paying, referral making, or repeat business attribute of a party could trigger mediator bias in favor of that party.

Finally, Honeyman notes the irony of personal bias. “An actual personal bias may remain unknown to all participants. The appearance of personal bias, however, may leave the mediator blissfully ignorant of any problem, while causing one party to act based on [his or her] perception that the mediator is biased against [him or her].”

187. Id.
188. Id.
189. Moore, supra note 60, at 52 (”Neutrality also means that the mediator does not expect to obtain benefits or special payments from one of the parties as compensation for favors in conducting the mediation.”). For a discussion of referral fees in the context of legal ethics, see Helen W. Gunnarsson, Fee Not-So-Simple: Referral Fee Dos and Don’ts, 93 Ill. Bar J. 236 (2005).
190. “This practice occurs routinely in such areas as the mediation of employment discrimination lawsuits, where the defendant employer pays the mediator’s fee, personal injury litigation, and the like.” ABA, ACR & AAA, Reporter’s Notes, § V(I), available at http://www.abanet.org/litigation/standards/docs/mscm_reporternotes.pdf [hereinafter Reporter’s Notes]. People commenting on the draft standards expressed concern that if the standards precluded these types of fee arrangements, some parties might have to forgo the benefits of mediation. Id.
191. Kovach characterizes the “repeat player” issue as a Quadrant 1 issue of future relationships with participants. Kovach, supra note 41, at 157.
192. These situations also raise questions about the mediator’s relationship to the outcome or fee. The next section of the article discusses this issue.
193. Honeyman, supra note 45, at 585.
This quadrant likely represents the largest category of mediator biases because each mediator in the field will hold a host of different biases triggered by a vast variety of participant conduct or attributes.

b. *Buzz Group Discussion of Party Conduct or Attributes that Can Trigger Mediator Bias*

In the workshop, I ask the buzz groups to consider the following questions: (1) “What kinds of conduct of a party or his or her lawyer might affect a mediator’s impartiality?” and (2) “What attributes of a party or his or her lawyer might affect a mediator’s impartiality?” These questions always generate some interesting answers. One participant disclosed that she had difficulty staying neutral towards parties who wanted to open the mediation session with a prayer. Another participant described a session in which one of the parties, a law enforcement officer, removed her holstered gun from her waist and placed it prominently in the center of the mediation table. Yet another participant explained her difficulty with parties who exhibited narcissistic behavior that reminded her of a former boss. Another participant described her difficulty in working with a party whose mannerisms reminded her of a brother she did not like. Another participant described the adverse reaction she had in a car accident case to the white plaintiff who used the word “them” in a joint session discussion involving an African-American defendant.

c. *Learning Specific Code Provisions Governing Freedom from Bias Based on the Behaviors or Attributes of Parties*

If time permits, the instructor can again tie the general discussion to specific provisions of an aspirational or mandatory code. For example, the 2005 Model Standards discuss these aspects of conduct neutrality in Standard II.\textsuperscript{194} I discuss the relevant provisions of the standards in a previous article.\textsuperscript{195}

\textsuperscript{194} Model Standards of Conduct for Mediators Standard II (2005).
\textsuperscript{195} Young, *Rejoice!*, supra note 30, at 213–14.
3. Quadrant 3: Mediator Bias Based on His or Her Relationship to the Outcome

a. Introduction to Topic

Up to this point, even novice mediators can generally understand the problems that arise when a mediator’s impartiality can be affected by the relationships he or she has with participants in the process or the conduct of the parties in that process. The next two quadrants of the grid—both of which focus on the outcome of the mediation—may be less accessible to mediators who have not yet had much practice experience. In other words, like law students, more inexperienced mediators may lack the professional “context” for fully processing (stage two learning) the ethics information.

Party self-determination is at the core of this quadrant of the grid, but it focuses on the mediator’s relationship with the outcome of the mediation.196 The literature on mediator impartiality tends to focus on this aspect of impartiality. In an ideal setting, a mediator will defer to the high-quality decision making of the parties to settle—or not—and on what terms.197 One author reminds us that the mediator should stay outside the conflict itself by “refusing to slip into the role of judge, adviser, or advocate.”198 Stulberg reminds us that the role of the mediator is not that of a philosopher-king who participates in the affairs of his citizenry.199 Gifford warns that “[i]f a mediator intrudes excessively into the substantive content of the negotiated agreement, she virtually becomes an adjudicator and not a mediator.”200 The resulting agreement will not likely serve the parties’ interests. In addition, the parties may resent the agreement because one or both of them may sense that the mediator imposed it on the parties.201 Another mediator says: “If you have substantive experience on the issue at hand, you may have to fight you[r] own tendencies to be partisan.”202

196. BRUNET ET AL., supra note 71, at 225 (“[O]ne can argue that in mediation all outcome-determining norms must be generated by the parties.”).
199. Stulberg, A Reply to Professor Susskind, supra note 50, at 114.
201. Id.
Two mediators also note:
Rose, a well-known California mediator, writes:

Clients brought a complex set of goals and objectives to the process. Instead of trying to
design the outcome, based on my formal law school training and professional legal
expertise, I had begun discovering both the necessity for and the value of ceding to
clients the responsibility for dealing with the content of their settlement. Without
consciously intending to do so, I had begun practicing the art of . . . working within a
“client-centered” process.203

Moore explains: “Mediators are advocates for a fair process and not for
a particular settlement.”204 In Stulberg’s description of the problem, a
mediator should not have a “substantive commitment to a particular outcome
or range of outcomes for a given dispute.”205 Haynes talked about the

Another potential trap occurs when the mediator has a background in a professional field
(e.g., medical, construction, real estate) and may feel that his or her background
knowledge would help to move things along. A mediator’s expertise in a relevant
content area should serve to make the mediator a more informed listener and aid in
formulating insightful questions, but not to add opinions or factual information . . . . This
type of input could negatively impact the parties’ perception of the mediator’s neutrality.

Lehman & Page, supra note 178, at 1.

203. Chip Rose, The Client-Centered Process: Common Ground for Mediators and
Collaborative Professionals, FAM. MEDIATION NEWS, Fall 2007, at 1, 5, available at
http://www.mediate.com/articles/rose6.cfm (“A process can be defined as client-centered when it is
of, about, and for the clients.”) (emphasis in original).

204. MOORE, supra note 60, at 52–53 (suggesting a mediator should not “indicate his personal
opinion or approval of the solution that [the parties] ultimately developed”).

205. Stulberg, Reply to Professor Susskind, supra note 50, at 115. In contrast, and unlike any
other set of UPL guidelines for mediators, the Virginia UPL guidelines allow mediators to give
parties a sense of the range of the verdicts juries had awarded in similar types of cases. See DEP’T OF
DISPUTE RESOLUTION SERVS., SUPREME COURT OF VA., GUIDELINES ON MEDIATION & THE
df [hereinafter VIRGINIA UPL GUIDELINES]. The mediator, however, must be sufficiently familiar
with the awards in a given type of case and in a particular location by virtue of his or her experience
or his or her familiarity with empirical evidence. Id. Also, the mediator should not make specific
outcome predictions in a case. The mediator may also provide a “range of possible outcomes.” Id.
As a matter of good practice, the mediator should advise parties that no two cases are identical. The
mediator should also take care that this type of intervention does not undermine party self-
determination or the mediator’s impartiality. Id. See generally Paula M. Young, A Connecticut
Mediator in a Kangaroo Court?: Successfully Communicating the “Authorized Practice of
Mediation” Paradigm to “Unauthorized Practice of Law” Disciplinary Bodies, 49 S. TEX. L. REV.
1047, 1203–29 (2008) [hereinafter Young, Kangaroo Court?] (describing mediator conduct that
could be deemed the practice of law).
concept in terms of asserting “power in controlling the process but deny[ing] power in relation to the content.” 206 Bernard and his co-authors simply say:

[W]e recommend a strictly neutral settlement strategy as an initial position. Deviating from this stance should be explicitly and deliberately chosen and justified. We are impressed with the difficulty of making such powerful value decisions for others. Should mediators attempt to do so, they should act openly and with the obligation to explain their judgment to the parties. 207

Winslade and Monk quote one author who expresses concern that “instrumental goal-directed thinking leads to a privileging of ‘substantive issues over relational and identity management aims.’” 208 They quote Folger and Bush as expressing the concern that a “settlement orientation” narrows “the range of subject matter that a mediation conversation can address.” 209 Moreover, the mediator can, through imposition of his or her views, change the frames of reference of the parties, thus potentially suppressing social justice issues, ignoring power imbalances, and allowing third-parties to covertly determine outcomes. 210

Honeyman takes a more nuanced approach to the topic by realizing that the urge to control the outcome of the mediation can arise as part of a mediator’s philosophy of practice or style. 211 A mediator can focus on an immediate settlement (problem-solving or evaluative orientation) or on the improvement of the relationship (transformative orientation). 212 Those orientations to the process can affect the outcome of the mediation. In addition, more evaluative mediators may exercise more control over the outcome by exercising more control over the information parties use to reach

208. WINSLADE & MONK, supra note 44, at 36.
209. Id. (quoting Folger & Bush).
210. Id. at 48 (quoting Folger & Bush).
211. See Honeyman, supra note 45, at 581–89.
a decision.\textsuperscript{213} In the context of this Quadrant 3 discussion, Honeyman identifies what he calls “situational bias” arising from an attorney-mediator’s concurrent adherence to a legal code of ethics.\textsuperscript{214} Thus, if the mediator realizes that a mutually acceptable settlement would be unlawful, he or she would thereafter have problems acting “whole-heartedly” in his or her role as mediator.\textsuperscript{215} In effect, the mediator would likely discourage the parties from taking this unlawful path for the sake of the “public-interest” and thereby exert control over the outcome of the mediation.\textsuperscript{216}

\begin{itemize}
\item \textsuperscript{213} Honeyman, supra note 45, at 584–85. See also BRUNET ET AL., supra note 71, at 254 ("Even providing information is not neutral and unproblematic."). Nonetheless, Virginia’s Standards of Ethics and Professional Responsibility for Certified Mediators (Standards of Ethics) provides:

1. The mediator shall encourage the participants to obtain independent expert information and/or advice when such information and/or advice is needed to reach an informed agreement or to protect the rights of a participant. 2. A mediator shall give information only in those areas where qualified by training or experience. 3. When providing information, the mediator shall do so in a manner that will neither affect the parties’ perception of the mediator’s impartiality, nor the parties’ self-determination.

\textsc{Standards of Ethics & Prof’l Responsibility for Certified Mediators § F (Judicial Council of Va. 2005)} (emphasis added). The Virginia Ethics Committee, on which I served, revised these standards. Virginia’s DRS office has not yet implemented the revisions. Nonetheless, provisions cited in this article may be different by the time of its publication.

