

# ACHIEVING WISE RESOLUTIONS IN MEDIATION

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“Still another distinctive mark of wisdom is that it cannot be misused. We recognize bad men as well as good may possess other kinds of knowledge. We have seen artistic skill and scientific truth put to evil use. But we do not ordinarily think a man wise unless he acts wisely. To act wisely is to act well; even as to have wisdom is to use it.”

– Mortimer J. Adler  
1902 - 2001

## I. INTRODUCTION

Conflict is inevitable. However, the result can be beneficial or harmful by degrees, depending upon the circumstances, and depending upon the way in which the conflict is resolved. Chris Moore writes that, “In seeking to manage and resolve conflicts, they [people] have tried to develop procedures that are efficient; that satisfy their interests; that build or maintain relationships, where appropriate; that minimize suffering; and that control unnecessary expenditures of resources.”<sup>1</sup>

The litigation system is one of the more common procedures for deciding conflict<sup>2</sup>, with the majority of those disputes being resolved during the pretrial litigation process, either through negotiated settlements or mediation.<sup>3</sup> The human dimension of litigation compels the most

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<sup>1</sup> See Christopher W. Moore, “The Mediation Process” (2003) 3<sup>rd</sup> Edition at page 3.

<sup>2</sup> See Thomas D. Barton (2002) “Integrating Problem-Solving and Problem Prevention Into An Existing Law School Curriculum. Legal problems are resolved in three basic ways, or “modes:” (1) through judgment, the decision rendered by a judge as part of litigation; (2) through consent, where two or more parties to a legal issue resolve it among themselves through rules of contract creation and the procedures of collective bargaining, mediation, and negotiation; and (3) through the conscious design of systems of rules and procedures. (Structures associated with the system design and prevention mode are: legislation and regulation, and various non-judgmental, non-consensual procedures like the checks and balances of the U.S. Constitution, or the Administrative Procedures Act.)

<sup>3</sup> See Marc Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts.” *Journal of Empirical Legal Studies*, Vol. 1, No. 3. (November 2004) (Originally presented as a working paper at the Litigation Section of the ABA’s December 2003 meeting in San Francisco, CA. Available for download at the following:

<http://www.abanet.org/litigation/vanishingtrial/vanishingtrial.pdf>. See also, “The Vanishing Trial” *Dispute Resolution Magazine*, Summer 2004, at pages 4-6. (As the “causes of trial implosion” Galanter identifies the “demographic, diversion and cost arguments” as the “focus” of “assessments, incentives and strategies of the parties.” “The demographic argument – that is, that cases did not eventuate in trials because they did not get to court in the first place or, having come to court, they have departed for another forum.” (a.k.a. The diversion argument).

zealous advocate to view settlement as an essential discussion, whether pre-suit, early in litigation, after discovery and motion practice, before trial, during post-trial motion practice, upon appeal or all of the above.<sup>4</sup> Why? Because “[t]he legal profession is a helping profession. Litigators, like all lawyers, have the privilege and responsibility to help their clients. This humanistic view of advocacy shapes and influences the work of the litigator.”<sup>5</sup> Therefore, even if precedent were absolutely clear, and there was only one way the law could be applied to undisputed facts, but that the legally correct answer would not meet the needs of your client, then it would be incumbent upon you as trial counsel to transmogrify to the role of settlement counsel.<sup>6</sup> In the loosely translated words of Sun Tzu, ‘The smartest strategy in war is the one that allows you to achieve your objectives without having to fight.’<sup>7</sup>

As you already know, settlements at any stage of litigation, however, do not typically occur spontaneously; rather it is usually the result of sincere attempts between counsels to negotiate.<sup>8</sup> For resolution to be achieved, all that is needed is a conversation because through the exchange of ideas, parties and advocates recognize issues, clarify their perceptions of them and understand the ways in which one issue bears upon another. The discussions may begin informally and may progress to something that has the potential to become an agreement. Alternatively, a variety of barriers may prevent fruitful direct negotiation.<sup>9</sup> Regardless, some event in the life of the case will usually give rise to a specific discussion about settlement with opposing counsel, whether it be; informal encouragement of the judge, a settlement conference, summary judgment, a summary jury trial, a firm trial date, or a mediation.

