

BARNACLES, ARISTOCRACY AND TRUTH DENIAL: THREE NOT SO BEAUTIFUL ASPECTS OF CONTEMPORARY MEDIATION

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Like any fairy tale, the Sleeping Beauty story has many variations. Most are far more complicated and sinister than the Disneyesque version that the public is familiar with. The same is true with mediation. On the surface, it is a beautiful story—self-determination, mediator neutrality, and party empowerment.¹ In practice, especially in litigated cases, something else quite dark is actually transpiring: parties are literally locked away from one another.² Mediators routinely testify³ and often actively “assist parties” to see the world as the mediators and the parties’ lawyers do.⁴ Settlement is a prime directive and driving force.⁵ Institutionalization through statute and court rule⁶ has

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¹ See generally, ROBERT A. BARUCH BUSH & JOSEPH B. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (rev. ed. 2004); JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* (1984); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (4th ed. 2014); JOSEPH B. STULBERG & LELA P. LOVE, *THE MIDDLE VOICE* (2d ed. 2012); JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* (2000). See also Robert A. Baruch Bush, “*What Do We Need a Mediator For?*”: *Mediation’s ‘Value-Added’ for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 36 (1996) (describing mediation’s ability to enhance “the quality of both party decision-making and interparty communication, which themselves lead to better quality outcomes whether or not in the form of settlements”); Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry Into Justice in Mediation*, 9 CLINICAL L. REV. 157 (2002) (extolling mediation for its rich opportunities to implement procedural justice and provide a problem-solving framework that leads to resolutions far superior to ones derived in more adversarial and contentious adjudicative processes); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982) (arguing, among other things, that “[m]ediation offers some clear advantages over adversary processing: it is cheaper, faster, and potentially more hospitable to unique solutions that take more fully into account nonmaterial interests of the disputants”).

² See, e.g., Eric Galton & Tracy Allen, *Don’t Torch the Joint Session*, 21 DISP. RESOL. MAG. 25 (2014).

³ See generally, James Coben & Peter Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 59–62 (2006); James R. Coben & Peter N. Thompson, *Mediation Litigation Trends: 1999–2007*, 1 WORLD ARB. & MED. REV. 395, 401–03 (2007). See generally, SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* §§ 8:1–8:49 (2014–2015).

⁴ See, e.g., Jacqueline Nolan-Haley, *Mediation: The “New” Arbitration*, 17 HARV. NEGOT. L. REV. 61 (2012) (describing mediation as a “surrogate” for arbitration, the “functional equivalent of a private judicial settlement conference”); Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: “The Problem” in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 866 (2008) (describing “the gap between the expansive potential of mediation and the constricted reality of most court-oriented mediation”); Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation and What it Means for the ADR Field*, 3 PEPP. DISP. RESOL. L.J. 111, 113–14 (2002) (bemoaning “evidence of a rising level of ‘market demand’ for a form of mediation in which the mediator provides expert case evaluation (assessing strengths and weaknesses of each party’s case), substantive settlement recommendations (based on predictions of court outcomes, for example), and strong pressures to accept those recommendations, in addition to tightly managing the discussion process”).

⁵ See, e.g., Robert A. Baruch Bush, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades*, 84 N. D. L. REV. 705, 727 (2008) (describing the settlement orientation of court mediation programs as a “mixed picture” of successful institutionalization and “thinning aspirations”); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do*

spawned an ultimate judicial irony—an entire body of litigation about the mediation intended to avoid litigation in the first place.⁷ Judges, many of whom likely hope to become the “elite” mediators of the future, are not even sure that the clients need to be in the room at all.⁸

Is there a Prince Charming to save the beauty? It is an extraordinarily difficult question, especially if we keep in mind that in many Sleeping Beauty variations the prince is a rapist and often a bigamist to boot, who impregnates the beauty while she sleeps, and whose spouse later schemes to cook the beauty and her children.⁹ In other words: the “solution” (e.g., mandatory mediation as proposed by my colleague Giuseppe De Palo in this symposium’s keynote address) may just make things uglier!

And just to complicate the equation a bit more, the time is ripe to confront the possibility that mediation contributes to a particular virulent contemporary public policy challenge: the entitlement people assert to “have their own truth” without concern for key fact-finding principles (flawed as they might be) that adjudication highly values—burdens of production, shifting burdens of proof, the rigorous testing of evidence through cross-examination, and procedures to qualify experts.

Our society is plagued by outright denial of “objective fact”¹⁰—examples abound, from climate change¹¹ to voter suppression¹² to Ebola quarantines to anti-vaccination

With It?, 79 Wash. U. L.Q. 787, 860 (2001) (documenting how the settlement-driven approach to court-connected mediation, including such things as a reduced role for disputants, heavier reliance on evaluative interventions, and a near exclusive focus on monetary settlements “raise very serious problems for perceptions of procedural justice”).

⁶ See generally, Sarah R. Cole et al., *Where Mediation is Concerned, Sometimes “There Ought Not to be a Law!”*, 20 DISP. RESOL. MAG. 34 (2014).

⁷ See generally, Coben & Thompson, *Disputing Irony*, *supra* note 3, at 43; Coben & Thompson, *Mediation Litigation Trends*, *supra* note 3, at 395; see also COLE ET AL., *supra* note 3, §§ 5–9.

⁸ See e.g., *Khoday v. Symantec Corp.*, No. 11–180 (JRT/TNL), 2014 WL 1281600 (D. Minn. Mar. 13, 2014) (rejecting argument that a class action plaintiff’s failure to know about settlement mediation and not being consulted about mediation established the party’s inability to be the “named” party representative). According to the court, “the party’s reliance on counsel to apprise her of the nature of her legal claims is appropriate, and the record does not demonstrate that any such reliance will prevent her from vigorously prosecuting the action in the best interest of absent class members or that a conflict of interest exists.” *Id.* at *17.

⁹ Anthony Lane, *Tales Retold: “Maleficent” and “A Million Ways to Die in the West”*, THE NEW YORKER (June 9, 2014).

¹⁰ See generally, CHRIS MOONEY, *THE REPUBLICAN WAR ON SCIENCE* (2005); AJIT VARKI & DANNY BROWER, *DENIAL: SELF-DECEPTION, FALSE BELIEFS, AND THE ORIGINS OF THE HUMAN MIND* (2013); see also J. Roseanau, *Science Denial: A Guide for Scientists*, *TRENDS MICROBIOLOGY* 20(12): 567–69 (2012) (noting that on topics of evolution, climate change, vaccination and others, “scientists, policymakers, and educators are confronted by organized campaigns to spread doubt, denial, and rejection of the scientific community’s consensus on central scientific principles. To overcome these threats, scientists not only need to spread scientific knowledge, but must also address the social drivers of science denial.”); Judith Warner, *Fact-Free Science*, N.Y. TIMES, Feb. 25, 2011, <http://www.nytimes.com/2011/02/27/magazine/27FOB-WWLN-t.html?adxnnl=1&adxnnlx=1426266348-/Xkb73TxNshp29bbq8dreg> (last visited Mar. 11, 2015) (bemoaning “a troubling new reality: the rise of the Tea Party and its anti-intellectual, anti-establishment, anti-elite worldview [that] has brought both a mainstreaming and a radicalization of antiscientific thought.”).

¹¹ See, e.g., Editorial Board, *Sen. Jim Inhofe embarrasses the GOP and U.S.*, WASH. POST http://www.washingtonpost.com/opinions/a-snowballs-chance/2015/03/01/46e9e00e-bec8-11e4-bdfa-b8e8f594e6ee_story.html (last visited Mar. 8, 2015); Justin Gillis, *Verbal Warming: Labels in the Climate Debate*, N.Y. TIMES, Feb. 12, 2015, <http://www.nytimes.com/2015/02/17/science/earth/in-climate->

cabals.¹³ What if the ADR movement (and mediation in particular), with its postmodernist emphasis on self-determination and the all too cavalier way that many mediators “dismiss” facts in the rush to reconciliation and settlement, has actually made our society harder to govern and complex problems all the more difficult to talk about and resolve?

To borrow the framing from famed biologist Edward O. Wilson: do we need more enlightenment or more romanticism?¹⁴ The mediation community, I would assert, speaks with a surprising orthodoxy in its resounding support for the latter. It is as if our entire movement, much like our fractured body politic, responds to factual complexity with a collective shrug and easy slide from “it’s hard to know” to “it’s unknowable.”