I could do a training workshop focusing on these provisions of the ethics code. When could a mediator satisfy the requirements of the final condition? Virginia’s UPL Guidelines provide additional guidance to mediators. They suggest a mediator may (1) “provide legal resources and procedural information to disputants”; (2) make statements that declare the law on a given topic so long as the mediator is competent to do so by training or experience; (3) ask “reality-testing questions,” even if they “raise legal issues,” so long as they do not predict the specific resolution of a legal issue; (4) inform the parties about outcomes in a particular court or type of case based on personal observation or empirical research, so long as the mediator does not make a specific prediction in a specific case; and (5) inform the parties about the general enforceability of mediated agreements. VIRGINIA UPL GUIDELINES, supra note 205, ch. 2, § 4. Virginia’s DRS office takes a very liberal view of the scope of these activities as its examples indicate. Virginia mediators can provide parties with copies of relevant statutes or court cases, with reference information that will allow parties to do their own legal research, or with printed brochures. Virginia’s Dispute Resolution Services guidelines see these activities as supporting the parties’ abilities to make fully-informed decisions. \textit{Id.} Mediators may provide parties information about local court procedures for scheduling matters, required fees, or the steps parties must follow to have the “mediated agreement entered as a court order.” \textit{Id.} The guidelines recognize that for many parties in court-connected or community mediation programs, the mediator will be the principal source for this type of information. \textit{Id.} See generally Young, Kangaroo Court?, supra note 205, at 1203–40.

\item \textsuperscript{214} See Honeyman, supra note 45, at 586–87.

\item \textsuperscript{215} \textit{Id.}

\item \textsuperscript{216} \textit{Id.} at 586. See also ORDOVER & DONEFF, supra note 185, at 128 (“Mediators have an obligation to make sure [through reality testing questions and independent professional advice] that the agreements reached are not illegal or impossible to execute.”); KOVACH, supra note 41, at 156.
Very few authors have commented on the risks associated with a therapist-mediator who blurs professional roles. These therapists may mediate with a particular outcome in mind, specifically “the best interest of the child” as a matter of mediator philosophy. Barsky, a professor at the School of Social Work of Florida Atlantic University, provides the following example of this type of outcome bias in the family mediation context:

All of us have preconceptions and biases about the nature of family, what is “good” for separating couples and their children, and what types of parenting rights and responsibilities society “should” promote. As family mediators working with same-sex couples, it is imperative to be aware of our preconceptions and biases, ensuring that these do not inhibit our ability to practice in an impartial, respectful, and client-centered manner.

Donaghy cites a study of community mediators who “set aside their position of neutrality and act[ed] as advocates for the parties.” They coached tenants in landlord-tenant disputes to begin seeing their situation as one of disparate power and resources in comparison to the landlords. The community mediators encouraged the tenants to lobby for change in the landlord-tenant relationship. In doing so, they controlled the outcome of the mediation.

Schwarz, writing in the context of group facilitation, considers the issue from the perspective of the use of neutral questions, paraphrasing, and summarizing. He admits that a neutral is “not neutral about the content of a group’s discussion when it involves how to manage group or interpersonal
process more effectively.” 223 In managing this process, the author encourages neutrals to choose words that make a distinction between the roles of the facilitator and the group members; and avoid judgmental words that “contain some built-in evaluation, implying that the facilitator either approves or disapproves of . . . [an] idea.” 224 He further recommends that the facilitator decline assignments when he or she cannot be substantively neutral because he or she has strong feelings about the subject matter of the dispute. He explains that:

[T]here are two working criteria for judging neutrality: facilitators must believe that their personal views about the substance of the facilitation will not significantly affect the facilitation, and the client group must believe that [the] facilitator’s personal views about the substance of the facilitation will not significantly affect her facilitation. 225

Firestone suggests that parties should consider the following situations because they change a mediator’s relationship to the outcome of the mediation. 226 Does the mediator brag about a high settlement rate? 227 Does the court-connected program director refer cases to mediators with high settlement rates? 228 Should a party, therefore, be concerned that the mediator views the case as the next notch on his belt? Does the mediator have a vested interest in the outcome because his fee is based on a percentage of the agreed settlement? Does she unduly prolong the mediation

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224. Id. at 140.
225. Id. at 242.
226. Firestone Conference Presentation, supra note 118.
227. Beck et al., Research on the Impact of Family Mediation, supra note 51, at 472 (suggesting that mediators who achieve a settlement without focusing on underlying causes for the conflict may direct the conversation between the parties and “inadvertently lead them to push couples towards a particular result”; even a problem-solving approach that considers underlying causes of the conflict can cause the mediator to direct the parties “towards particular discussions that can lead to solutions”). Christopher Moore, however, suggests that “mediators, although neutral in relationship to the parties and generally impartial toward the substantive outcome, are directly involved in influencing disputants toward settlement.” CHRISTOPHER MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 327 (1986). Coben expresses concern that consumers may not be aware that mediators have this bias towards settlement or that the mediator will use a variety of tools to achieve settlement. “Such ‘control or play upon by artful, unfair, or insidious means so as to serve one’s purpose’ is the very definition of manipulation.” James R. Coben, Mediation’s Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception, 2 J. ALTERNATIVE DISP. RESOL. EMP. 4, 6 (2000). See also ORDOVER & DONEFF, supra note 185, at 125 (“Pushing the parties toward a settlement is just as much a showing of partiality—it is still taking sides; it just happens to be your side instead of one of the parties.”).
228. Persons commenting on the draft standards expressed concern that in court-connected programs, program administrators may steer cases to mediators known to have high settlement rates. Reporter’s Notes, supra note 190, § V(C). This practice may undermine a mediator’s ability to maintain an impartial relationship to the outcome.
Does he act in a way to ensure future referrals from the repeat player? Honeyman would characterize some of these concerns as aspects of “situational bias,” a term referring to the pressures a mediator may feel as a result of his or her source of appointment or arising from obligations to parties not immediately involved in the mediation. He describes the organizational pressures that the third parties who maintain rosters of mediators may exert on the mediator through repeated appointment as a mediator or in monitoring settlement rates. Even when the appointing organization does not consider settlement rates of mediators, mediators may still perceive the need to be “successful.” A mediator described the pressure he felt in this situation: “If I failed to get an agreement my first time out, I was afraid the [Maryland] Commission [on Human Rights] might not have me back.”

Firestone also urges us to consider whether a mediator believes, for example, that all civil rights-related mediations must result in an agreement consistent with Title VII law. Can he mediate with impartiality as to the outcome in an air pollution case if his son suffers from severe asthma? Can she mediate with impartiality an abortion clinic real estate boundary dispute if she opposes abortion?

Time pressures also may lead mediators to seek the first possible agreement rather than the best possible agreement, especially if he or she “need[s] to show progress to the mediator’s appointing agency or peers . . . .” Mediation, therefore, can “favor a quick or easy way out instead of a real and enduring solution.” A rookie mediator described a failed mediation in which self-imposed time pressures affected his ability to

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229. Isolina Ricci, Court-Based Mandatory Mediation: Special Considerations, in DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 404 (Jay Folberg et al. eds., 2004) (“Couples unaware of the terms of the state or local mandate may not question attending regular mediation sessions for [six] or [eight] months, assuming that long-term negotiations are expected by the state mandate.”).

230. Honeyman, supra note 45, at 586.

231. Id. See also Best Practices: A Participant Accuses You, supra note 49, at 2 (describing how an electricity consumer accused a facilitator of bias because the consumer perceived the facilitator as “invested in ‘getting a settlement.’”).


233. Firestone Conference Presentation, supra note 118.

234. Honeyman, supra note 45, at 588. For a discussion of the use by a mediator of time constraints to pressure parties into a settlement, see infra notes 270, 278–98 and accompanying text.

235. Honeyman, supra note 45, at 587.
work with the parties. He admitted that he had taken time off from his day job and “was very conscious of the need to get back to the office in a reasonable amount of time.”

Perhaps the most difficult philosophical decision mediators face is whether they must intervene to ensure a fair outcome, especially when the mediator perceives that one party has little power or negotiating skill. In whatever way the mediator resolves this issue, it could affect his impartiality or the perception by one party of his partiality. Scholars have carefully debated whether a mediator must ensure a “fair” outcome. I only outline the contours of that debate in this article.

Mnookin identifies five elements defining a party’s power in the relationship: (1) the legal rules governing the issues in the divorce, including martial property distribution, child custody, and child and spousal support obligations; (2) the parties’ best alternatives to a negotiated agreement; (3) each party’s risk tolerance; (4) the parties ability to retain and use lawyers and other professionals in the divorce process; and (5) each party’s support for his or her positions and the extent to which they will manipulate the other party to gain advantage in the negotiation.


237. Id.


Honeyman, discussing “structural bias,” counter-intuitively suggests that the mediation process will tend to “benefit weaker parties over stronger ones, moderate factions over radical, and negotiators over principals.” The field recognizes that persons acting in “bad faith” can also use mediation as a tool to gain power and strategic advantage.

Some mediators assert that they can or should redress these sources of power imbalances. Nolan-Haley suggests that, in mediations in which the parties appear pro se, “fairness demands that these parties know their legal options before making final decisions in mediation.” Maute advises that a mediator should “refuse to finalize an agreement when one party takes undue advantage of the other, when the agreement is so unfair that it would

240. Honeyman, supra note 45, at 587–88 (“In the process of altering positions . . . the stronger party is thus led toward positions and proposals based on ‘defensible’ criteria . . . [thereby] los[ing] ground because she is led to compete more within the weaker party’s frame of reference.”).

241. Id. at 589.

242. For a discussion of this issue, see Field, supra note 129, at 16. See also BRUNET ET AL., supra note 71, at 200 (“Some would draw a line at content-neutrality, however, when the result would be unfair to one of the parties or have detrimental effects on individuals with interests that are not represented at the table.”).