This latter event, mediation, has become common in many jurisdictions and in some, unfortunately unavoidable.<sup>10</sup> The growth of mediation may be because of a need for a flexible

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Finally, is “the economic argument – that is, that going to trial has become more technical, complex and expensive. For those who can afford to play, the increased transaction costs enlarge the overlap in settlement ranges.” Galanter goes on to say that another set of explanations relates to institutional factors, such as the courts lacking resources to hold trials, managerial judging arising from enhanced discretionary powers and a focus on docket management.)

<sup>4</sup> See e.g. Thomas A. Mauet, “Pretrial” 5<sup>th</sup> Ed. (2002) Section VIII beginning at page 343-381.

<sup>5</sup> See Roger S. Haydock, David F. Herr and Jeffrey W. Stempel, “Fundamentals of Pretrial Litigation” 3<sup>rd</sup> Edition at page 4.

<sup>6</sup> See e.g. Thomas A. Mauet, “Pretrial” 5<sup>th</sup> Ed. (2002) at page 343 (“... most clients ultimately prefer settlement over the increased expenses and uncertainties of a trial”).

<sup>7</sup> Sun Tzu, “The Art of War” 500 BC

<sup>8</sup> See Thomas A. Mauet, “Pretrial” 5<sup>th</sup> Ed. (2002) which includes an expanded section on the tactics, techniques, and procedural rules relative to settlement and how to incorporate direct or facilitated negotiation into a pretrial case management plan.

<sup>9</sup> See Christopher W. Moore, “The Mediation Process” (2003) 3<sup>rd</sup> Edition at page 166 and Chapter Seven for a specific discussion of each. “Five problems commonly create negative psychological dynamics in negotiations: 1) Strong emotions, 2) Misperceptions or stereotypes held by one or more parties of each other or about issues in dispute, 3) Legitimacy problems, 4) Lack of trust and poor communication.” Moore goes on to say that conciliation occurs throughout the mediation and defines it as follows: “Conciliation is the psychological component of mediation, in which the third party attempts to create an atmosphere of trust and cooperation that promotes positive relationships and is conducive to productive negotiations.”

<sup>10</sup> With the exception of mandatory mediation jurisdictions, parties are free to choose whether they will avail themselves of mediation; who will be their mediator and how their case will be mediated. In short, free market principles apply. See also, Frank E. Sander, et al., “Judicial (Mis)Use of ADR? A Debate” (1996) 27 U. Tol. L. Rev. 885.

process that can rationalize conflicting interests, and manage rapidly developing diverse issues, or it may simply be quicker, cheaper and less risky.<sup>11</sup> Whatever the reasons, the professional mediator is emerging as a specialist within the legal community<sup>12</sup> and the need/demand for such services appears to be increasing.<sup>13</sup>

The growth and strut toward maturity of mediation, however, has occurred in fits and starts.<sup>14</sup> From the early 1980s, with George Mason University's Masters Degree program in Conflict Management and with Harvard University's sponsorship of the Program on Negotiation consortium in 1983, to the wealth of programs available today (by some estimates, over 100), practical and theoretical interdisciplinary academic programs have profoundly influenced the development of alternative dispute resolution processes. Since that time, new processes have largely come from individual practitioners, private organizations and institutions of higher education, rather than from rights granted by the federal government or administrative agency initiatives.

Beginning in the late 1980's, new processes have tended to focus on cooperation, identification of interests and recognition of the importance of mutuality.<sup>15</sup> These approaches have been called many things, Mutual Gains Bargaining (MGB), Interest Based Bargaining (IBB), Needs-Based, Positive-Sum, Problem-Solving, Principled Negotiation or in the vernacular, Win-Win<sup>16</sup>. Each approach is based generally on the premise that all parties would have something to gain by negotiating, and that the agreement ultimately proposed will be better than each party's most favored alternative course of action.<sup>17</sup>

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<sup>11</sup> See Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" *Journal of Empirical Legal Studies*, Vol. 1, No. 3. (November 2004), and *Dispute Resolution Magazine*, Summer 2004, at pages 4-6, citing as the "causes of trial implosion" the "demographic, diversion and cost arguments" along with "institutional factors".