In the brief reflection to follow, I will examine these themes by exploring three separate topics: barnacles, aristocracy and truth denial. The first topic, barnacles, refers to the surprising and myriad number of ways that mediation has fully integrated (insinuated) itself into the U.S. litigation system. Institutionalization, some might argue, is “beautiful”; indeed, widespread, systematic use of mediation is often offered evidence of success.¹⁵ But I want to explore a different perspective on the same development—how institutionalization leads to rule exploitation and spawns its own unique litigation ironies. The second topic, aristocracy, refers to the documentation and arguments I have made elsewhere in much greater detail¹⁶ regarding the considerable evidence of unjustified judicial deference to the opinions of class action mediators on settlement process and settlement quality. And, finally, truth denial. Even the most summary review of mediation texts reveals a stunningly consistent message about the nature of truth: “there ain’t any.” For the reasons hinted at above (and explored in more depth below), I find this foundational assumption of our field to be potentially quite ugly, notwithstanding the allure of its practicality when interacting with polarized disputants.

change-whats-in-a-name.html (last visited Mar. 11, 2015); Stephan Lewandowsky, et al., *NASA Faked the Moon Landing – Therefore, (Climate) Science is a Hoax: An Anatomy of the Motivated Rejection of Science*, 24 *PSYCHOL. SCI.* 622 (May 2013).

¹² See, e.g., Kevin Drum, *The Dog That Voted and Other Election Fraud Yarns*, MOTHER JONES July/August 2012, available at <http://www.motherjones.com/politics/2012/07/voter-suppression-kevin-drum> (last visited Mar. 11, 2015); Alexander Keyssar, *Voter Suppression Returns: Voting Rights and Partisan Practices*, HARV. MAG., July–Aug. 2012, available at <http://harvardmagazine.com/2012/07/voter-suppression-returns> (last visited Mar. 11, 2015); Brendan Nyhan, *Voter Fraud is Rare, But Myth is Widespread*, N.Y. TIMES, June 10, 2014, <http://www.nytimes.com/2014/06/11/upshot/vote-fraud-is-rare-but-myth-is-widespread.html?abt=0002&abg=1> (last visited Mar. 11, 2015).

¹³ See, e.g., Frank Bruni, *The Vaccine Lunacy: Disneyland, Measles and Madness*, N.Y. TIMES, Jan. 31, 2015, <http://www.nytimes.com/2015/02/01/opinion/sunday/frank-bruni-disneyland-measles-and-madness.html> (last visited Mar. 12, 2015); Angie Drobnic Holan & Aaron Sharaockman, *2014 Lie of the Year: Exaggerations About Ebola*, TAMPA BAY TIMES POLITICFACT.COM, Dec. 15, 2014, available at <http://www.politifact.com/truth-o-meter/article/2014/dec/15/2014-lie-year-exaggerations-about-ebola/> (last visited Mar. 12, 2015).

¹⁴ EDWARD O. WILSON, *THE MEANING OF HUMAN EXISTENCE* 37–38 (2014).

¹⁵ See, e.g., Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 *PENN STATE. L. REV.* 327 (2003); Thomas Stipanowich & J. Ryan Lamare, *Living with “Adr”: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, 19 *HARV. NEG. L. REV.* 1 (2013); Donna Stienstra, *ADR in the Federal District Courts: An Initial Report*, FEDERAL JUDICIAL CENTER, Nov. 16, 2011, available at [http://www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/\\$file/adr2011.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/$file/adr2011.pdf) (last visited Mar. 12, 2015).

¹⁶ James R. Coben, *Creating a 21st Century Oligarchy: Judicial Abdication to Class Action Mediators*, 5 *PENN. ST. Y.B. ARB. & MEDIATION* 162 (2013).

I. BARNACLES

*“Barnacles are encrusters, attaching themselves permanently to a hard substrate.”*¹⁷

Roughly a decade ago, I first began to joke that it might be possible for me to teach my first year civil procedure course using only case law decisions about disputed mediation issues. That is no longer a hypothetical. It would be easy and here is a course outline to prove it, each with a single representative case (for many of these topics, dozens of reported mediation decisions are available to chose from):¹⁸

Personal Jurisdiction: *Glenwood Farms, Inc. v. O'Connor*¹⁹ (rejecting plaintiffs’ allegation that a lawyer was subject to personal jurisdiction for

¹⁷ *Barnacle*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, available at <http://en.wikipedia.org/wiki/Barnacle> (last visited Mar. 8, 2015).

¹⁸ Much of the analysis in this section comes from the mediation treatise that I currently co-author with Sarah R. Cole, Craig A. McEwen, Nancy H. Rogers, and Peter N. Thompson, as well as two earlier law review articles I co-wrote with Peter N. Thompson. SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* (2014–2015); Coben & Thompson, *Disputing Irony*, *supra* note 3; Coben & Thompson, *Mediation Litigation Trends*, *supra* note 3, 395. The dataset we utilize for this research is derived by searching for cases on Westlaw in the “ALLSTATES” and “ALLFEDS” databases that include the term “mediat!”. As you might imagine, this search brings up a large number of “hits” on opinions that include some mention of mediation (most commonly, the fact of a court referral into the process), but no express discussion of a disputed mediation problem. The number of total hits per year on the search term has increased from 1176 in 1999 to 4499 in 2013 (suggesting, if nothing else, considerable increased use of mediation in American courts). In that same time period, the number of opinions actually deciding a disputed mediation issue has risen from 172 to 802, as illustrated in the chart below:

Year	Federal Cases	State Cases	Total Cases
1999	63	109	172
2000	70	129	200
2001	76	139	215
2002	96	209	301
2003	88	248	335
2004	143	332	475
2005	218	303	523
2006	325	352	677
2007	359	250	609
2008	353	292	645
2009	316	277	593
2010	458	311	769
2011	377	271	648
2012	449	286	735
2013	444	358	802

One particularly interesting trend is the “shift” to a majority of disputed mediation issues occurring in federal courts, not state (a shift that first occurred in 2006 and continues to this day).

¹⁹ *Glenwood Farms, Inc. v. O'Connor*, 666 F. Supp. 2d 154 (D. Me. 2009).

alleged fraudulent and tortious acts in mediation held out-of-state which allegedly caused injury in the state)

Diversity Jurisdiction: *Webb v. Paccar Leasing Co.*²⁰ (concluding that mediated settlement not approved by state court prior to removal means the settling non-diverse party remains the defendant in the case precluding removal)

Supplemental Jurisdiction: *Watz v. Wal-Mart Stores East, LP*²¹ (refusing to exercise supplemental jurisdiction over state law claims following dismissal of federal ADA claims, where the state court had presided over the suit for almost a year prior to its removal, and the parties had arranged for facilitative mediation in the course of state court proceedings)

Remand: *Babasa v. LensCrafters, Inc.*²² (remanding case as untimely removed, where a letter sent in anticipation of mediation provided sufficient notice of the amount in controversy to begin running the thirty day time period to timely remove the case)

Service of Process: *In re Marriage of Craze*²³ (rejecting husband's argument that personal service of summons and petition of divorce should be deemed void because served at a mediation he was invited to from out of state).

Attachment: *Thornapple Associates, Inc. v. Sahagen*,²⁴ (treating the failure to participate in mediation as a factor justifying a pre-judgment attachment in aid of security)

Venue: *Robinson v. Eli Lilly and Co.*²⁵ (citing expertise of district's magistrate in settling cases as a factor weighing against transfer)

Transfer: *Shaw Group, Inc. v. Zurich American Ins. Co.*²⁶ (granting venue transfer, for among other reasons, fact that pre-mediation and mediation communications and conferences took place in the transferee jurisdiction)

Erie Doctrine: *Mut. of Enumclaw v. Cornhusker Casualty Ins. Co.*²⁷ (deeming the state's newly adopted version of the Uniform Mediation Act

²⁰ *Webb v. Paccar Leasing Co.*, No. 4:09CV211, 2009 WL 1703207 (E.D. Tex. 2009).

²¹ *Watz v. Wal-Mart Stores East, LP*, No. 12-15245, 2013 WL 1506847, *3 (E.D. Mich. 2013).

²² *Babasa v. LensCrafters, Inc.*, 498 F.3d 972 (9th Cir. 2007).

²³ *In re Marriage of Craze*, 133 Wash. App. 1023 (Div. 1 2006).

²⁴ *Thornapple Assocs., Inc. v. Sahagen*, No. 06 Civ. 6412(JFK), 2007 WL 747861 (S.D.N.Y. 2007).

²⁵ *Robinson v. Eli Lilly and Co.*, 535 F. Supp. 2d 49 (D.D.C. 2008).

²⁶ *Shaw Grp., Inc. v. Zurich Am. Ins. Co.*, No. CV-11-279-RMP, 2012 WL 1466779 (E.D. Wash. 2012).