243. Nolan-Haley, Informed Consent, supra note 238, at 837. Judith Maute goes even further, stating that: “When the parties are not independently represented, the lawyer-mediator represents them jointly in a limited capacity. When mediating a litigable dispute, the neutral lawyer is accountable to both the legal system and her clients . . . . Where the mediation substitutes for legal process, the neutral lawyer[-mediator] has a duty to protect the public value of fairness.” Maute, supra note 238, at 509. No ethics code imposes this duty on a mediator. They typically require much higher levels of unfairness before a mediator must take any action. The ethics codes typically require the mediator to withdraw without otherwise “policing” the fairness of the agreement. For example, Virginia’s Standards of Ethics states: “Under circumstances in which the mediator believes that manifest injustice would result if the [settlement] agreement was signed as drafted, the mediator shall withdraw from the mediation prior to the agreement being signed.” STANDARDS OF ETHICS & PROF’L RESPONSIBILITY FOR CERTIFIED MEDIATORS § J (Judicial Council of Va. 2005) (emphasis added). See also Fla. Mediator Ethics Advisory Comm., Op. 98-005 (Aug. 7, 1998), available at http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/1998%20Opinion%20005.pdf (mediator should not have signed a settlement agreement negotiated when he was partially absent from the session and which he suspected resulted from duress). Virginia’s Standards of Ethics further require the mediator to inform the parties if he or she decides that the integrity of the mediation process has been compromised by, for example: “(a) the inability or unwillingness of a party to participate meaningfully; (b) gross inequality of bargaining power or ability; or (c) gross unfairness resulting from non-disclosure or fraud by a participant.” STANDARDS OF ETHICS & PROF’L RESPONSIBILITY FOR CERTIFIED MEDIATORS § L (Judicial Council of Va. 2005) (emphasis added). After requiring the mediator to inform “the parties” (which suggests a duty to inform both parties), Section L then instructs the mediator to discontinue the mediation, but to adhere to any confidentiality requirements. Id. The ethics codes never require a mediator to give legal advice or otherwise act as a legal representative for one of the parties. See generally Young, Kangaroo Court?, supra note 205, at 1211–19 n.341.
be a miscarriage of justice, or when the mediator believes it would not receive court approval.²⁴⁴

A modified approach to mediator neutrality permits mediators to give unrepresented parties professional information.²⁴⁵ Most ethics codes only permit a mediator to provide information he or she is qualified to give by virtue of the mediator’s training or experience, and then only if the mediator can do so without looking partial to one party or undermining party self-determination.²⁴⁶ These ethical limitations arise out of a concern that

²⁴⁴. Maute, supra note 238, at 505–06.

The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

Id. Another standard defines party self-determination as “the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.” Id. at Standard I.A. However, the standards caution that “[a] mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.” Id. at Standard I.A.2.

The divorce model standards describe the mediator as “an impartial facilitator . . . [who] may not impose or force any settlement on the parties.” MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION Standard III.A.1 (2000). They also provide that a “mediator shall not provide therapy or legal advice.” Id. at Standard VI.B. However, a mediator “should facilitate full and accurate disclosure and the acquisition and development of information during mediation so that the participants can make informed decisions. This may be accomplished by encouraging the participants to consult appropriate experts.” Id. at Standard VI.A. Another standard allows the mediator to give “information that the mediator is qualified by training or experience to provide” so long as that act is consistent with standards governing self-determination and mediator impartiality. Id. at Standard VI.B.

The Florida Standards of Conduct provide:

(a) Providing Information. Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide.
(b) Independent Legal Advice. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent legal counsel.
(c) Personal or Professional Opinion. A mediator shall not offer a personal or professional opinion intended to coerce the parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving party self-determination however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A mediator shall not offer a personal or
professional opinion as to how the court in which the case has been filed will resolve the dispute.

FLA. RULES FOR CERTIFIED & COURT-APPOINTED MEDIATORS R. 10.370(a)–(c) (2000). The Committee Notes to this rule state:

The primary role of the mediator is to facilitate a process which will provide the parties an opportunity to resolve all or part of a dispute by agreement if they choose to do so. A mediator may assist in that endeavor by providing relevant information or helping the parties obtain such information from other sources . . . . While a mediator has no duty to specifically advise a party as to the legal ramifications or consequences of a proposed agreement, there is a duty for the mediator to advise the parties of the importance of understanding such matters and giving them the opportunity to seek such advice if they desire.

Id. at R. 10.370 committee’s note. The Florida rules make the mediator “responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of self-determination.” Id. at R. 10.310(a). The Committee Notes to this rule state:

On occasion, a mediator may be requested by the parties to serve as a decision-maker. If the mediator decides to serve in such a capacity, compliance with this request results in a change in the dispute resolution process impacting self-determination, impartiality, confidentiality, and other ethical standards. Before providing decision-making services, therefore, the mediator shall ensure that all parties understand and consent to those changes.

Id. at R. 10.310 committee’s note. See also Love & Cooley, supra note 111, at 58–59 (describing the dangers to the core values of mediation from mediator evaluations). Finally, the Florida rules provide that “[a] mediator shall respect the role of other professional disciplines in the mediation process and shall promote cooperation between mediators and other professionals.” FLA. RULES FOR CERTIFIED & COURT-APPOINTED MEDIATORS R. 10.670 (2000).

Virginia’s Standards of Ethics provide:

(1) The mediator shall encourage the participants to obtain independent expert information and/or advice when such information and/or advice is needed to reach an informed agreement or to protect the rights of a participant. (2) A mediator shall give information only in those areas where qualified by training or experience. (3) When providing information, the mediator shall do so in a manner that will neither affect the parties’ perception of the mediator’s impartiality, nor the parties’ self-determination.

STANDARDS OF ETHICS & PROF’L RESPONSIBILITY FOR CERTIFIED MEDIATORS § F (Judicial Council of Va. 2005) (emphasis added). See also VA. RULES OF PROF’L CONDUCT R. 2.10(b)(2), cmt. 3 (2008) (similar language). A Virginia Supreme Court rule, however, gives lawyer-mediators more flexibility in their roles:
offering advice or information can change the dynamic of the negotiations between the parties because it may favor one of the parties. It therefore presents the risk that it will undermine party self-determination or affect the parties’ perception of the mediator’s impartiality, implicating at least two of the core values of mediation.

One mediator recommends that the mediator avoid becoming an advocate for either side by providing information, advice, or other negotiating support: “The stronger party will likely see the mediator as biased and feel ganged up on by the mediator and the weaker party . . . . Neither should the mediator passionately aid both parties as, again, the weaker side would benefit more from such assistance.”

Bush expresses even more reservation about policing the fairness of the outcome or the balance of power between the parties. Those interventions intrude on the “decision-making autonomy and . . . self-determination . . . even if there is a nondisclosure [of pertinent information], [because] all parties know that this is a risk of negotiation.”

(c) A lawyer-mediator may offer legal information if all parties are present or separately to the parties if they consent . . . . (d) A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator’s impartiality or the self-determination of the parties.

Id. at R. 2.11(c)–(d) (emphasis added). Taken together, the Virginia Rules of Professional Conduct and the Virginia Standards of Ethics prevent a mediator from offering legal advice, but allow a mediator to provide information in specific contexts. They authorize a lawyer-mediator to provide legal information under certain conditions and to provide at least three types of case evaluation, subject to the constraints of maintaining impartiality and party self-determination. See id. at R. 2.11(c)–(d), cmt. 7. Compare Conn. Formal Ethics Op. 35 (1988) and Or. Formal Ethics Op. 488 (1983) (advising that a lawyer-mediator may give all parties in a divorce mediation information on legal rules and explain whether party proposals fall within reasonable legal tolerances) with Wis. Formal Ethics Op. E-79-2 (1980) (lawyer-mediator may not educate the parties as to their legal rights and responsibilities).

247. See Haynes, Mediation and Therapy, supra note 206, at 22–30. “When asking questions, the mediator does not give advice . . . . [The mediator should avoid the imperative] and accept the couple’s right to make the decisions—even if the decisions are not those the mediator would choose for them . . . . [T]he person issuing the imperative believes that his or her command is correct, factually or morally.” Id. at 26-28.


250. Id. at 36 (discussing the study of ethical dilemmas reported by mediators and creating nine conceptual categories for analyzing them). Gunning, on the other hand, believes the mediator’s
If the parties agree to an outcome that the mediator believes is unwise or against public policy, like a racially-discriminatory hiring policy at a unionized manufacturer, Stulberg suggests the mediator protect his or her neutrality by using what is now often called “reality testing” questions:

The mediator should press the parties to examine whether or not they believe that (1) they would be acting in compliance with the law or with principles they would be willing, as rational agents, to universalize; (2) their activities will be acceptable to their respective constituencies and not overturned by public authorities; and (3) in the short and long run, their proposed actions are not contrary to their own self-interest. If the parties . . . still find the proposed course of action acceptable . . . [the mediator] can withdraw.252

Noll, while recognizing the mediator is a moral agent in the mediation process, stops short of requiring the mediator to assure an outcome that meets any standard of fairness independent from the standard on which the parties agree.253 Mediators concerned about the fairness of the outcome can withdraw from the mediation at any time or question the parties about the standards of fairness they intend to apply to the agreement or proposal.254

Mediators may have some difficulty spotting Quadrant 3 sources of bias, largely because they may reflect the identity, style, goals, and values of the mediator. In attempting to regulate these types of biases, we ask mediators to commit to a very broad vision of party self-determination, including the right of parties to make dumb, ill-informed, selfish, and legally unsound decisions. It also asks mediators to accept that some parties will decide not to consult lawyers or other professionals in making binding decisions in the mediation process. It asks mediators to accept parties as competent adults capable of running their own lives with great wisdom, even if the outcomes do not reflect the mediator’s perspective or expected outcome.

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251. See supra note 216 about unlawful outcomes negotiated by the parties.
252. Stulberg, Reply to Professor Susskind, supra note 50, at 116.
254. Id.
b. *Buzz Group Examples of a Mediator’s Relationship to the Outcome*

At the VMN workshop, I did not disclose this discussion. Instead, I explored these issues by first providing an example: A disabled party files a claim under the Americans with Disabilities Act of 1990 (ADA)\(^\text{255}\) against a local store that sells DVD players.\(^\text{256}\) The disabled party explains in mediation that the store had no handicap access. The store owner explains that he has looked into the cost of having a wheelchair ramp installed. Given his current profit margin, he cannot afford its cost. However, he would be happy to settle by offering the other party the most expensive DVD in the shop in exchange for dismissal of the claim. The disabled party agrees. The mediator, however, believes—as a matter of law and as a matter of his own sense of social justice—that he cannot continue as the mediator unless the store owner agrees to install the ramp consistent with the requirements of the ADA. Or, he begins to guide the parties to an outcome that involves the construction of a ramp. Does the mediator have a bias towards a particular outcome?

I also quickly explain why most mediation ethics codes ban contingency fee agreements.\(^\text{257}\) Payment of the mediator based on a percentage of the final settlement amount may undermine a mediator’s desire to convey a settlement offer between parties in caucus that might yield a lower contingency fee for the mediator.\(^\text{258}\)

Following these examples, I ask the buzz groups to identify any other examples of situations in which a mediator’s relationship to the outcome can undermine his or her impartiality in dealing with the parties or the dispute.

c. *Learning Specific Code Provisions Governing Outcome-Oriented Interventions of the Mediator*

As noted above, if the workshop format permits, the instructor could tie this discussion to the specific provisions of an aspirational or mandatory code of ethics. For example, the 2005 Model Standards address these

\(^{255}\) 42 U.S.C. §§ 12101 *et seq.*

\(^{256}\) I did not create this example, but borrowed it from another instructor. I cannot, however, recall from which instructor.