<sup>12</sup> In 1994, Martindale-Hubbell publishers introduced the *Dispute Resolution Directory*. In 1996 the *International Dispute Resolution Directory* was launched through a cooperative effort with the International Council for Commercial Arbitration, the International Chamber of Commerce, International Court of Arbitration and the London Court of International Arbitration.

<sup>13</sup> See Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" *Journal of Empirical Legal Studies*, Vol. 1, No. 3. (November 2004), and *Dispute Resolution Magazine*, Summer 2004, at pages 4-6, citing as the "causes of trial implosion" the "demographic, diversion and cost arguments" along with "institutional factors".

<sup>14</sup> See e.g., Jerome T. and Joseph P. Barrett, "A History of Alternative Dispute Resolution, The Story of a Political, Cultural, and Social Movement" (2004).

<sup>15</sup> See generally, Jerome T. and Joseph P. Barrett, "A History of Alternative Dispute Resolution, The Story of a Political, Cultural, and Social Movement"

<sup>16</sup> See Random House Webster's Unabridged Dictionary, Second Edition at page 2181, "win-win" adj. Advantageous to both sides, as in a negotiation: a win-win proposal; a win-win situation. [1980-1985]. (With the publication (and eventual best seller status) in 1981 of "Getting to Yes: Negotiating Agreements Without Giving In" by Roger Fisher and William L. Ury, the term "win-win" bargaining became familiar to the general public).

<sup>17</sup> See Russell Korobkin, "Negotiation Theory and Strategy" (2002) at pages 37-51. (Description of seven factors that influence the reservation value or bottom line: the party's no-agreement alternative, a party's particular preference for reaching an agreement, the probability estimate of future events, the ability to tolerate risk, the value of time, transaction costs and the opportunity for future relationships.) The most favored alternative course of action, a.k.a. BATNA; a.k.a. no-agreement alternative, differs from a drop dead number, a.k.a. bottom-line; a.k.a. reservation value conceptually in that one focuses on what is needed to settle, while the other focuses on what will happen if settlement is not achieved.

## II. THE PROPERLY DESIGNED AND EXECUTED PROCESS

The cooperative approaches described in above, and which are much in vogue today, are designed to encourage parties to revisit their predetermined notions of settlement in light of new information received during the mediation. In practice however, mediation approaches vary according to what is appropriate for the circumstance in which the mediator, the parties and the advocates find themselves. It is simply impossible to fully describe the function of mediation or the mediator without describing the environment within which the mediator is functioning. They are inseparable.

In some circumstances, a collaborative “expanding the pie” approach is not appropriate, rather the situation calls for a distributive process focused on a systematic discussion of the rights and power of a party relative to others.<sup>18</sup> This could include each party being called upon to present a detailed, well-organized, multi-dimensional, persuasive opening statement. Later, resources may be devoted to an evaluation of the strengths and weaknesses of the legal and factual theories of each party’s position, identification of possible claims and defenses, and the remedies available if proven. Thereafter, each of the parties would likely be called upon to predict the possible outcomes if the case were tried under a variety of scenarios. The result of these analyses would yield a legitimate basis for compromise based on risk.

Additionally, hybrid approaches incorporate both collaborative and distributive stages in a deliberate way, either from the outset or because of a specific situation that arises during the course of the mediation. As discussed in greater detail below, many aspects of what a skilled mediator does during a mediation are unique to that particular mediation, however some generalizations are possible.

### 1. BASIC PROCESS COMPETENCIES

“Every man must decide whether to walk in the creative Light of altruism or the destructive darkness of selfishness... This is the final judgment. Life's most persistent and urgent question is; what are you doing for others?”