²⁷ *Mut. of Enumclaw v. Cornhusker Cas. Ins. Co.*, No. CV-07-3101-FVS, 2008 WL 4330313, *2 (E.D. Wash. 2008).

to be substantive under Erie and applicable in lieu of Federal Rule of Evidence 408)

Choice of Law: *Mustafa v. Mac's Convenience Stores, LLC*²⁸ (applying the Illinois Uniform Mediation Act to protect mediation communications in a case asserted under the Illinois Human Rights Act which had been removed to federal court based exclusively on diversity jurisdiction)

Discovery relevance: *Hypertherm, Inc. v. American Torch Tip Co.*²⁹ (deferring ultimate ruling until trial but questioning whether evidence of parties' settlement negotiations and mediation would be relevant to the question of whether defendant willfully infringed plaintiff's patents in the past)

Discovery sanctions: *Irwin Seating Company v. Intl. Business Machines Corp.*³⁰ (striking expert witnesses and awarding costs and attorney's fees where the party violated mediation confidentiality by showing trial experts confidential mediation statements and exhibits obtained from the adverse party during mediation)

Privilege: *Folb v. Motion Picture Industry Pension & Health Plans*³¹ (adopting and applying a blanket federal mediation privilege to prevent discovery of a mediation brief and related correspondence)

Work Product: *GenOn Mid-Atlantic, LLC v. Stone & Webster, Inc.*³² (applying attorney-work product privilege to protect financial spreadsheets and illustrations of charges and change orders prepared by defendant for mediation of construction dispute)

Failure to state a claim: *Bogopa Service Corp. v. Shulga*³³ (deeming allegation that a corporate officer was present at mediation insufficient to plausibly infer that the individual personally acted to infringe a trademark)

Waivers of defenses: *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*³⁴ (concluding that defendants did not waive their right to object to lack of personal jurisdiction by participating in mediation before bringing a

²⁸ *Mustafa v. Mac's Convenience Stores, LLC*, No. 13 CV 2951, 2014 WL 1088991 (N.D. Ill. 2014).

²⁹ *Hypertherm, Inc. v. Am. Torch Tip Co.*, No. 05-cv-373-JD, 2009 WL 435324, *5 (D.N.H. 2009).

³⁰ *Irwin Seating Co. v. Intl. Bus. Mach. Corp.*, No. 1:04-CV-568, 2006 WL 3446584 (W.D. Mich. 2006, *aff'd*, 2007 WL 518866 (W.D. Mich. 2007)).

³¹ *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal. 1998), *aff'd*, 216 F.3d 1082 (9th Cir. 2000).

³² *GenOn Mid-Atlantic, LLC v. Stone & Webster, Inc.*, No. 11 CV 1299 HB, 2011 WL 6074275 (S.D.N.Y. 2011).

³³ *Bogopa Serv. Corp. v. Shulga*, No. 3:08cv365, 2009 WL 1628881 (W.D. N.C. 2009).

³⁴ *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1011 (D. Kan. 2006).

motion to dismiss which was filed less than two months after plaintiff joined them as parties)

Joinder: *Zurich Capital Markets Inc. v. Coglianese*³⁵ (granting motion to intervene as matter of right, where intervener's participation in informal mediation demonstrated his direct interest in the subject matter of the litigation)

Summary Judgment: *Lindsey v. Cook*³⁶ (vacating grant of summary judgment enforcing a mediated settlement where the party challenging enforcement raised a genuine issue of material fact by asserting that the ground rules set out by the mediator precluded the creation of any binding obligations and further noting that the trial court erred in taking oral testimony from the mediator at the summary judgment hearing)

Default: *Negron v. Woodhull Hospital*³⁷ (vacating default judgment entered because the defendant failed to comply with the mediator's instruction to bring a principal to the mediation, after concluding that lesser sanctions were warranted)

Dismissal: *Valencia v. French Connection Bakery, Inc.*³⁸ (granting Rule 41(b) dismissal for failure to prosecute, where plaintiffs failed to, among other things, participate in court-ordered mediation)

Appeals: *Johnson Specialized Transp., Inc. v. Metzger*³⁹ (interpreting trial court order to mediate reimbursement of cleanup claims before returning to court for further action as evidence that trial court decisions were interlocutory in nature and not final appealable orders)

Res judicata: *City of Demorest v. Roberts & Dunahoo Properties*⁴⁰ (applying collateral estoppel to bar action which included issues settled in a prior mediation, the terms of which were incorporated into a consent judgment of the court)

“Beautiful”—at least from the perspective of a civil procedure wonk! For many (okay, admittedly, *most* others), beautiful would not be the first word to come to mind. But now to push the point for you remaining agnostics, here are five categories of mediation litigation that strongly suggest that the “encrusting” of mediation into the contemporary litigation system is anything but “beautiful.”

³⁵ *Zurich Capital Mkt. Inc. v. Coglianese*, 236 F.R.D. 379 (N.D. Ill. 2006).

³⁶ *Lindsey v. Cook*, 139 Idaho 568, 82 P.3d 850 (2003).

³⁷ *Negron v. Woodhull Hosp.*, 173 Fed. Appx. 77 (2d Cir. 2006).

³⁸ *Valencia v. French Connection Bakery, Inc.*, No. C 07-1118 PVT, 2008 WL 152228 (N.D. Cal. Jan. 15, 2008).

³⁹ *Johnson Specialized Transp., Inc. v. Metzger*, No. C-49-05, 2011 WL 3687428 (N.J. Super. Ct. App. Div. 2011).

⁴⁰ *City of Demorest v. Roberts & Dunahoo Properties, LLC*, 288 Ga. App. 708, 655 S.E.2d 617 (2007).

A. *The Dog Ate My Paper*

Lawyers are creative. Give a lawyer a rule and it is very likely an excuse for not following it will immediately emerge. Mediation, and the burdens it imposes on litigants, has evolved into an “all-purpose” excuse.⁴¹ By way of example, belief that a case would settle in mediation has been offered to justify, among other things, late amendment of a complaint;⁴² late filings of motions;⁴³ extensions of time for discovery;⁴⁴ and requests for trial continuance.⁴⁵ Mediation efforts are routinely offered up as a defense against sanctions for failure to designate witnesses and exhibits (and a variety of other discovery failures).⁴⁶

1. The “Backfire” of Unintended Consequences

Participation (or non-participation) in mediation has come back to “bite” parties with a surprisingly diverse set of consequences,⁴⁷ ranging from influencing judicial evaluation of the propriety of an injunction,⁴⁸ to lack of entitlement to a restraining order,⁴⁹ to denial of the right to an in-person deposition.⁵⁰

2. The Substantive Surprise

Unfortunately for some litigants, their actions (or non-actions) in mediation are also invoked by judges to help justify decisions on the underlying substantive claims.⁵¹

⁴¹ For detailed analysis, see COLE ET AL., *supra* note 3, § 5:12.

⁴² *See, e.g.*, *iMedicor, Inc v. Access Pharm., Inc.*, 290 F.R.D. 50, 52–53 (S.D.N.Y. 2013) (rejecting party’s justification that it waited to amend until completion of mediation so as to avoid “needlessly taking up the court’s time” and noting instead that “[i]t would have been more efficient to put all of the possible claims on the table while the parties were negotiating not only to better inform the parties’ discussions, but also to resolve all possible claims at the same time.”).

⁴³ *See, e.g.*, *Johnson v. Eldridge*, 799 N.E.2d 29 (Ind. Ct. App. 2003) (concluding that a settlement offer made three months late because parties were awaiting mediation qualified as good cause for extension of time for purposes of making a required timely written offer of settlement under the Indiana Tort Prejudgment Interest statute).

⁴⁴ *See, e.g.*, *Wieters v. Roper Hosp., Inc.*, 58 Fed. Appx. 40, 44 (4th Cir. 2003) (affirming district court refusal to grant extension of time for discovery where moving party argued that basis for extension was that “valuable time had been consumed in a lengthy mediation process”).

⁴⁵ *See, e.g.*, *Thompson v. Thompson*, 387 S.W.3d 769, 772 (Tex. App. El Paso 2012) (denying motion to continue trial where, among other things, party failed to attend mediation).

⁴⁶ *See, e.g.*, *Woodhull v. County of Kent*, No. 1:04-CV-203, 2006 WL 708662 (W.D. Mich. 2006) (holding that submitting expert witness statements as exhibits to a Facilitative Mediation Case Summary satisfied the procedural requirements for mandatory expert disclosure).

⁴⁷ For detailed analysis and numerous examples, see COLE ET AL., *supra* note 3, § 5:12.

⁴⁸ *Chanel, Inc. v. Pu*, No. 07-2502-KGS, 2009 WL 722050 (D. Kan. 2009) (citing failure to participate meaningfully in mediation as evidence of defendant’s continuing disregard of plaintiff’s rights, justifying injunction against trademark infringement).

⁴⁹ *Sanchez v. Sanchez*, No. 10-CV-1628 JLS (RBB), 2010 WL 4790179, *5 (S.D. Cal. 2010) (citing request for continuance to permit mediation as evidence suggesting lack of imminent harm).

⁵⁰ *Palma v. Safe Hurricane Shutters, Inc.*, No. 07-22913-CIV, 2009 WL 653305 (S.D. Fla. 2009) (noting opportunity to view demeanor in mediation as rationale for denying in-person deposition)

⁵¹ For detailed analysis see COLE ET AL., *supra* note 3, § 5:12.