\(^{257}\) These contingency fee bans typically appear under a separate section of the ethics code governing fees. Most mediators would not understand them as an issue of mediator impartiality.

aspects of impartiality in the standard dealing with party self-determination.\textsuperscript{259} This treatment shows how the fundamental values of party self-determination, mediator impartiality, and confidentiality often overlap or create tension between values. I have discussed the relevant provisions of the standards in a prior article.\textsuperscript{260}

4. Quadrant 4: Mediator Conduct Affecting the Substantive Outcome

I explain that the final quadrant of the grid represents conduct that also undermines both the mediator’s impartiality and party self-determination. The mediator’s conduct can undermine party self-determination intentionally or unintentionally. Conduct falling in this quadrant of the grid gets the most attention in the codes of conduct governing mediators.

a. Introduction to the Topic

Kovach reminds us that “if mediators become too influential over the outcome, the agreement may cease to be that of the parties.”\textsuperscript{261} Riskin and his co-authors state: “[T]he greater the mediator’s direct influence on the substantive outcome of the mediation, the greater the risk that one side will suffer as a result of mediator biases.”\textsuperscript{262} Mediator conduct that affects the outcome of the mediation may reflect a mediator’s belief that he knows more than the parties about the law, their dispute, the best outcome,\textsuperscript{263} or other factors. Accordingly, he plays a role in its substantive resolution. As Rose explains: “We do not find out [the parties’] inner needs and macro goals by becoming ‘talking-head’ experts. On the contrary, the limited usefulness of our attempts to provide answers must give way to the infinite potential of our ability to ask questions.”\textsuperscript{264}

Mediator conduct affecting the substantive outcome may also reflect a lack of mediation skill or an over-reliance on the skills the mediator has

\textsuperscript{259}.MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I (2005).
\textsuperscript{260}Young, Rejoice!, supra note 30, at 214–15.
\textsuperscript{261}Kimberlee K. Kovach, Mediation, in THE HANDBOOK OF DISPUTE RESOLUTION 311 (Michael L. Moffit & Robert C. Bordone eds., 2005) [hereinafter Kovach, Mediation].
\textsuperscript{262}RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS, supra note 46, at 402.
\textsuperscript{263}In this case, the bias or behavior could overlap with behavior identified in Quadrant 3 of the grid. See supra Part IV.E.3.
\textsuperscript{264}Rose, supra note 203, at 4.
developed in his or her profession of origin (typically as lawyers). For instance, does she fall back on her lawyerly problem-solving skills of giving legal advice because she lacks the skills to adopt a less directive approach? Does the mediator engage in interventions or processes

265. For a more in depth discussion of this problem, see Young, Kangaroo Court?, supra note 205, at 1177–84, 1211–29. See also Honeyman, supra note 45, at 581–82 (using a matrix of three criteria to examine mediator impartiality: skill differences; policies and philosophies; and biases).

266. Honeyman, supra note 45, at 583 ("An effective mediator will vigorously use . . . the skill set already possessed. Thus, it should be no surprise that mediators who possess the skills of evaluation find more moments to call upon those skills than mediators whose skill set is more rounded.")

While the mediation ethics codes may permit mediators to provide information under certain conditions designed to protect party self-determination, they do not, however, allow mediators to give legal advice to parties. Instead, mediators should advise parties of the opportunity to consult with experts, including lawyers. For example, the 2005 Model Standards require a mediator “where appropriate . . . [to] make the parties aware of the importance of consulting other professionals to help them make informed choices.” MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I.A.2 (2005).

The aspirational ethics standards for family mediators provide that “[a] family mediator should inform the participants that they may seek information and advice from a variety of sources during the mediation process.” MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION Standard I.C (2000). Another standard requires the mediator to inform the parties before the mediation begins “that they may obtain independent advice from attorneys, counsel, advocates, accountants, therapists or other professionals during the mediation process.” Id. at Standard III.A.4. It also requires the mediator to inform the parties:

that the presence or absence of other persons at a mediation, including attorneys, counselors or advocates, depends on the agreement of the participants and the mediator, unless a statute or regulation otherwise requires or the mediator believes that the presence of another person is required or may be beneficial because of a history of threat of violence or other serious coercive activity by a participant.

Id. at Standard III.A.7. Yet another standard provides: “The mediator should recommend that the participants obtain independent legal representation before concluding an agreement.” Id. at Standard VI.C.

The Florida rules require a mediator to refer parties to seek independent legal counsel “[w]hen a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations.” FLA. RULES FOR CERTIFIED & COURT-APPOINTED MEDIATORS R. 10.370(b) (2000). Another rule requires the mediator to “respect the role of other professional disciplines” and promote cooperation between professionals working with the parties. Id. at R. 10.670.

Virginia contemplates referrals to both lawyer and non-lawyer experts, such as accountants, financial planners, or child psychologists. Virginia’s Standards of Ethics provide: “The mediator shall encourage the participants to obtain independent expert information and/or advice when such information and/or advice is needed to reach an informed agreement or to protect the rights of a participant.” STANDARDS OF ETHICS & PROF’L RESPONSIBILITY FOR CERTIFIED MEDIATORS § F(1) (Judicial Council of Va. 2005). A Virginia statute defines mediator misconduct as including:
inconsistent with the definition of mediation? 267  Does she provide an expert judgment about the facts or what has happened? 268  Does he evaluate the merits of each party’s legal position, the likely outcome at trial, or predict what a particular judge might do in the dispute being mediated? 269  Does she

failure of the neutral to inform the parties in writing at the commencement of the mediation process that: (i) the neutral does not provide legal advice, (ii) any mediated agreement may affect the legal rights of the parties, (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.

V.A. CODE ANN. § 8.01-576.12 (West 2007). In Virginia, these required disclosures are known as the “four legals.”

267. For example, one aspirational code includes the following definition:

Family and divorce mediation . . . is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants’ voluntary agreement. The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions and reach their own agreements.

MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION Overview and Definitions (2000). According to a policy statement of ACR, mediators engage in “improper mediation practice” when they:

- hold themselves out as a legal representative of the parties;
- state that, by virtue of having a mediator, parties to a mediation do not need a lawyer;
- advise parties about their legal rights or responsibilities, or imply that a party can rely on the mediator to protect her or his legal rights;
- draft an agreement that goes beyond the terms specified by the parties;
- coerce a decision (explicitly or implicitly);
- interfere with or ignore the parties’ self-determination;
- fail to act with impartiality;
- apply legal precedent to the specific facts of the dispute; or
- offer any personal or professional opinion as to how the court (judge or jury) in which a case has been filed will resolve the dispute.


268. Dwight Golann & Jay Folberg, Mediation: The Roles of Advocate and Neutral 233 (2006) [hereinafter Golann & Folberg] (“Here[,] the neutral is assuming the role of advisory arbitrator in the case. This is the most dangerous form of evaluation, because the loser is likely to feel, with some justification, that the neutral has taken sides against him.”).

269. Id. Most ethics codes would not allow these types of mediator interventions. See supra notes 213, 246, 266. Riskin and his co-authors suggest: “The need for impartiality increases in direct proportion to the extent to which the mediator will evaluate. In other words, the greater the
give parties sufficient time and opportunity to consult with independent legal counsel or other professionals?270

Alfini and his co-authors suggest that the mediator is more likely tempted to interject legal rules into the mediation when it “is used in substantive areas that are more traditionally defined by the parties’ legal rights, particularly where such dispute has become a court case and has been referred to a lawyer-mediator.”271 Kovach makes a distinction between norm-generating, norm-educating, and norm-advocating roles on the part of the mediator, and identifies the last two roles as creating the greatest risks to mediator impartiality and party self-determination.272 Purnell says that giving legal advice is “inherently partial: the attorney’s goal is not to educate her client about the law but to marshal her knowledge to his service by formulating the best possible legal position she can given the facts of his particular situation.”273 Riskin and his co-authors suggest that “[t]he need for impartiality increases in direct proportion to the extent to which the mediator will evaluate.” 274

Other conduct by the mediator can imperil the mediator’s impartiality while undermining party self-determination. Does she generate options on

mediator’s direct influence on the substantive outcome of the mediation, the greater the risk that one side will suffer as a result of the mediator’s biases.” RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS, supra note 46, at 402. A Virginia Supreme Court rule, however, gives lawyer-mediators more flexibility in their roles as evaluators. See discussion of Rule 2.11(c)-(d) supra note 246. Golann and Folberg describe several criteria for judging when a mediator should offer an evaluation. GOLANN & FOLBERG, supra note 268, at 233. They describe the following type of evaluation as the “classic” type offered by mediators:

A mediator can offer a prediction of what will happen if a particular issue or the entire matter is adjudicated. Here the mediator is not saying how he personally would decide the issue, but rather is assessing how a judge, jury, or arbitrator in that jurisdiction, with all their quirks and foibles, is likely to respond. To put it another way, in this model the mediator is offering a “weather forecast” about the atmosphere in some future courtroom, but not advocating rain.

Id.

270. KOVACH, supra note 41, at 154–55 (“An additional aspect of neutral and fair process includes allowing each party to obtain the information necessary for informed decision making . . . . As a result, permitting the disputing parties to be accompanied by counsel or other representative is often considered an element of a fair and neutral process.”).

271. ALFINI ET AL., supra note 48, at 167.

272. Kovach, Mediation, supra note 261, at 312.


274. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS, supra note 46, at 264.
her own or provide an opinion about, or evaluation of, a proposed option? Does she truly respect party-self determination as a matter of mediation philosophy? Does she add terms to the settlement agreement on which the parties have not agreed? Does the mediator use coercion, intimidation, or other heavy-handed tactics to get the parties to reach an agreement?

b. Video Clip of Highly Directive Interventions by a Mediator

I start this next part of the workshop with a short video clip depicting the final caucus session in Vitakis-Valchine v. Valchine, a well-known case among instructors in which the mediator arguably used misrepresentation, legal evaluation, coercion, artificial time limits, and threats to force a party to settlement. This clip elicits a strong response from the audience, many of whom ask: “Did that really happen?!!”

In that case, a Florida court ordered mediation for a husband and wife who had been in divorce proceedings for two years after their twelve-year marriage dissolved. The mediation lasted seven to eight hours. Lawyers represented both parties in the mediation, and the wife’s brother also attended the session. The mediator put the parties into caucus almost immediately and kept them there for the remaining time of the mediation.