-- Martin L. King Jr.

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<sup>18</sup> “Rights are independent standards that demonstrate the legitimacy or fairness of a party’s position.” Stephan H. Kreiger and Richard K. Neumann, Jr., “Essential Lawyering Skills, Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis” Second Edition, at page 271.; Power is the “ability to coerce someone to do something he would not otherwise do.” The primary sources of power are economic, social, psychological, and political power, and expertise. William L. Ury, et al., “Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict” (1988) page 7.

By the time a conflict gets to the mediation stage, often parties and advocates have become committed to their views and are settled into patterns of thinking and behaving that perpetuate conflict. What is needed is a concerted effort and deliberate techniques for reorientation to a common task of determining whether resolution is possible.

What actions must mediators take in order to build such commitment? Despite the many available approaches, skilled mediators share some common practices. For example, much of the literature on the subject describes mediation as embodying five different stages: (1) pre-mediation; (2) opening ceremonies; (3) opening statements; (4) facilitated negotiations, and (5) reaching agreement.

In the pre-mediation stage, the parties are contacted to discuss various process design options. Information is gathered confidentially and appropriate process recommendations are made. A conference call or pre-mediation meeting may be convened and position statement submissions may be requested. Prior to the mediation day, the mediator will guide the parties in their preparations and confirm their commitment to the agreed upon process.

In the opening ceremonies stage, the mediator must be thoroughly prepared and be focused on the case at hand. The mediator will deliver a monologue that orients the parties and advocates to the mediation center, to each other and to the process. The foundation will be laid for positive conflict engagement along with pre-conditioning for difficult discussions to come. The mediator will emphasize the importance of the day relative to the resolution of the case and secure a joint commitment to begin.

In the opening statement stage, at a minimum, the parties and advocates will greet each other and acknowledge the purpose of the day. This is a critical time where negotiating behaviors for the day are likely to be set. Because this is the best opportunity for counterparts to educate each other, typically, each of the parties and advocates will be given uninterrupted time to present their view. Active listening is encouraged, and the mediator will show appreciation for the participation in this stage.

In the facilitated negotiation part of the mediation, the mediator will encourage the parties and advocates not to lock themselves into a position before they have taken full advantage of the opportunity to listen to their counterpart's point of view and given full thought to their own interests. If positions are taken prematurely, the tendency is to use resources to defend that position rather than considering options. Secondly, the mediator will encourage an order or prioritization of discussions that will create momentum toward resolution. Thirdly, the mediator will continue to press for productive discussions of remaining issues while seeking to minimize frustration. During this stage, the mediator will also likely use a variety of techniques to encourage evaluation and reevaluation and sound decision-making.

In the agreement stage of the mediation, the parties and advocates have formed some level of expectation for settlement. Resolved issues are revisited and opportunities for positive-sum negotiation may be further explored before the agreement is journalized. The case may be

resolved, or conversely, the mediator will set the stage to take up negotiations again at some future point in time. Alternatively, part of the case may be resolved either as to some parties or as to certain claims. Typically, the mediator will assist the parties as they document the mediated settlement agreement at the conclusion of the session.

## 2. BEYOND KNOWING THE STEPS IN THE PROCESS

“Mankind’s moral sense is not a strong beacon light, radiating outward to illuminate in sharp outline all that it touches. It is, rather, a small candle flame, casting vague and multiple shadows, flickering and sputtering in the strong winds of power and passion, greed and ideology. But brought close to the heart and cupped in one’s hands, it dispels the darkness and warms the soul.”<sup>19</sup>

– James Q. Wilson

It is generally accepted that the presence of the mediator alters the dynamics of the negotiations. Since the mediator enters a preexisting dispute with no real authority, the mediator’s influence is therefore based upon the willingness of the parties and advocates to accept the mediator’s guidance. What do people demand of their mediator as a prerequisite to willingly contributing their resources to the search for resolution?