Thus, for example, in *Hodge v. ClosetMaid Corp.*,⁵² the court cited plaintiff's attendance at mediation conferences where she exercised settlement authority on behalf of her employer as evidence that she was an exempt employee not entitled to overtime compensation. In *Logan v. Potter*,⁵³ the court rejected plaintiff's claim that defendant failed to accommodate his condition, in part because defendant engaged in mediation with plaintiff. And in *In re I.C.*,⁵⁴ a father's refusal to mediate a visitation dispute was invoked to demonstrate his inability or refusal to work in the best interest of the children thereby supporting an award of physical custody to the mother.

3. Traps for the Unwary

Still other litigants fall into a variety of "traps for the unwary" involving waivers (or unexpected tolling) of relevant statutes of limitations, unintended waivers of rights and notice of claims, and exhaustion of remedies.⁵⁵ For example, in *Michelson v. Mid-Century Ins. Co.*,⁵⁶ the court rejected plaintiff's argument that the statute of limitations for an insurance claim should have remain tolled until she was formally notified that the mediation process was ended, as opposed to twelve days earlier when mediation failed.⁵⁷ And in *Stipp v. St. Charles*,⁵⁸ the Kentucky Court of Appeals held that a party waived its objection to venue by, among other things, beginning mediation. More notorious, is the case of *Haghighi v. Russian-American Broadcasting*,⁵⁹ where the parties' failure to include statutorily-mandated "magic words" in their settlement agreement led to years of litigation about its enforcement.⁶⁰

4. A Source of Entirely New Claims

And, sadly, mediation itself is the source not only of litigation about the mediation and its impact within the original dispute, but also a source of entirely new claims, ranging from lawyer malpractice⁶¹ to discrimination⁶² to insurance bad faith.⁶³

⁵² *Hodge v. ClosetMaid Corp.*, No. 5:13-cv-62-Oc-10PRL, 2014 WL 1328967, *9 (M.D. Fla. 2014).

⁵³ *Logan v. Potter*, No. 06-297, 2007 WL 1652268, *12 (D.N.J. 2007).

⁵⁴ *In re I.C.*, No. B217758, 2010 WL 427129, *25 (Cal. App. 2d Dist. 2010).

⁵⁵ For detailed analysis see COLE ET AL., *supra* note 3, at § 5:15.

⁵⁶ *Michelson v. Mid-Century Ins. Co.*, 83 Cal. App. 4th 450, 99 Cal. Rptr. 2d 804 (2d Dist. 2000).

⁵⁷ *Id.* at 459, 99 Cal. Rptr. 2d at 809 (noting that the relevant statute requires no written notification to trigger the end of the tolling period and instead simply provides that tolling ends when mediation is "completed").

⁵⁸ *Stipp v. St. Charles*, 291 S.W.3d 720 (Ky. Ct. App. 2009).

⁵⁹ *Haghighi v. Russian-American Broadcasting Co.*, 173 F.3d 1086, 1087-88 (8th Cir. 1999); *Haghighi v. Russian-American Broadcasting Co.*, 945 F. Supp. 1233, 1234-35 (D. Minn. 1996), *certified question answered*, 577 N.W.2d 927 (Minn. 1998) and *rev'd*, 173 F.3d 1086 (8th Cir. 1999) (refusing to enforce an otherwise fair mediation agreement signed by the parties that stated it was a "Full and Final Mutual Release of All Claims"; but did not include the magic words that "it was binding").

⁶⁰ See James R. Coben & Peter N. Thompson, *The Haghighi Trilogy and the Minnesota Civil Mediation Act: Exposing a Phantom Menace Casting a Pall Over the Development of ADR in Minnesota*, 20 HAMLIN J. PUB. L. & POL'Y 299, 324 (1999) (arguing that the insistence on technical terms in mediated settlement agreements contrary to community expectations creates uncertainty in whether mediation settlements are enforceable "casting a pall over the development of ADR in Minnesota").

⁶¹ For detailed analysis see COLE ET AL., *supra* note 3, at § 12:4.

⁶² *Id.* at § 5:19.

And all of this lack of beauty does not even include the vast bulk of mediation litigation—the inevitable battles about enforcement of mediated settlements,⁶⁴ sanctions disputes regarding mediation behavior,⁶⁵ and bitter fights about mediation costs and entitlement to attorney’s fees.⁶⁶

Despite my better judgment, I will close with a positive: the arguably “beautiful” fact that there is virtually no litigation about mediators themselves,⁶⁷ notwithstanding the considerable ink spilled over the last three decades in academic journals and continuing legal education materials.⁶⁸ Perhaps closing on a positive note makes sense: these “barnacles” are an annoyance and certainly create inefficiencies. In other words, they aren’t pretty; but I am willing to concede that “ugly” might be too strong a word. That label is better reserved for aristocracy and truth denial.

II. ARISTOCRACY

*They are purportedly selected for their “virtue”—judgment, neutrality, expertise—yet rewarded as if they are participants in international deal-making. In more sociological terms, the symbolic capital acquired through a career of public service or scholarship is translated into a substantial cash value in international arbitration.*⁶⁹

With the quote above, Yves Dezaly and Bryant Garth neatly described the “very select and elite group of individuals”⁷⁰ eligible to serve as international arbitrators. I have systematically argued elsewhere⁷¹ that this same mantle has been passed to the elite group of class action mediators and “the symbolic power that led to their selection by disputing parties has fostered especially lazy judicial reasoning, and unjustified judicial deference in a context where vulnerable third parties (class members not at the bargaining table) deserve better from our judicial system.”⁷² What exactly am I referring to? In dozens of decisions each year, federal and to a lesser extent, state court judges cite the

⁶³ *Id.* at § 5:18.

⁶⁴ *Id.* at §§ 7:1–7:20.

⁶⁵ *Id.* at §§ 9:3–9:16.

⁶⁶ *Id.* at §§ 9:17–9:20. Just by way of example, courts routinely grapple with how many attorneys are necessary to effectively represent a party in mediation. Generally speaking, more than two is problematic! *Id.* at § 9:20 n. 8–13 (and cases cited therein).

⁶⁷ COLE ET AL., *supra* note 3, at § 7:10. Lawyers, on the other hand, have fared far worse, with malpractice actions and ethics complaints brought against them for mediation acts and omissions ranging from disclosure of privileged communications to failure to schedule or pay for mediations to seeking to enforce mediated settlements with client consent. For detailed analysis and case examples, see COLE ET AL., *supra* note 3, at § 12:4.

⁶⁸ See, e.g., Scott H. Hughes, *Mediator Immunity: The Misguided and Inequitable Shifting of Risk*, 83 OR. L. REV. 107 (2004); Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81 (2003); Joseph P. Stulberg, *Mediator Immunity*, 2 OHIO ST. J. ON DISP. RESOL. 85 (1986). See generally, COLE ET AL., *supra* note 3, at §§ 11:10.

⁶⁹ YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 8 (1996).

⁷⁰ *Id.*

⁷¹ Coben, *supra* note 16. Much of the analysis for this section is drawn from this earlier article.

⁷² *Id.* at 162–63.

involvement of a private mediator as evidence that bargaining in a class action case was conducted at arms-length and without collusion between the parties.⁷³ The degree of deference ranges from the sublime to the ridiculous:

“[A] court-appointed mediator's involvement in pre-certification settlement negotiations *helps to ensure* that the proceedings were free of collusion and undue pressure”;⁷⁴

“The assistance of an experienced mediator . . . *reinforces* that the Settlement Agreement is non-collusive”;⁷⁵

“[T]he participation of an independent mediator in settlement negotiations *virtually insures* that the negotiations were conducted at arm's length and without collusion between the parties”;⁷⁶ and

“The assistance of an experienced mediator in the settlement process *confirms* that the settlement is non-collusive”⁷⁷

Surprisingly, courts not only cite mediator testimony on process fairness, they routinely detail and credit mediator endorsement of settlement quality, in effect allowing the broker of the settlement to opine on its substantive merits.⁷⁸ Sometimes it is a passing reference, for example a mention “that the experienced mediator ‘unreservedly’ recommends the Settlement.”⁷⁹ But often, the mediators volunteer much more, including their own comparison of the fairness of the settlement they brokered to other settlements or predicted litigation outcomes:

[I]t is my opinion that *the [S]ettlement[s] w[ere] achieved through a fair and reasonable process and [are] in the best interest of the class . . . the*

⁷³ For recent examples, *see, e.g., In re Fannie Mae Sec. Litig.*, MDL No. 1668, No. 04–1639 (RJL), 2013 WL 6383000, *4 (D. D.C. Dec. 6, 2013) (citing mediator letter attesting that, “in [his] professional opinion, the negotiations leading to this proposed settlement were very concentrated and conducted at arms’ length,” and “[a]ll of the Parties’ counsel were not only professionals, but also clearly possessed the sufficient discovery and research materials to make informed decisions”); *In re Citigroup Inc. Sec. Litig.*, 965 F.Supp.2d 369, 381 (S.D.N.Y. 2013) (observing that “[f]rom his front row seat, the mediator concluded that “negotiations in this case were hard fought and at arm's-length at all times”); *In re LivingSocial Mktg. and Sales Practice Litig.*, 298 F.R.D. 1, 11 (D. D.C. 2013) (reciting mediator testimony that “[t]here was never any type of collusion between the Parties in any of the negotiations,” and that the parties’ negotiations “were intense at every step of the way, and the Parties vigorously advocated for their respective positions”). For historical documentation of this practice and many more case citations and parentheticals, *see* James R. Coben, *supra* note 16, at 167–72; *see also* COLE ET AL., *supra* note 3, at § 7:17 n. 26–33.