275. See Young, Kangaroo Court?, supra note 205, at 1122–29 (discussing the code provisions governing option generation or evaluation by the mediator).
276. Honeyman, supra note 45, at 584 (“There is no bright-line test to be had of whether a transformative, facilitative[,] or evaluative mediator is operating primarily on conviction or on [skill] capacity.”).
277. See Young, Take It or Leave It, supra note 13, at 748–84 (discussing grievances filed against mediators based on the use of coercion or other heavy-handed techniques). See also Randle v. Mid Gulf, Inc., 1996 WL 447954 (Tex. App. 1996) (reversing and remanding a trial court’s summary judgment enforcing a mediated settlement agreement when the mediator did not permit a party to leave the mediation session without signing the agreement even though the party complained of chest pains, had a history of heart disease, and had not taken his heart medications that day). John Haynes identified the “safeguard against the mediator’s misuse of power” as ensuring that any mediated agreement be acceptable to both parties before they sign or otherwise formalize it. Haynes, Mediation and Therapy, supra note 206, at 22–30.
279. Id. at 1096.
280. Id.
281. Id.
282. Id.
The couple had created several frozen embryos. The wife wanted to keep them. According to the wife’s later testimony, “the mediator told her that the embryos were not ‘lives in being’ and that the court would not require the husband to pay child support” for a child born from the embryos. He said: “The judge will never give you custody of embryos.” Several of these statements could be deemed legal advice, legal evaluation, or the prediction of what a specific judge would do in a specific case.

During the discussion about the wife’s right to the embryos, the mediator entered the wife’s caucus room, threw papers on the table and said: “That’s it; I give up.” In the presence of the wife, the mediator got a call and asked the caller to “have a bottle of wine and a glass of . . . strong drink ready for me.” The mediator then set a deadline by saying: “You guys have five minutes to hurry up and get out of here because [my] family is more important to me.” The mediator repeatedly said “that his daughter was leaving for law school” in the near future. These statements suggest the imposition of artificial time pressures.

According to the wife’s later testimony, the mediator also told the wife that she had no right to the husband’s federal pension money. He further stated that the pensions were only worth $200 per month and that it would cost the wife $70,000 to get a ruling on the pension distribution issue. During the mediation, the wife allegedly had no knowledge of the present value of the husband’s pensions or of the marital estate. A later review of the couple’s assets showed that the financial settlement short-changed the wife by $34,000, not including the pensions. The mediator’s statements could be deemed legal advice, legal evaluation, or possible factual misrepresentation. The wife’s lack of knowledge about the assets of the couple suggests she had to make decisions without informed consent.

Finally, the mediator tried to overcome the wife’s reluctance to settle by saying that she could contest the terms of the mediated agreement at the
hearing on the settlement. This statement indicates the mediator’s knowledge that the wife had not consented to the terms of the written agreement, and it may misrepresent applicable law about the binding effect of a signed mediated agreement.

The mediation resulted in a twenty-three page agreement dealing comprehensively with alimony, bank accounts, IRAs, and the husband’s pensions. It also indicated that the wife reluctantly agreed to allow the husband to dispose of the frozen embryos. Before the family court, she argued that she signed the agreement because she felt pressured, saw no alternative, and believed everything that the mediator said. Nonetheless, the court entered the mediated agreement as the final order of dissolution.

After the workshop participants view the video clip, I ask them to identify the conduct of the mediator that troubled them and to explain how that conduct affected both party self-determination and the mediator’s impartiality. I next ask the buzz groups to identify other examples that would fit in this quadrant of the grid. I highlight again for the participants the idea that Quadrant 4 represents an overlap between the core values of impartiality and party self-determination. This comment “closes the loop” of learning for this quadrant. After this discussion, I provide the participants with a copy of the completed grid that provides examples of the sources of bias we have discussed.

c. Learning Specific Code Provisions Governing the Use of Mediator Interventions that Undermine Party Self-Determination over the Outcome of the Process

As noted above, the instructor can tie this more general discussion to specific code sections if he or she has the time. For example, the 2005

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295. Id.
296. Id. at 1096.
297. Id.
298. Id. at 1097. Viewers of this video do not always remember that the wife had her lawyer and brother present during the mediation to advise and support her.
299. Id.
300. See Young, Teaching Professional Ethics, supra note 2, at 144-45 (summarizing that the instructor “closes the loop” by (1) giving students an experience, (2) reviewing the experience, (3) having students make conclusions from the experience, and (4) helping them plan the next steps in light of that experience).
301. See infra Appendix A.
Model Standards require the mediator to protect party self-determination as to mediator selection, process design, participation in or withdrawal from the process, as well as to outcome.\textsuperscript{302} I have discussed the relevant provisions and the related commentary in an earlier article.\textsuperscript{303}

V. **ASSESSING WHETHER THE WORKSHOP PARTICIPANTS HAVE LEARNED THE ETHICAL VALUES GOVERNING MEDIATOR IMPARTIALITY**

A. **Use of Grievances Filed Against Florida Mediators**

The last part of the workshop provides participants with the third and fourth steps in the learning process: retaining and recalling, and transferring the knowledge to a new situation and solving problems.\textsuperscript{304} In the workshop, I ask participants to review and analyze thirteen grievances filed with the Florida Mediator Qualifications Board (MQB) relating to mediator impartiality.\textsuperscript{305} This exercise allows participants to assess whether they understand, retain, and can recall the concepts I have presented. It also invites them to apply the concepts to a new fact pattern.\textsuperscript{306} An instructor can also assess student learning by grading the student’s analysis of the grievances.\textsuperscript{307}

To complete and de-brief these grievance exercises in the workshop requires about thirty to forty minutes depending on the number of buzz groups and the number of grievance exercises used.\textsuperscript{308} Alternatively, I will hand out the incomplete exercises, invite participants to complete them, and then provide—when they exit—a copy of my sample answers. As a parting “gift,” I also typically provide a copy of the law review article that explains how the provisions of the 2005 Model Standards address issues of mediator

\textsuperscript{302} Model Standards of Conduct for Mediators Standard I.A (2005). The new standards shift the focus of self-determination to process choices, as well as to outcome choices. Reporter’s Notes, supra note 190, § V(C).

\textsuperscript{303} Young, Rejoice!, supra note 30, at 216–20.

\textsuperscript{304} See Young, Teaching Professional Ethics, supra note 2, at 144-45.

\textsuperscript{305} For a discussion of the role of the MQB in Florida’s regulatory structure governing mediation in the state, see Young, Take It or Leave It, supra note 13, at 792–95, 804–12.

\textsuperscript{306} See Young, Teaching Professional Ethics, supra note 2, at 144-45.

\textsuperscript{307} See supra notes 24-25 and accompanying text for a discussion of assessing student learning.

\textsuperscript{308} For instance, an instructor could have several buzz groups work on the same grievance exercise, thereby using only three or four of the grievances. Thus, when they report their conclusions, remaining participants would hear the recitation of the facts once by the first reporting buzz group for that grievance, but could get additional insight about that grievance from several buzz groups.
Impartiality.309 This handout serves two purposes. First, verbal learners may prefer it.310 Second, I never have time to discuss specific code sections, even in a two-hour workshop.

1. Analyzing the Grievances

In the workshop, time permitting, I ask each buzz group to analyze—using “Another Grid for the Perplexed”—one of the MQB grievances. Each buzz group gets a copy of one of the thirteen grievance scenarios. I instruct the buzz group members to identify the source or sources of the alleged mediator bias. I also instruct the members to identify the procedural justice factors that seem missing or that the mediator allegedly compromised.

2. Background Information for Instructors About the Exercises

The Florida MQB is the umbrella organization primarily responsible, through committees or hearing panels formed from its membership, for responding to matters involving mediator qualifications, ethics, or moral character.311 It consists of fifty-one members drawn from the state’s judges, lawyers, and mediators in the three regions of Florida.312 Three divisions—located in north, central, and south Florida—make up the Florida MQB.313 Each division of the MQB consists of three circuit or county judges, three certified county mediators, three certified circuit mediators, three certified family mediators (at least two of which are non-lawyers), at least one, but not more than three, certified dependency mediators, and three attorneys licensed to practice in Florida who are not certified mediators.314 The chief

310. “Verbal” learners absorb information from reading and writing text. They tend to be “left-brained,” “serialistic” learners who process information in a linear, logical, step-by-step, efficient process. They see the whole picture later in the process and tend to work independently. Jacobson, supra note 28, at 151, 160–61.
311. See Young, Take It or Leave It, supra note 13, at 792-93. I thank the Ohio State Journal on Dispute Resolution for permission to reprint this discussion.
312. Id.
313. Id. at 792.
314. Fla. Rules for Certified & Court-Appointed Mediators R. 10.730(b) (2005). The three attorneys must have substantial trial practice. They cannot be certified as mediators or judicial officers during their terms on the board. At least one of the attorneys must have substantial experience in the dissolution of marriages. Id. at R. 10.730(b)(6). It has become increasingly difficult to find experienced trial or family law attorneys to serve on the MQB who are not also
justice of the Florida Supreme Court makes appointments to the unpaid MBQ positions for staggered four-year terms.\textsuperscript{315}

The Florida Dispute Resolution Center (DRC) uses the MBQ pool of volunteers to create complaint committees that handle the ethics grievances received by the DRC against mediators.\textsuperscript{316} Each complaint committee consists of three MBQ members: one judge or attorney (who acts as the chair and the due process watchdog); one mediator who is certified in the area to which the grievance refers; and one other certified mediator.\textsuperscript{317} A complaint committee ceases to exist after it disposes of the grievances assigned to it.\textsuperscript{318}

Complaint committees may refer grievances against mediators to a hearing panel composed of five MQB members: one circuit or county judge (who serves as the chair and the due process watchdog); three certified mediators, at least one of whom must be certified in the practice area in which the grievance arises; and one attorney.\textsuperscript{319} Like the complaint committees, the hearing panels cease to exist after disposing of all assigned cases.\textsuperscript{320} Persons cannot serve on both the complaint committee and the hearing panel in the same mediator grievance.\textsuperscript{321} The hearing panels provide an adjudicatory function and cannot conduct investigations of grievances.\textsuperscript{322}

In comparison to other states I researched, Florida provides to the public the greatest amount of information pertaining to the allegations and dispositions of grievances filed against its mediators. In contrast, the few other states with mediator grievance systems provide a very brief summary of the party’s complaints, little procedural history, and a very short description of the disposition.\textsuperscript{323}

Instructors should know that the grievance scenarios in Appendix B to this article do not include the disposition of the grievance by the MQB. I eliminated the summary of the disposition of the grievance after a workshop I conducted in Florida. The participants, rather than focusing on the application of the concepts we had discussed in the workshop, wanted to instead argue with the disposition of the case. Almost uniformly, they felt

certified mediators. Telephone Interview with Sharon Press, Director of Florida’s DRC, in Tallahassee, Fla. (Aug. 12, 2005).