⁷⁴ D'Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001) (emphasis added).

⁷⁵ Diaz v. E. Locating Serv. Inc., No. 10 Civ. 4082(JCF), 2010 WL 2945556, *1 (S.D.N.Y. 2010) (emphasis added).

⁷⁶ Bert v. AK Steel Corp., No. 1:02-CV-467, 2008 WL 4693747, *2 (S.D. Ohio 2008) (emphasis added).

⁷⁷ Satchell v. Fed. Express Corp., Nos. C03-2659 SI, C 03-2878 SI, 2007 WL 1114010, *4 (N.D. Cal. 2007) (emphasis added).

⁷⁸ For a detailed narrative *see* Coben, *supra* note 16, at 172–74.

⁷⁹ Moore v. Verizon Communications, Inc., No: C 09-1823 SBA, 2013 WL 4610764, *7 (N.D. Cal. 2013).

court system and the mediation process worked exactly as they are supposed to work at their best; a consensual resolution was achieved based on full information and honest negotiation between well-represented and evenly balanced parties”;⁸⁰

“The settlement “was arrived at through arm's length negotiations by counsel who were skilled and knowledgeable about the facts and law of this case,” and it was “*fair, reasonable and adequate in light of the strengths and weaknesses of the claims and defenses and the risks of establishing liability and damages*”;⁸¹

“All members of the defined class . . . were adequately represented during the lengthy course of the mediation” and “[a]ll sides exhibited great skill and determination . . . resulting in *a comprehensive settlement of a very complex matter which I believe is the fairest resolution which could be obtained*”;⁸²

“The separately negotiated attorneys' fees and expenses agreement was negotiated in good faith and *is fair and reasonable and within the range of fees paid in similar shareholder derivative cases*”;⁸³

“[T]he settlement reached between the parties was the product of arm's-length and good faith negotiations . . .” [and] “*is non-collusive, fair and reasonable to all parties and provides significant benefits to the Settlement Class.*”⁸⁴

And, to make things worse, in some cases, this testimony is encouraged in strategic direct rebuttal to objections regarding the merits of the settlement offered by class members absent from the mediation.⁸⁵

⁸⁰ *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F.Supp.2d 503, 509–10 (E.D.N.Y. 2003) (emphasis added).

⁸¹ *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 957 (9th Cir. 2009) (emphasis added).

⁸² *In re Literary Works in Electronic Databases Copyright Litig.*, 654 F.3d 242, 263 (2nd Cir. 2011) (emphasis added).

⁸³ *In re MRV Communications, Inc. Derivative Litig.*, No. CV 08-03800 GAF (MANx), 2013 WL 2897874, *6 (C.D. Cal. 2013) (emphasis added).

⁸⁴ *Johansson-Dohrmann v. CBR Systems, Inc.*, No. 12-cv-1115-MMA (BGS), 2013 WL 3864341, *8 (S.D. Cal. 2013) (emphasis added).

⁸⁵ In 2002, Richard T. Seymour endorsed this approach as a particular strategic benefit of mediated class actions. See Richard T. Seymour, *Mediating Class Actions: A Plaintiff Lawyer's View*, in HOW ADR WORKS 389–411 (Norman Brand ed. 2002). Seymour advised that “[t]he mediator can provide a direct response to class members claiming improper collusion between the plaintiffs and the defendant in the settlement by testifying to the arms-length character of the negotiations and the vigor with which the parties pursued their competing goals.” *Id.* at 392. A stark “no-apologies” example of implementing the strategy can be seen in *Lipuma v. Am. Express Co.* where the mediator’s affidavit stated:

3. It has come to my attention that counsel for a purported class member has alleged that counsel for the parties “colluded” in reaching the settlement. I submit this affidavit to specifically address those allegations. Based on my observations as mediator, such allegations are entirely baseless. I observed no signs of collusion or unethical conduct.

Courts utilizing this testimony never explain in any satisfactory manner why they choose to credit it.⁸⁶ The sobering reality is that this judicial deference has its foundation in a modern aristocracy. These mediators are admired and not to be doubted simply because of their character and reputation.⁸⁷ In other words, “we know these are good people.”⁸⁸ When wearing my more cynical hat, I suspect as well, “this is a club that I soon hope to join.”

Why care about this problem? After all, these elite class action mediators are amazingly talented professionals, no doubt some of the very best lawyers and problem-solvers in our nation’s history. Haven’t they earned the right to be trusted? I have a simple response: trust based on individual “virtue” may well be a good reason to choose a particular neutral but it is a poor criterion for the judicial system to base the administration of power on, especially when that exercise occurs as it does in mediation’s private rooms without controls of any formal procedure or rules. The lack of accountability and transparency leaves one with a distinctly undemocratic feeling.⁸⁹ As I wrote in my earlier article, “the intersection of private rights (the parties’ choice to have the mediator they want and the process they want) does not mesh neatly with the public rights at stake in the class action settlement approval process—the necessity to protect the interests of the absent class members.”⁹⁰

There are voices of reason in this wilderness, most admirably *Kakani v. Oracle Corp.*,⁹¹ where, in rejecting the parties’ joint motion for preliminary approval of a mediated class action settlement, the Honorable William Alsup pointedly opined:

4. It is my observation that Defendants and Plaintiffs were represented by highly competent, reputable and ethical counsel who negotiated vigorously and at arms-length for their respective party's interests.

Lipuma v. Am. Express Co., 406 F. Supp. 2d 1298, 1306 (S.D. Fla. 2005).

⁸⁶ A number of rationales are vaguely implied in the case law, including the erroneous assumptions that mediators have a duty to stop collusion or fraud, that mediators have an ethical responsibility to protect the interests of third parties, or that the threat of mediator testimony serves as deterrence against bad acts. See Coben, *supra* note 16, at 175–82.

⁸⁷ For detailed discussion and case examples illustrating the effusive praise courts use to describe the mediators they rely on, see Coben, *supra* note 16, at 183–85 (documenting approbation ranging from “experienced” to “nationally recognized” to “indisputably exquisitely qualified” and all kinds of variation in between).

⁸⁸ See e.g., *In re Cmty. Bank of N. Virginia*, MDL No. 1674, No. 03-0425, 2008 WL 3833271, *11 (W.D. Pa., 2008) (concluding a settlement was entitled to a presumption of fairness based on the mediator’s testimony, noting that the mediator was “well known to the court, having served on this court as well as the court of appeals, with distinction. *His integrity is beyond reproach and no credible attack has been, or could be, lodged against his assurances*”) (emphasis added). *Id.*

⁸⁹ For a trenchant discussion of democracy and alternative dispute resolution, see Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW AND CONTEMP. PROBS. 279, 281 (Winter 2004) (noting “[w]ith rare exception . . . the question of the relationship between arbitration and democracy, or for that matter, democracy and dispute resolution generally . . . has simply fallen through the cracks of scholarly attention”).

⁹⁰ Coben, *supra* note 16, at 187. Moreover, this disconnect is profoundly compounded by the inability of class objectors to get access to mediation information. See generally, WILLIAM B. RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 11:57 (4th ed. 2008) (noting that “[t]he objector does not have an absolute right to discovery and presentation of evidence.”).

⁹¹ *Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 WL 2221073 (N.D. Cal. 2007).

*It is . . . no answer to say that a private mediator helped frame the proposal. Such a mediator is paid to help the immediate parties reach a deal. Mediators do not adjudicate the merits. They are masters in the art of what is negotiable. It matters little to the mediator whether a deal is collusive as long as a deal is reached. Such a mediator has no fiduciary duty to anyone, much less those not at the table.*⁹²

Sadly, Judge Alsup has been joined by only a small number of jurists, but none willing to so precisely name the problem with any sense of the concern I think it deserves.⁹³

Will this anointing of a mediator aristocracy spread beyond the specialized context of class action cases? That remains to be seen. If it does, a “sleeping” mediation may well awaken, but will be far uglier than when she first fell asleep.