316. Young, Take It or Leave It, supra note 13, at 794.
318. Id.
319. Id. at R. 10.730(f).
320. Id.
321. Id. at R. 10.820(a).
322. Id. at R. 10.740(c).
323. See Young, Take It or Leave It, supra note 13, at 933–36.
the MQB had acted too leniently in disciplining the mediator. These comments became distracting and time consuming.

Instructors should know, however, that most of the grievances filed against Florida mediators do not result in an imposed sanction of any type.\footnote{Id. at 910–32.} In many cases, the MQB dismisses the grievance as not stating a claim under the rules, as not supported by sufficient evidence, as stating only a technical violation of the rule, or as otherwise not warranting further action.\footnote{Id.}

I have also deleted references to specific Florida ethics rules because they proved confusing to participants when I used the grievances in other states like Virginia and Kentucky. In addition, the rule citations became dated as Florida continued to update and re-number the applicable rules. I have also re-written all of the scenarios for style and to eliminate allegations that did not potentially focus on mediator impartiality.

3. Working with the Grievance Exercises

As noted above, if time permits, I allow the buzz groups, as part of their report, to read the facts of their assigned grievance to the other workshop participants. I simultaneously project those facts on a Power Point slide. The group’s reporter will also explain how the members applied the concepts learned in the workshop. The instructor could then open the discussion to all participants.

Alternatively, instructors could have each buzz group role-play the scenario and then ask the remaining participants to analyze the situation using the grid and procedural justice framework. This approach would take substantially longer, but would provide more experiential learning, improve retention of the material learned in the workshop,\footnote{See Young, Teaching Professional Ethics, supra note 2, at 144-45. See also James E. Groccia & Miller, supra note 27, at 5 (noting that simulations and role-plays better ensure student retention of the materials covered).} and would appeal to visual,\footnote{See supra note 153.} aural,\footnote{See supra note 153.} oral,\footnote{See supra note 153.} kinesthetic,\footnote{See supra note 153.} and tactile\footnote{See supra note 153.} learners.
In closing, I remind workshop participants that parties may perceive partiality or bias even when the mediator’s conduct indicates it does not exist. At the same time, I suggest that unhappy parties would probably not file a grievance against a mediator unless the mediator has also compromised two or more procedural justice factors. I hope that this comment reinforces my sense from reading all the grievances filed in Florida that good practices—consistent with the elements of procedural justice—will help mediators avoid complaints from unhappy parties. More importantly, they will consistently provide parties a much higher quality mediation experience.

VI. ANALYSIS OF COURSE DESIGN AND INSTRUCTION

A. Learning Objectives Reached in the Workshop

This article has forced me to think about my thinking in connection with this workshop. I have structured the curriculum around fairly narrow learning objectives because of the two-hour time limit imposed on the workshop. From the list of objectives identified in Section IV.A of the first article in this series, this workshop intends that participants will, at least on a superficial level:

328. “Aural” learners absorb information best by listening to lectures, audio tapes, discussions in class, or discussions with study group members, buzz group members, professors, tutors, and teaching assistants. They benefit from taping class lectures or discussions and reviewing them later. They may need to eliminate sound-based distractions while listening. They may also need to eliminate other distractions by sitting in the front row of class or not taking notes during lectures. Jacobson, supra note 28, at 155.

329. “Oral” learners absorb information best by talking out ideas in class, in buzz groups, in study groups, with professors, with tutors, and with teaching assistants. They may find it helpful to read assigned materials out loud when studying at home. Id. at 154–55.

330. “Kinesthetic” learners need to move around or see movement to assist their information absorption. Accordingly, CALI tutorials, simulations, role-plays, clinical experiences, externships, internships, and clerkships aid these learners. Id. at 155. When studying at home, these learners may benefit from moving to music, pacing, or standing. Id. Some kinesthetic learners doodle, knit, or otherwise keep their hands busy during class sessions.

331. “Tactile” learners learn by touching and manipulating objects, even if it is a book or a handout. They can also benefit from CALI tutorials, simulations, role-plays, clinical experiences, externships, internships, and clerkships. Id.

332. I am currently reviewing all the Florida grievances for procedural justice issues.

333. For a discussion of the thinking out loud teaching technique, see supra note 26.

334. See Young, Teaching Professional Ethics, supra note 2, at 141-43.
• Gain some mastery of the rules creating the boundaries of, or lower limits to, ethical conduct in connection with mediator impartiality;
• Learn to avoid conduct that will put a mediator before a disciplinary board;
• Understand that avoiding conduct that will put a mediator before a disciplinary board is not the same as engaging in conduct consistent with professional ethics, professional responsibility, or good practice;
• Gain an appreciation of the social content involved in the rules, values, and norms of mediation ethics and professionalism;
• Recognize professional ethics issues when they arise, especially in complex situations or in moments of stress;
• Learn to “unpack” ethical dilemmas in a conscious way, successfully describe their features, and select the standard of judgment or framework of analysis to identify ethically appropriate action;  
• Apply the rules, values, and norms in a “real world” context to reach an appropriate ethical decision;
• Resolve to act in conformity with the moral judgments made by the mediator; and  
• Gain an appreciation that resolving an ethical dilemma often requires the good judgment of the self-regulated mediator.

335. See supra notes 117–121 and accompanying text for a discussion of “Another Grid for the Perplexed” used in the workshop.

336. Robert P. Burns, Teaching the Basic Ethics Class Through Simulations: The Northwestern Program in Advocacy and Professionalism, 58 LAW & CONTEMP. PROBS. 37, 38 n.4, 42 (1995) (explaining: “Practicing lawyers understand the context of the practice in which ethical issues arise and are themselves deeply involved in that practice. Legal education[,] however[,] is disengaged from that practice. Thus[,] students have neither the imagination nor the incentives to appreciate the importance of ethical issues”; making the analogy that learning ethics rules without contextual application of them is like “knowing all the grammatical rules of a language but still not being able to speak or write”). See also Alan M. Lerner, Law and Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solvers, 32 AKRON L. REV. 107 (1999); Frank E. A. Sander & R. N. Mnookin, A Worthy Challenge: The Teaching of Problem Solving in Law Schools, DISP. RESOL. MAG., Summer 2000, at 21.


338. Burns, Teaching the Basic Ethics Class, supra note 336, at 38–39.
Under Josephson’s schema for cognition in law school—synthesis, then judgment, then problem-solving, then issue spotting, then understanding, and then knowledge acquisition, in descending order—this workshop asks participants to acquire some knowledge about mediator impartiality, understand some aspects of it, spot potential ethics issues relating to impartiality, and engage in problem-solving by applying their knowledge to new facts set out in the Florida grievances, which, in turn, requires the exercise of judgment on the part of the participants. The workshop may also require participants to engage in some synthesis of the different sources of mediator bias. This schema demands higher-order thinking.

The last time I gave this workshop, a mediator at a community mediation center asked: “Why should we care which attitude or behavior fits in which quadrant of the grid?” I responded that I hoped the grid analysis allowed her to better understand the theoretical underpinnings for the specific rules governing mediator impartiality. Moreover, my experience as a mediation instructor has told me that mediators often have difficulty transferring ethical guidelines set out in the typically drafted framework of an ethics code into principles they can use in the moment. The 2005 Model Standards, for instance, provide guidelines that affect mediator impartiality in six separate standards without showing how they relate to each other and without always showing the aspects of impartiality they affect. The grid, I hope, will help mediators understand on a gut level why something that just happened in the mediation should make them consider a possible ethical dilemma. Mediators often need to make these decisions in the midst of a difficult conversation or an emotionally intense moment in the mediation. In that moment, a mediator would have difficulty consulting a set of mandatory or aspirational ethics rules to determine an appropriate response.

B. Limits to the Scope of the Workshop

The workshop could begin with a much broader “top down” discussion of the commonly recognized attributes essential to professionalism: “(1) subordinating self-interest to the interest of others, (2) adhering to high ethical and moral standards, (3) responding to societal needs, (4) evincing core humanistic values, (5) exercising accountability, (6) demonstrating

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continued commitment to excellence, (7) exhibiting a commitment to scholarship, (8) dealing with high levels of complexity and uncertainty, and (9) reflecting upon actions and decisions.\textsuperscript{342} The workshop could more explicitly explore a working definition of professionalism in the mediation field rather than examine lapses in professionalism.\textsuperscript{343} Moreover, the workshop could use participant expertise to develop the “ideals” of the mediation field or profession.\textsuperscript{344} It could also compare the ideals and core values of two other professions—say the legal and social work professions—to reinforce the distinctions that exist between the professions and, perhaps, help workshop participants further understand the reasons for the ethics rules governing mediators.


\textsuperscript{343}. \textit{Id}. at 481. For instance, Hamilton identifies the following elements of professionalism in the context of law. Each lawyer:

1. Continues to grow in personal conscience over his or her career;
2. Agrees to comply with the ethics of duty—the minimum standards for the lawyer’s professional skills and ethical conduct set by the Rules;
3. Strives to realize, over a career, the ethics of aspiration—the core values and ideals of the profession, including internalization of the highest standards for the lawyer’s professional skills and ethical conduct;
4. Agrees to both hold other lawyers accountable for meeting the minimum standards set forth in the Rules and encourage them to realize core values and ideals of the profession; and,
5. Agrees to act as a fiduciary, where his or her self-interest is over-balanced by devotion to serving the client and the public good in the profession’s area of responsibility: justice. This includes:
   a. Devoting professional time to serving the public good, particularly by representing pro bono clients; and,
   b. Undertaking a continuing reflective engagement, over the course of a career, on the relative importance of income and wealth in light of the other principles of professionalism.

\textit{Id}. at 482–83.

\textsuperscript{344}. For example, the ideals of the practice of law include: “the commitment to seek and realize excellence at both the skills of the profession and the other core values and ideals of the profession; integrity, honesty, and fairness.” \textit{Id}. at 490–91. The core values of the legal profession include the following: representing clients competently, acting with diligence, communicating with the client, showing loyalty to the client, keeping client information confidential, providing “zealous advocacy on behalf of the client” as constrained by the role of the lawyer as the officer of the legal system, exercising independent professional judgment, providing “public service to improve the quality of justice,” maintaining and improving the quality of the legal profession, “ensur[ing] equal access to the justice system, educating people about the justice system,” and respecting the legal system and “all persons involved in the legal system.” \textit{Id}. at 489–90.