III. TRUTH DENIAL

*“It’s like pointing to an apple and saying, ‘this is an orange.’ It takes practice to train your mind to be able to do it. . . . You have to convince yourself, not so much that an apple is an orange, but that there is no such thing as what the object ‘really’ is. . . . Or rather, that on the question of what the object is, there are *only* competing answers—no objective fact of the matter.”* David Roberts⁹⁴

In the late 1990s, toward the end of my first decade of mediation work, I first read *Some Trouble with Cows*,⁹⁵ Beth Roy’s intriguing account of conflict in a remote Bangladeshi village. I found myself immediately drawn to the following two sentences:

⁹² *Id.* at *11 (rejecting the mediated settlement of alleged failure to pay overtime claims as a “bonanza” for the company and for class counsel, where it, among other things, provided an extraordinarily short time period for workers to claim settlement benefits and provided that payments unclaimed by class members were to be retained by the defendant notwithstanding that plaintiff’s counsel would receive a set multi-million dollar fee regardless of how many claims were actually submitted by class members).

⁹³ *See, e.g., In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011) (vacating trial court approval of a class action attorney fee award and mediated settlement where the gross disproportion between the class award and the negotiated fee award raised at least an inference of unfairness, and pointing out that “the mere presence of a neutral mediator, though a factor weighing in favor of a finding of non-collusiveness, is not on its own dispositive of whether the end product is a fair, adequate, and reasonable settlement agreement”); *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 399 (C.D. Cal. 2007) (lauding the mediator’s involvement in the case but pointing out that he was essentially duped by the parties into believing that hard trade-offs were made during the mediation process he brokered and wholeheartedly endorsed, when in fact, the trade-offs had been negotiated secretly by the parties before the mediation even began); *In re Tribune Co.*, 464 B.R. 126, 157 n. 44 (Bkrtcy. D. Del 2011) (stating that “a proposed settlement must stand or fall on its own merits and is not dependent upon the identity of the Mediator.”).

⁹⁴ Grist Staff, *David Roberts Explains Postmodern Conservatism in 36 Tweets*, GRIST (Nov. 11, 2014), available at <http://grist.org/politics/david-roberts-explains-postmodern-conservatism-in-36-tweets/> (last visited March 6, 2015) (citing the grant of *certiorari* in *King v. Burwell*, 135 S.Ct. 475 (2014) “as a crucial turning point in the American conservative movement’s ability to assert that black is white and up is down”).

⁹⁵ BETH ROY, *SOME TROUBLE WITH COWS* (1994).

The stories I heard . . . were not about “what happened” (itself a questionable concept). What I heard was how people *saw* what happened, or, rather, how people *remembered* what they saw, or rather, how they *talked* about what they remembered, or rather, how they talked *to me* about what they remembered—or, rather, what I *heard* people say to me about what they remembered.⁹⁶

The description aptly captured my experience sitting in conflict and listening to disputants’ stories. I suspect many mediators would feel the same way. At the time, I did not stop to reflect on just how adroitly it summed up the fundamental postmodernist assumptions about truth that mediation literature offers up unabashedly, and for the most part, without dissent. I divide the thinking into four categories, each illustrated with quotes from well-known mediation texts:

A. *Focus on the Future, Not the Past*

In mediation land, there is the past—a troubled and confusing place, which is contrasted with a much more attractive future—one that parties can control and shape. For example, in the newest edition of their *Mediation Theory and Practice*⁹⁷ casebook, James Alfini, Sharon B. Press, and Joseph B. Stulberg advise:

Focus on the Future. It is helpful to remind parties that they cannot change what happened in the past, but they can decide how they want things to be in the future. As a means of comparison, the traditional litigation process focuses on the past, determining what happened, and who was wrong or right. In mediations involving an ongoing relationship, what happened in the past need only be relevant in helping parties determine how they want to behave in the future.⁹⁸

In the 2012 revised edition of *The Middle Voice*,⁹⁹ Stulberg and Love instruct us:

Focus on the future, not the past. A mediator helps parties shape their future. Past events influence that design. But the mediator must remember that no one can change what has happened and that the impact of past events becomes less dominant as their details become ambiguous and disputed. A mediator must not let the parties’ competing visions of their past paralyze them.”¹⁰⁰

⁹⁶ *Id.* at 5.

⁹⁷ JAMES J. ALFINI, SHARON B. PRESS & JOSEPH B. STULBERG *MEDIATION THEORY AND PRACTICE* (3d ed. 2013).

⁹⁸ *Id.* at 125. Even the drafters of the Uniform Mediation Act saw fit to emphasize that mediation is not a truth-seeking process. See UNIF. MEDIATION ACT prefatory note 1 (2003) (“Although it is important to note that mediation is not essentially a truth-seeking process in our justice system such as discovery, if the parties realize that they will be unable to show that another party lied during mediation, they can ask for corroboration of the statement made in mediation prior to relying on the accuracy of it.”).

⁹⁹ STULBERG & LOVE, *supra* note 1.

¹⁰⁰ *Id.* at 96.

Lawrence Boulle, in *Mediation: Skills and Techniques*,¹⁰¹ recommends:

Getting out of the past into the future. . . . While the mediation might have to devote some time to dealing with prior events, it is not obsessed with the past and with historical facts, as are other forms of dispute resolution such as adjudication. The mediator is able to redirect the parties' attention from a negative and destructive past to a future which can be different and more attractive.¹⁰²

In the 1984 classic, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation*,¹⁰³ Jay Folberg and Alison Taylor noted:

Mediation is more concerned with how the parties will resolve the conflict and create a plan than with personal histories. In this respect, mediation is cognitive and behavioral in perspective rather than existential. It is more concerned with the present and the future than with the past.¹⁰⁴

Folberg and Taylor went on to propose that one of eight propositions "for a system of shared, unified beliefs for mediators" should be that "[i]n mediation the past history of the participants is only important in relation to the present or as a basis for predicting future needs, intentions, abilities, and reactions to decisions."¹⁰⁵

To be fair, some do push back strongly against this reductionist view of the past. As Joseph P. Folger and Robert A. Baruch Bush wrote in 1996, an important hallmark of transformative practice "is a willingness to mine the past for its value to the present":¹⁰⁶

Hallmark 8: "*Discussing the past has value to the present*": *Being responsive to parties' statements about past events.* . . . Parties' comments about the past can be highly relevant to the present, in the unfolding conflict interaction. In talking about what happened, each disputant reveals important points about how he or she sees, and wants to be seen by, the other party. . . . If third parties view the history of conflict as evil, as something that the session quickly must move beyond, then important

¹⁰¹ LAWRENCE BOULLE, *MEDIATION: SKILLS AND TECHNIQUES* (2001).

¹⁰² *Id.* at 46. See also MARK S. UMBREIT, *MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE* 20 (1995) (describing mediation as "a time limited problem solving intervention that is proving to be effective in a wide range of interpersonal disputes and conflicts. It does not focus primarily on past behavior and specific weaknesses or emotional problems of individuals. Instead, mediation is future oriented and builds upon the strengths of the people in mediation to work together with each other in resolving the conflict.").

¹⁰³ JAY FOLBERG AND ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* (1984).

¹⁰⁴ *Id.* at 8–9.

¹⁰⁵ *Id.* at 13–14.

¹⁰⁶ Robert Baruch Bush & Joseph P. Folger, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 *MEDIATION Q.* 263, 274 (1996).

opportunities for empowerment and recognition will almost certainly be missed.¹⁰⁷

B. *Truth in Stories*

Still other mediation writers emphasize the importance of “stories” and the fairy tale imagery they evoke (a particularly apt metaphor given our symposium title). In the introductory chapter of *Resolving Personal and Organizational Conflict: Stories of Transformation and Forgiveness*,¹⁰⁸ Kenneth Cloke and Joan Goldsmith share an ancient piece of Jewish wisdom:

“What is truer than the truth?” It answers, “The story.” How is it possible for a story to be “truer than the truth”? Stories contain not only the truth of factual description, of events, people, and places, but also fragments of the storyteller’s truth. They expose the shadow that falls between emotion and response.¹⁰⁹

Cloke and Goldsmith invite conflict professionals to “hear as fairy tales all the stories of conflict that you will ever be told, not because they are untrue but because their truths are hidden deep within their narrative structure.”¹¹⁰ The issue of truth or falsity, assert Cloke and Goldsmith:

takes on a different meaning in mediation. When people hear stories told about them by their opponents, they often respond, “That’s not true!” And when their opponents hear stories told about them, they offer the same protest. Our experience is that no conflict story is either completely true or completely false. No one tells the truth, the whole truth, and nothing but the truth while embroiled in conflict. Indeed, it is impossible to do so, because no one is completely omniscient or empathic, and no one can come close to knowing the whole truth. The oath people take in court to tell the truth actually forces them to lie. Truth, in conflict, is always relative to one’s role in it and one’s angle of perception. This does not mean objective truth does not exist, but that it cannot be determined by consensus. Moreover, mathematical and scientific truth rests on predictability, which requires uniformity, but no two conflicts or

¹⁰⁷ *Id.* at 273–74 (noting, as I believe to be the case, that many mediation “how-to manuals advise third parties to focus on the future, not the past, and to encourage parties to keep their discussion of past events to a minimum” just as the same guides “advise against encouraging expression of emotions.”).