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I could also spend some time discussing the four components of personal conscience: (1) recognizing moral issues in a situation; (2) formulating a morally defensible position to the situation; (3) giving priority to moral concerns or values that compete with other concerns or values; and (4) implementing moral action.345

The workshop could also highlight the challenges professionals face in the legal and social work professions as they try to practice ethically. These challenges include “power, arrogance, greed, misrepresentation, impairment, lack of conscientiousness, and conflict of interest.”346 This discussion could highlight any overlap that exists with the mediation field or profession, especially in the area of conflicts of interest, self-interest, and institutional constraints that pull practitioners away from the ideals or core values of mediation.

Moreover, the workshop does not permit a more in-depth discussion of mediator impartiality under different organizational matrices or theories.347 It also does not permit higher-order thinking about the “fairness” debate or the risks to mediator impartiality of a more evaluative style of mediation. Either topic could serve as the focus of follow-up workshops.

In addition, the workshop does not explore how the mediator might discuss neutrality in his or her agreement to mediate or in the opening monologue. It does not develop the skills a mediator may need when accused by a party of partiality or bias. For instance, several authors describe the need to invite parties to let the mediator know when the party perceives bias.348 The mediator can then discuss the situation with the party. If they can resolve a misperception about the mediator’s impartiality, the mediator can continue in the process.349 If the perception remains, the mediator will need to withdraw.350

No two-hour workshop could cover all these additional topics, but a trainer could explore them over a series of workshops.

While I consciously attempt to teach to persons with varying information absorption styles, the workshop presentation still tends to emphasize the delivery of information in a form that appeals to aural, oral, visual, and verbal learners.351 Kinesthetic and tactile learners may feel a

345. Id. at 484–88.
346. Id. at 478.
347. See, e.g., Honeyman, supra note 45, at 585–88.
349. Id.
352. I do, however, consciously move about the room like “Donahue” to help the kinesthetic learners. See supra note 330 (addressing the preferences of kinesthetic learners).
little frustrated (or lost) with the presentation. The instructor might improve the experience for visual and tactile learners by distributing a blank grid. Trainees could fill it in as the workshop discussion proceeds and then check their completed grid against the grid appearing at Appendix A to this article. Thus, over the workshop, the participants would fill in the grid, quadrant by quadrant, with their insights and examples.

The instructor could also improve the experience in the workshop by using more experiential role-plays or simulations. For instance, the instructor could use the simulation techniques described by Burns and Tzannes and other legal ethics trainers that I summarize in the first article in this series. The instructor could also improve the experience in the workshop by using more experiential role-plays or simulations. For instance, the instructor could use the simulation techniques described by Burns and Tzannes and other legal ethics trainers that I summarize in the first article in this series. Several workshop participants could play the role of mediator, parties, disciplinary counsel, and defense counsel in a disciplinary proceeding based on a grievance appearing in Appendix B to this article. Remaining workshop participants could sit as the disciplinary body analyzing the situation, applying the relevant rules or standards, rendering a decision, and imposing sanctions. This approach would especially appeal to visual, aural, tactile, and kinesthetic learners. The instructor could also offer this simulation as a follow-up workshop.

C. Scaling the Workshop for Law School Courses

I have used the same workshop format in my Certified Civil Mediation practicum course, which meets twice a week for 110 minutes. To jump-start the discussion, I ask students to read before class a shorter article I wrote about the impartiality grid. We complete the grid in class. Students analyze the grievances at Appendix B as graded homework. Before turning them in to me, we close the learning loop by discussing their answers in class.

In my Dispute Resolution survey course, I also assign my shorter article as a reading. While we do not discuss mediator impartiality in depth, we touch on some of its aspects when we view and de-brief the video mediation called Red Devil Dog Lease. The video clip, in which the mediator recommends a possible option to settle the dispute, raises Quadrant 2, 3, and

353. See Young, Teaching Professional Ethics, supra note 2, at 158-60.
355. See Young, Teaching Professional Ethics, supra note 2, at 144-45.
356. Id.
357. RED DEVIL DOG LEASE MEDIATION VIDEO (West American Casebook Series 1991).
4 issues about the mediator’s impartiality. The mediator, for instance, comes across as a bit paternalistic towards the female party, suggests an option that may be financially impossible, and may show some disregard for party self-determination. We also discuss in that course the limits on evaluation imposed on Virginia’s certified lawyer-mediators.\textsuperscript{358}

On the final exam in the Dispute Resolution course, I test whether students have read my shorter article by asking them to choose a mediator from a roster of three or four mediators. Each mediator has disclosed an actual or potential conflict of interest or bias. Students earn exam points by analyzing the impartiality issue with some sensitivity to the situation of the parties.

D. Evaluation of the Workshop by Participants

Fifty participants in the Spring 2008 VMN workshop provided written evaluations. Of those evaluators, twenty-eight rated the content, organization, and teaching techniques as “excellent,” sixteen rated those three aspects of it as “good,” and six rated them as “fair.”\textsuperscript{359} Only one participant rated the teaching techniques I used as “poor.” The positive comments included: “superb,” “also fun,” “great ethics session,” “really excellent,” “very informative,” “good content,” “enjoyed exploring the four quadrants,” “good interactive workshop,” “great examples,” “thanks for the grid—nice resource tool,” “like[d] the different approach to ethics,” “down to earth academics,” and “great way to think about some of the ethical issues other than referring to the code.”

Less positive comments included: “a relatively straight-forward topic made complex,” “felt the quadrant system a bit confusing,” “poor A/V,” and “probably confusing for new mediators and not as helpful as I thought it would be.” Two participants did not like the buzz group work saying: “too many small group sessions,” and “not set up well to be continually breaking into groups.” Finally, participants recommended that in the future I provide in the handouts copies of the Power Point slides, and that I make sure to use the microphone during all aspects of the presentation.\textsuperscript{360}

In subsequent workshops, I have provided copies of the Power Point slides in the handouts to participants and changed the format of the slides to make them more readable, even by persons with sight impairments.

\textsuperscript{358} See supra note 246 and accompanying text.

\textsuperscript{359} These numbers reflect an average of the number of evaluations in each category for the three aspects of the program evaluated.

\textsuperscript{360} E-mail from Robin M. Morrison, Administrator, Virginia Mediation Network, to author (Sept. 30, 2008, 11:44 a.m. CST) (on file with author).
Otherwise, given the overwhelming positive feedback for the workshop, I have kept the format the same.

E. Limited Barriers to Learning in the Workshop

I do not face many of the barriers to learning that professors teaching legal ethics face in the law school context that I discussed in the first article in this series. Many mediators come to the field as a second career or a “calling.” Accordingly, most of the workshop participants would fit the profile of a highly-motivated, true adult learner. Most participants have little fear of speaking before the group, and some are very eager to share their thoughts, insights, and experiences. For me, the session feels more like an energized conversation with colleagues who can teach me as much as I can teach them. I always leave with fresh examples and new insights to the topic.

VII. CONCLUSION

The use of “Another Grid for the Perplexed” offers mediators a conceptual way of thinking about issues relating to mediator impartiality. As I gain more experience as a mediator and hear the comments and stories of other mediators, I continue to refine it as a teaching tool. While I may continue to revise its organization, I believe the four-quadrant approach to identifying sources of mediator bias provides a tool that allows mediators to resolve ethical dilemmas quickly and with greater assurance than other tools that exist. It does not, however, substitute for a careful reading of the ethics code that applies to the practicing mediator.

As a member of the Standing Committee on Mediator Ethical Guidance of the American Bar Association’s Section of Dispute Resolution, the grid

361. See Young, Teaching Professional Ethics, supra note 2, at 132-39.
362. Morton et al., supra note 18, at 475–77, 496.
363. For access to the opinions of this committee, see Standing Committee on Ethics, Committee on Mediator Ethical Guidance, American Bar Association Section of Dispute Resolution, http://apps.americanbar.org/dch/committee.cfm?com=DR018600&edit=1 (last visited April 1, 2011). The nine-member committee includes: myself; James Alfini (South Texas College of Law); Robert C. Bordone (Harvard Law School); Jay Folberg (University of San Francisco); Nancy Lesser (private mediator); Lela P. Love (Cardozo Law School); Hon. Ellen Sickles James (retired); Leila C. Taiiffe; and Larry Watson. Committee on Mediator Ethical Guidance, http://www2.americanbar.org/directory/pages/groupprofile.aspx?committee=DR018600 (last visited April 1, 2011).
has helped me analyze several questions posed to the committee by practicing mediators. As a mediator, my deeper understanding of mediator impartiality has made me a more skillful and patient mediator. As a member of Virginia’s Mediation Ethics Committee, it has helped me revise Virginia’s mediation ethics code.364

As a law professor and mediation ethics trainer, I am strongly committed to the use of active learning techniques to convey the knowledge, skills, and values of our field. I hope this series of articles will suggest ways in which we can improve ethics training for new and experienced mediators. I invite my colleagues to suggest and share additional tools they use to teach mediation ethics.

364. The seven-member committee included: myself; Lawrie Parker (Executive Director of Piedmont Dispute Resolution Center); Jeanette Twomey (Mediation Works and trainer for the Northern Virginia Mediation Center); John McCammon (founder of the McCammon Group); and lawyer–mediators Lawrence Hoover, Samuel Jackson, and Frank Morrison. Three of the committee members, including myself, serve or have served on the Virginia Supreme Court’s Mediator Review Board. Hoover, Jackson, Twomey, and Morrison teach mediation at Virginia law schools. The committee met over a three-year period at the invitation of the Director of the Dispute Resolution Services, Department of Judicial Services, Office of Executive Secretary of the Supreme Court of Virginia.


APPENDIX A

“Another Grid for the Perplexed”

<table>
<thead>
<tr>
<th>RELATIONSHIP</th>
<th>CONDUCT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Past → Present → Future</td>
<td>Uncooperative party</td>
</tr>
<tr>
<td>Conflicts of Interest:</td>
<td></td>
</tr>
<tr>
<td>• Former client,</td>
<td>Racial, cultural, or gender bias</td>
</tr>
<tr>
<td>• Business or social relationships,</td>
<td>Uncomfortable with a party’s emotional expression</td>
</tr>
<tr>
<td>• Repeat player in mediation,</td>
<td>Personality conflict</td>
</tr>
<tr>
<td>• Investment in party’s business, or</td>
<td>Difficulty working with high conflict personalities</td>
</tr>
<tr>
<td>• Future representation as lawyer or other professional</td>
<td>Favoritism based on referral fees, who is paying, or repeat player</td>
</tr>
<tr>
<td>PARTIES</td>
<td></td>
</tr>
<tr>
<td>Desire to maintain high settlement rate</td>
<td>Unskillful use of coercion, intimidation, or heavy-handed tactics</td>
</tr>
<tr>
<td>Court pressures to maintain a high settlement rate</td>
<td>Over-reliance on legal skills by offering legal advice</td>
</tr>
<tr>
<td>Contingent fees</td>
<td>Lack of respect for party self-determination</td>
</tr>
<tr>
<td>OUTCOME</td>
<td></td>
</tr>
<tr>
<td>Belief Title VII or ADA cases must be resolved in a certain way</td>
<td>Adding terms to the settlement agreement to which parties have not agreed</td>
</tr>
<tr>
<td>Personal or ethical opinions about how the dispute should be resolved</td>
<td>Artificial time pressures or unduly long mediation sessions</td>
</tr>
<tr>
<td>Prolonging the mediation beyond time when it is likely to settle or beyond the time the parties wanted to mediate</td>
<td></td>
</tr>
</tbody>
</table>

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APPENDIX B

Some of the Grievances Filed with the Florida Mediator Qualifications Board Relating to Mediator Impartiality (1992 to 2007)

Grievance Scenario No. 1:

A party filed a grievance against a mediator in a small claims case involving a business that sought to collect money owed on a debt. The defendant acknowledged that he owed the debt and he agreed to the entry of a judgment against him. However, he wanted his wife dismissed from the suit because she had not incurred any of the debt. The plaintiff-creditor (complainant) would not do so because the couple jointly owned all their property and the husband had no current employment. The plaintiff-creditor alleged that the mediator gave legal advice during the mediation by advising the defendant that the defendant’s wife was “wrongfully named in the suit.”

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

____ Q1: Relationship-Parties
____ Q2: Conduct-Parties
____ Q3: Relationship-Outcome
____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

____ Problems with voice
____ Problems with consideration by the neutral
____ Problems with even-handed treatment by the neutral
____ Problems with respect and dignity

365. The complaints survived the facial sufficiency review. For a discussion of this process, see Young, Take It or Leave It, supra note 13, at 804–14.

Grievance Scenario No. 2:

An attorney filed the grievance against the mediator in a county court contract case involving two corporations represented by lawyers at the mediation. The defendant-corporation was allegedly bankrupt and thus judgment proof. During mediation, in joint session, the mediator pointed out to both parties that the individual who had appeared at mediation on behalf of the defendant corporation had signed the contract in his individual capacity, not on behalf of the corporation, and thus he could be sued individually. Neither party had raised this fact in the mediation previously.367

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

____ Q1: Relationship-Parties
____ Q2: Conduct-Parties
____ Q3: Relationship-Outcome
____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

____ Problems with voice
____ Problems with consideration by the neutral
____ Problems with even-handed treatment by the neutral
____ Problems with respect and dignity

Grievance Scenario No. 3:

Parties to the mediation filed this grievance against a mediator in a circuit case, in which the original defendants counterclaimed against the plaintiff. The mediation involved offers of settlement by the original plaintiff to the defendants. The complainants alleged that the mediator told the complainants that they were “too poor” to try their case, addressed one of the complainants as “a spoiled brat,” and declared the complainants “poor slobs” who would never be recognized in court. The mediator offered to go across the street to the courthouse to discuss this situation with the judge so that the complainants would understand. The complainants also alleged that the mediator decided that the offer made by the plaintiff was acceptable and then attempted to impose the settlement on the complainants. Finally, the complainants alleged that despite repeatedly stating that they did not wish to settle at mediation, the mediator would not terminate the mediation. The mediator admitted having told the complainants that “in [the mediator’s] experience, if people are too poor to properly prepare their case the results are always disastrous.”

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

_____ Q1: Relationship-Parties
_____ Q2: Conduct-Parties
_____ Q3: Relationship-Outcome
_____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

_____ Problems with voice
_____ Problems with consideration by the neutral
_____ Problems with even-handed treatment by the neutral
_____ Problems with respect and dignity

Grievance Scenario No. 4:

A party filed this grievance in a case involving an eleven-hour, single session, family mediation. The complainant alleged that due to gender bias, the mediator showed partiality to the husband. In addition, the complainant alleged that the mediator threatened her with contempt of court, coerced her into staying past the time when she could bargain effectively (the mediation began at approximately 10 a.m. and concluded at 9 p.m.), would not allow her to obtain food when she requested it, and used verbal assaults to obtain an agreement.369

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

_____ Q1: Relationship-Parties
_____ Q2: Conduct-Parties
_____ Q3: Relationship-Outcome
_____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

_____ Problems with voice
_____ Problems with consideration by the neutral
_____ Problems with even-handed treatment by the neutral
_____ Problems with respect and dignity

Grievance Scenario No. 5:

A party filed this grievance against a mediator in a circuit court case. The complainant alleged that: (1) the mediator was rude to the complainant and his female attorney who were from “out-of-town” by “dismissing what counsel had to say” and walking out of the room during her presentation; (2) the complainant and his attorney were subjected to “ethnic profiling and stereotyping”; (3) the mediator behaved “more like . . . an attorney for the plaintiff than a mediator”; and (4) the mediator exhibited a lack of impartiality by telling the complainant that “if you go to court, you need to be on medication and heavy drugs.”

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

______ Q1: Relationship-Parties
______ Q2: Conduct-Parties
______ Q3: Relationship-Outcome
______ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

______ Problems with voice
______ Problems with consideration by the neutral
______ Problems with even-handed treatment by the neutral
______ Problems with respect and dignity

Grievance Scenario No. 6:

A party filed this grievance against a mediator in a circuit court case and alleged that the law partners of the mediator had an ongoing business relationship with the other party. The business relationship involved the same issues as the underlying case of the mediation. The complainant also alleged that the mediator conveyed the other party’s offer to the complainant and added that “he thought that this was a good solution.”

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:
   _____ Q1: Relationship-Parties
   _____ Q2: Conduct-Parties
   _____ Q3: Relationship-Outcome
   _____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:
   _____ Problems with voice
   _____ Problems with consideration by the neutral
   _____ Problems with even-handed treatment by the neutral
   _____ Problems with respect and dignity

Grievance Scenario No. 7:

A party filed this grievance against a family mediator who met with the complainant and his wife for a meeting whose purpose and length of time the parties disputed. The complainant alleged that the parties met to mediate a divorce agreement. Further, the complainant alleged that during the course of this meeting, the mediator provided legal advice to the complainant’s wife about alimony and attorney’s fees. At the conclusion of the meeting, the mediator provided the parties with financial affidavits to complete and scheduled a follow-up meeting. The parties never returned to mediation because the complainant felt that the mediator had indicated a bias towards his wife. Subsequent to the mediation, the complainant’s wife hired the “mediator” as her counsel in the divorce.372

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

_____ Q1: Relationship-Parties
_____ Q2: Conduct-Parties
_____ Q3: Relationship-Outcome
_____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

_____ Problems with voice
_____ Problems with consideration by the neutral
_____ Problems with even-handed treatment by the neutral
_____ Problems with respect and dignity

Grievance Scenario No. 8:

A party filed this grievance in connection with a family mediation. The complainant alleged that the mediator was “very aggressive and condescending” to the complainant, yelled at the complainant, and used profanity when speaking to the complainant. The mediator also told the complainant that she would “lose in court” and that she would make a terrible witness. Finally, the mediator purposely misled the complainant in order to get an agreement.373

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

____ Q1: Relationship-Parties
____ Q2: Conduct-Parties
____ Q3: Relationship-Outcome
____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

____ Problems with voice
____ Problems with consideration by the neutral
____ Problems with even-handed treatment by the neutral
____ Problems with respect and dignity

Grievance Scenario No. 9:

A party filed this grievance against a mediator in a circuit court case. The complainant alleged that during the course of the mediation, the mediator used a culturally insensitive term to describe the other party.\textsuperscript{374}

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

\begin{itemize}
  \item Q1: Relationship-Parties
  \item Q2: Conduct-Parties
  \item Q3: Relationship-Outcome
  \item Q4: Conduct-Outcome
\end{itemize}

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

\begin{itemize}
  \item Problems with voice
  \item Problems with consideration by the neutral
  \item Problems with even-handed treatment by the neutral
  \item Problems with respect and dignity
\end{itemize}

Grievance Scenario No. 10:

A lawyer filed this grievance against a mediator in a county case. The complainant alleged that the mediator made statements, in front of the other side, that favored the other party and “exploded” in anger towards the end of the mediation when the complainant brought up an additional term for the agreement while the mediator was drafting the stipulation.375

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

____ Q1: Relationship-Parties
____ Q2: Conduct-Parties
____ Q3: Relationship-Outcome
____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

____ Problems with voice
____ Problems with consideration by the neutral
____ Problems with even-handed treatment by the neutral
____ Problems with respect and dignity

Grievance Scenario No. 11:

A party filed this grievance against a family mediator. The complainant alleged that the mediator displayed bias towards the opposing side and interfered with the parties’ self-determination by visibly reacting to the child support order, which was already in place, and inquiring if the opposing party was intending to get an attorney and/or appeal the order. After the mediation concluded, the mediator shared with the party her personal story of divorce. It appeared to the complainant that the mediator showed bias against men as a result of her own divorce experience. The mediator was also “rude, short, and impatient” with the complainant throughout the process.  

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:
- Q1: Relationship-Parties
- Q2: Conduct-Parties
- Q3: Relationship-Outcome
- Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:
- Problems with voice
- Problems with consideration by the neutral
- Problems with even-handed treatment by the neutral
- Problems with respect and dignity

Grievance Scenario No. 12:

A party filed this grievance against a family mediator who conducted a family mediation for friends who were divorcing. The complainant alleged that the mediator had a personal and business relationship with both parties. In addition, the mediator allegedly gave advice about specific marital assets and who would win in court and presented her own proposal regarding a custody arrangement. The mediator also seemed partial to the complainant’s ex-husband.377

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

_____ Q1: Relationship-Parties
_____ Q2: Conduct-Parties
_____ Q3: Relationship-Outcome
_____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

_____ Problems with voice
_____ Problems with consideration by the neutral
_____ Problems with even-handed treatment by the neutral
_____ Problems with respect and dignity

Grievance Scenario No. 13:

A party filed this grievance against a family mediator. The complainant alleged that the mediator made statements reflecting “favoritism or bias” and proposed that the other party and opposing counsel go out for a drink with the mediator after the mediation. In addition, the mediator did not require full financial disclosure from the other party and allowed the mediation process to continue in his office with the attorneys after the complainant dismissed the mediator.  

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:
____ Q1: Relationship-Parties
____ Q2: Conduct-Parties
____ Q3: Relationship-Outcome
____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:
____ Problems with voice
____ Problems with consideration by the neutral
____ Problems with even-handed treatment by the neutral
____ Problems with respect and dignity