¹⁰⁸ KENNETH CLOKE & JOAN GOLDSMITH, *RESOLVING PERSONAL AND ORGANIZATIONAL CONFLICT: STORIES OF TRANSFORMATION AND FORGIVENESS* (2000).

¹⁰⁹ *Id.* at 1.

¹¹⁰ *Id.* at xv. The authors also assert “that every story about conflict is, at one level, a fairy tale. Each tale of conflict, in the way it is told, has the power to keep people locked in combat, and it has an equal power to free them from suffering. Each story can leave them closer to anger or forgiveness, toward impasse resolution, into stasis or transformation.” *Id.* at 7.

perceptions are sufficiently alike to allow for agreement, except in the most abstract terms.”¹¹¹

B. *No Objective Truth*

Moving beyond the notion of deeply hidden truths in stories, others have written eloquently and directly that there simply is no such thing as “objective truth”, story or not. For example, in *Narrative Mediation: A New Approach to Conflict Resolution*,¹¹² John Winslade and Gerald Monk assert:

Stories therefore are not viewed as either true or false accounts of an objective “out there” reality. Such a view is not possible, because events cannot be known independently of the dominant narratives known by the knower. It is therefore more useful to concentrate on viewing stories as constructing the world rather than viewing the world as independently known and then described through stories.¹¹³

Winslade and Monk then go on to explicitly link this vision of truth to the postmodern philosophical movement.¹¹⁴ As they put it:

Postmodern philosophy emphasizes the enormous variation in how people live their lives due to the quite different discursive contexts that surround them. Postmodern thinking suggests that there is no single definable reality. Rather, there is great diversity in the ways we make meaning in our lives. It is inevitable that differences will result from this diversity of meaning and that conflict will arise from time to time within or between people. . . . [A]lso from a narrative point of view, conflict is likely because people do not have direct access to the truth or to the facts about any situation. Rather, they always view things from a perspective, from a cultural position. Drawing on this perspective, they develop a story about what has happened and continue to act into a social situation out of the story they have created. Facts, from this perspective, are simply stories that are generally accepted. From time to time these stories lead to diametrically opposed readings of events. Again, this is not anyone’s fault. It is to be expected, given the nature of human cultural interaction. Nevertheless, these stories have effects and produce realities.¹¹⁵

Other writers, less willing to abandon objective reality altogether, nonetheless question our ability discern it. For example, Donald Saposnek points out in *Mediating Child Custody Disputes*¹¹⁶ that “neither individual truth nor objective reality is easily

¹¹¹ *Id.* at 37.

¹¹² WINSLADE & MONK, *supra* note 1.

¹¹³ *Id.* at 3.

¹¹⁴ *Id.* at 41.

¹¹⁵ *Id.*

¹¹⁶ DONALD T. SAPOSNEK, *MEDIATING CHILD CUSTODY DISPUTES* (revised ed. 1998).

attainable in custody disputes,”¹¹⁷ and as a result, “the mediator can succeed in resolving the dispute only if he or she adheres to the systems point of view, in which the mediator deals with varying degree of descriptive accuracy about the system itself.”¹¹⁸

C. Truer than Truth

I have been extremely fortunate over the years to enjoy co-teaching mediation with our symposium host, Professor Lela P. Love. In those trainings, she often shares the story of Charles Drew to examine the power of narrative. In a 2000 law review article, she summarized the importance of “stories” and draws a distinction between “literal” and “larger” ones:

Allowing parties to tell their stories (often a story of a wrong they have experienced) is critical to each party being able to move beyond that experience of wrong and to listen to the other party’s story, frequently a quite different story or viewpoint on the same “facts” and invariably expanding the picture or reality that informs each individual party’s perception of events. Mediators need to understand that they must listen to each party’s story and be able to see how that party views events, but they need not judge or determine what version of events constitutes “fact.” By preserving for each party an uninterrupted platform for speech, the mediator offers an important vehicle to achieve the objectives of party empowerment and intraparty recognition.

The story of the death of Charles Drew illustrates that finding factual truth is not necessarily the purpose of storytelling. Charles Drew was a prominent African American physician and scientist whose research on the use of blood plasma and whose work in helping to establish the first American Red Cross Blood Bank saved countless lives in World War II. Drew died after an automobile accident in North Carolina in 1950. Many people tell and believe the story that Drew was denied treatment and a blood transfusion at the hospital to which he was taken after the accident because the black beds were full, and Drew died as a result of this action. We can listen to that story and learn important lessons about the indignities and tragedies suffered due to segregation policies in the South in the first half of the 20th century, which may be the “truth” that the speaker is trying to relate. In fact, the myth around Charles Drew is not historically accurate, though it is true that many African Americans were denied critical medical treatment. Drew received appropriate and energetic care in the small hospital to which he was taken. The legend around Drew, then, is not literally true but reveals a larger truth. Such

¹¹⁷ *Id.* at 39.

¹¹⁸ *Id.*; see also JOHN W. COOLEY, *THE MEDIATOR’S HANDBOOK* 3 (2000) (observing that “[t]he mediator deals primarily with the subjective and is generally an active participant in the mediation process who attempts to move the parties to reconciliation and agreement, regardless of who or what is right or wrong.”).

complexities lend themselves to mediation. Although an arbitrator or neutral expert must attempt to find “facts,” a mediator must give each party the storytelling floor and allow the parties to be shifted by the power of the other’s narrative (sometimes assisted by advocates and the translating function of the mediator). The telling of the story shifts the speaker; the hearing of the story potentially shifts the listener; from a mediator’s perspective, the parties, as firsthand participants, are in the best position to judge the “truth” around the events related to their conflict.¹¹⁹

This notion of a divide between “literal truth” and “larger truths” captures the essence of contemporary mediation theory. It also leaves me deeply troubled.

Just over a decade ago, Bernie Mayer made the case that “[c]onflict resolution as a field is facing a serious crisis.”¹²⁰ He convincingly argued, apropos of this symposium’s keynote by colleague Giuseppe De Palo urging expanded use of mandatory mediation, that “[c]onflict resolution professionals are not significantly involved in the major conflicts of our times.”¹²¹ He asked us to “consider the possibility that the nature of the services offered and the concept of the field currently being articulated may speak to a narrow range of people,”¹²² specifically calling out as examples our field’s concepts of neutrality and impartiality that are a poor match for what people in conflict often want: “advice, recommendations, and evaluations of their case; assistance in persuading others; or vindication of their actions and positions.”¹²³ Mayer described how “disputants do not necessarily want resolution”¹²⁴ and how they “are suspicious of neutrality.”¹²⁵ And he suggested conflict resolvers “overidentify our work with the third-party neutral role”¹²⁶ which “may offer one means for creating a safe, flexible, informal, and creative forum for interchange, but they do not offer sufficient opportunities for voice, justice, vindication, validation, or impact.”¹²⁷ Finally, Mayer chastised us for being too focused on

¹¹⁹ Lela P. Love, *Training Mediators to Listen: Deconstructing Dialogue and Constructing Understanding, Agendas, and Agreements*, 38 FAM. & CONCIL. CTS. REV. 27, 35 (2000).

¹²⁰ BERNIE S. MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION 3 (2004).

¹²¹ *Id.* at 4–5 (“People involved in conflict do not readily or naturally turn to conflict resolvers. In many arenas, if mediators had to rely on people voluntarily asking for their services, they would have almost no business. Instead, people must be persuaded, cajoled, or mandated to use mediation and related services.”).

¹²² *Id.* at 6.

¹²³ *Id.*

¹²⁴ *Id.* at 15 (“People want to win, to build a movement, to carry on an important struggle, to achieve meaning, to address basic issues, to gain political advantage, or other similar goals. Resolution implies too shallow an outcome or goal to many.”).

¹²⁵ *Id.* at 17 (“People often do not trust our neutrality. They are suspicious of the concept and question, often correctly, whether we can genuinely be as neutral, impartial, and unbiased as we say we are. More important perhaps, neutrality is not what people embroiled in deep conflict are usually looking for. They want assistance, advocacy, advice, power, resources, connection, or wisdom. We tend to rely heavily on a neutral stance to obtain trust and credibility, whereas disputants are more inclined to accept the procedural help of a nonneutral who brings other resources to bear and to doubt the practical usefulness of someone who is genuinely neutral. There are times when neutrality is essential, but conflict resolvers place too much reliance on it as a defining feature of the role we play. In many situations, if we emphasized this less, we might actually be trusted more.”).

¹²⁶ MAYER, *supra* note 120, at 29.

¹²⁷ *Id.*

collaborative problem solving,¹²⁸ when disputants may instead most want help “with noncollaborative approaches—ones that they hope will further their cause, achieve victory, and give them the chance to be heard in a powerful and decisive way.”¹²⁹

To Mayer’s powerful case “beyond neutrality,” I wish to add that we at least should be willing to consider that people just might also be hungry for the recognition of truth. And, by truth, I do not mean the relativist, postmodernist framing that characterizes much of mediation writing, theory and practice.

In an era where political polarization so routinely leads to outright denial of objective fact with resulting loss of personal accountability,¹³⁰ why is the mediation movement so confident that entitlement to separate “truths” is the preferred path forward? When dealing with uncertainty, might we be stronger as a society with more science (with its foundational assumptions of peer review, constant reevaluation and testing)¹³¹ and more, rather than less, reliance on time-tested principles borrowed from law, concepts like shifting burdens of proof, rigorous testing of evidence and application of socially negotiated norms?

I surface this concern profoundly aware of the considerable body of contemporary social science supporting the notion that “emotions, culture and world view” are intimately connected to facts and fact perception.¹³² And, though I am a civil procedure

¹²⁸ *Id.* at 31.

¹²⁹ *Id.* (noting that “[p]eople in conflict are often worried that the collaborative processes in which they are urged to participate will require them to give up something of basic value or to cooperate with what they believe to be evil or malicious”).

¹³⁰ See, e.g., Paul Krugman, *Cranking it Up for 2016*, N.Y. TIMES, Feb. 20, 2015, <http://www.nytimes.com/2015/02/20/opinion/paul-krugman-cranking-up-for-2016.html> (“Along with this denial of reality comes an absence of personal accountability. If anything, alleged experts seem to get points for showing that they’re willing to keep saying the same things no matter how embarrassingly wrong they been in the past.”).

¹³¹ See, e.g., Joel Achenbach, *What Makes Some People So Suspicious of the Findings of Science*, GUARDIAN WEEKLY, Feb. 27, 2015, <http://www.theguardian.com/science/2015/feb/27/science-facts-findings-method-scepticism> (“It’s their very detachment, what you might call the cold-bloodedness of science, that makes science the killer app. It’s the way science tells us the truth rather than what we’d like the truth to be. Scientists can be as dogmatic as anyone else—but their dogma is always wilting in the hot glare of new research. In science it’s not a sin to change your mind when the evidence demands it. For some people, the tribe is more important than the truth; for the best scientists, the truth is more important than the tribe.”).

¹³² Sheryll Cashin, *Why Whites Don’t See Racism: Reagan Democrats are Stephen Colbert Democrats Now*, SALON.COM (May 3, 2014), available at http://www.salon.com/2014/05/03/why_whites_dont_see_racism_reagan_democrats_are_stephen_colbert_democrats_now/ (last visited Mar. 12, 2015) (noting that “[f]acts no longer matter in these debates” and that social science research suggests that “people tend to reject facts that do not fit with their cognitive frames of reference.”) According to Cashin:

On matters of race, many if not most whites have a cognitive frame of reference that suggests to them that no interventions on behalf of racial minorities are necessary. The idea of prejudice is threatening to most whites’ self-identity as nonracist. Thus they can protect their self-identity by minimizing perceived racism. This may explain why blacks and whites can have dramatically different perceptions about whether a particular event, say George Zimmerman’s profiling of Trayvon Martin, was motivated by racism.

Id. See also Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455 (2010) (describing cultural cognition as “a collection of social and psychological mechanisms that cause individuals to conform their factual beliefs to their core values and cultural commitments”); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?: Scott v. Harris and*

professor, I am by no means a litigation romantic. As *Scott v. Harris*¹³³ so dramatically illustrates even a most “objective” form of evidence—a videotape of an event—is interpreted and understood only in a context and “from” a perspective.¹³⁴

Yet, this all feels too comfortable. As mediators, we give people permission to do what they are inclined to do anyway: confront complexity by living their own truths, rather than doing the uncomfortable or difficult job of sorting out reality, of separating fact from fiction.¹³⁵ And by giving them this permission to do so at what is arguably one of (if not *the*) most contentious moments of any individual disputant’s private life, what is the implication for society writ large when it comes to engaging in the most critical public policy issues of our time—almost all of which are characterized by uncertainty?

CONCLUSION

the Perils of Cognitive Illiberalism, 122 HARV. L. REV. 837, 861 (2009) (noting that cultural worldviews “matter from the standpoint of motivated cognition”).

¹³³ *Scott v. Harris*, 550 U.S. 372 (2007) (where the majority relied on the events depicted in a videotape to grant summary judgment and conclude that a police deputy did not violate the Fourth Amendment’s prohibition against use of excessive force).

¹³⁴ The majority opinion’s author, Justice Antonin Scalia, stated during oral argument that the videotape of the chase in question was “the scariest chase [he] ever saw since ‘The French Connection.’” Transcript of Oral Argument at 28, *Scott v. Harris*, 550 U.S. 372 (2007)., This comment immediately followed Justice Alito’s observation that the tape showed plaintiff creating “a tremendous risk” for other drivers.” *Id.* at 27. Justice Scalia’s subsequent written opinion noted, with respect to summary judgment law, that “[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Scott*, 550 U.S. at 380. Justice Stevens in dissent viewed the same video quite differently, noting “the tape actually confirms, rather than contradicts, the lower courts’ appraisal of the factual questions at issue.” *Id.* at 390. Two years later, Dan M. Kahan, David A. Hoffman and Donald Braman, taking up the “Scott challenge,” published their fascinating study of a diverse sample of 1350 Americans who viewed the tape. Kahan, *supra* note 132. Among their conclusions:

As we predicted, there were sharp differences of perception among persons bearing characteristics and commitments typical of two recognizable cultural styles. Individuals (particularly white males) who hold hierarchical and individualist cultural worldviews, who are politically conservative, who are affluent, and who reside in the West were likely to form significantly more pro-defendant risk perceptions. Individuals who hold egalitarian and communitarian views, whose politics are liberal, who are well educated but likely less affluent, and whose ranks include disproportionately more African Americans and women, in contrast, were significantly more likely to form pro-plaintiff views and to reject the conclusion that the police acted reasonably in using deadly force to terminate the chase. The conspicuous competition between these recognizable cultural styles (or “status collectivities”) on issues ranging from gun control to climate change, from abortion to the death penalty, attests to the power of the images reflected in the Scott tape to provoke perceptions protective of observers’ identities.

Id. at 879 (footnotes omitted).

¹³⁵ See generally, DANIEL KAHNEMAN, THINKING, FAST AND SLOW 31 (2011) (drawing a distinction between System 1 thinking (fast, intuitive, and emotional) and System 2 thinking (slower, more deliberative, and more logical) and noting that “[t]he defining feature of System 2, in this story, is that its operations are effortful, and one of its main characteristics is laziness, a reluctance to invest more effort than is strictly necessary.”).

In my fellow panelist's brilliant TedTalk video, "*Mediation and Mindfully Getting in the Middle*"¹³⁶ (which should in my view, be required viewing for all students and practitioners of mediation), Brad Heckman invokes F. Scott Fitzgerald for the proposition that being open to differing truths is at the core of mediation. As Heckman puts it (with delightful drawings of Fitzgerald and a pair of ducks in the video version, the latter offered up as a playful pun on the closing word of the quote):

This is F. Scott Fitzgerald who once said that the sign of a first rate intelligence is the ability to hold two opposed ideas in their head and maintain the ability to function and then I think Hemingway punched him in the mouth. This is very much the core of mediation and so [is] the idea of holding two differing truths at the same time. So when I struggle with mindfulness in mediation, I think of F. Scott Fitzgerald playing with that paradox.¹³⁷

Taking Heckman to heart, I simultaneously recognize the power of narrative, of the "fairy-tales" of storytelling but also ask us to confront the potential ugliness of mediation's postmodern "surrender" of objective fact. This particular ugly characteristic is not an ironic and perhaps inevitable result of institutionalization ("barnacles"), or a predictable and virulent concentration of power that comes with aging systems ("aristocracy"). Mediation's central abandonment of fact is arguably what often allows it to succeed, at least in the sense of helping parties to reach "resolution." But in my view it comes at an extremely high cost, in a form of potential contagion. The complete surrender of truth as a seminal feature of one of ADR's most popular private processes, however well intentioned, may be setting us up for failure in our public disputing and decision-making. And, I fear it is a surrender that will be hard to back away from.

¹³⁶ Brad Heckman, *Mediation and Mindfully Getting in the Middle*, TEDxTeachersCollege, YOUTUBE (Aug. 18, 2013), <https://www.youtube.com/watch?v=UUVmPVKaJzk>.

¹³⁷ *Id.* at 1:25–1:55.