One approach would be to first answer the more basic question, “What is the purpose the mediator serves?” Knowing and understanding the mediator’s purpose reveals whether the mediator is functioning well or poorly.<sup>20</sup> In pursuit of these answers, please consider the following descriptions of the purpose of the mediator:

“The mediator’s sole purpose is to assist the disputing clients and their attorneys in resolving the dispute.”<sup>21</sup>

“[t]he mediator attempts to improve the process of decision-making and to assist the parties to reach an outcome to which each of them can assent.”<sup>22</sup>

“. . . the mediator acts as a catalyst between opposing interests attempting to bring them together by defining issues and eliminating obstacles to

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<sup>19</sup> The Moral Sense, 1997, page 251. Free Press Paperbacks, NY. From 1961 to 1987, James Q. Wilson taught political science at Harvard University, where he was the Shattuck Professor of Government. From 1985 until 1997 he was the James Collins Professor of Management and Public Policy at UCLA. Today, he is the Ronald Reagan Professor of Public Policy at Pepperdine University.

<sup>20</sup> See e.g. Aristotle, *Nicomachean Ethics*. 2nd ed. Translated, with introduction, notes, and glossary by Terence Irwin. Indianapolis: Hackett, 1999.

<sup>21</sup> Harold I. Abramson, *Mediation Representation: Advocating in a Problem-Solving Process* (2004) at page 2.

<sup>22</sup> Laurence Boulle & Maryana Nestic, “Mediation: Principles, Process, Practice” (2001).

communication, while moderating and guiding the process to avoid confrontation and ill will . . .”<sup>23</sup>

“The role of the mediator is fluid. It is determined in large part by the personal style and personality of the mediator . . . In other words, the mediator’s function is to help the parties establish the mutual trust and understanding that will enable them to work out their own resolution. The mediator merely acts to reduce the communication problems of the parties, make them take some objective view of their positions and interests, and maximize the verbal exchange of alternatives.”<sup>24</sup>

Given the foregoing, it is probably a fair statement that the reason the parties and advocates willingly accept the guidance of the mediator, is because more likely than not, that assistance will have some value to them, but how? The mediation process is analogous to a waltz in that participants in both activities miss the point when they pick a single spot and race to get there. Mediation is the artful execution of a complex pattern. It is the repeated execution of the pattern that gives the experience meaning; even profound meaning.

From my perspective, the most significant quality a mediator possesses is to be worthy of trust. By being worthy of trust and attaining and maintaining the trust of the parties and advocates throughout the mediation; the mediator can be an effective listener and an effective questioner and therefore, an effective advocate for resolution. It also helps if the mediator is a good person.<sup>25</sup>

Active listening<sup>26</sup> is one of the ways mediators build trust in the process and earn the confidence and respect of the parties. Active listening by the mediator, the parties and advocates increases the likelihood that important information will be shared, which will lead to better understanding and therefore allow for wise resolution to be achieved. Another significant skill is that of being a good questioner. Good questioning skills in mediation ensure that counterparts

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<sup>23</sup> <http://www.jamsadr.com/mediation/defined.asp>, The Role of the Mediator.

<sup>24</sup> See Marilyn J. Berger, John B. Mitchell and Ronald H. Clark, “Pretrial Advocacy: Planning, Analysis, & Strategy” (1988) at page 447.

<sup>25</sup> What are the characteristics of a good human being? Plato included prudence, courage, temperance, and justice. (Plato, *Laws*, trans., A.E. Taylor, 1.631d, 12.965d, and *Republic*, trans., Paul Shorey, 4.427e, 433, in *Plato: The Collected Dialogues*, eds., Edith Hamilton and Huntington Cairns (New Jersey: Princeton University Press, 1961).) Aristotle wrote that the virtues of the excellent person include courage, temperance, liberality, proper pride, good temper, ready wit, modesty, and justice. (Aristotle, *Nicomachean Ethics*. 2nd ed. Translated, with introduction, notes, and glossary by Terence Irwin. Indianapolis: Hackett, book four (1999)). Thomas Aquinas added faith, hope, and love. (Arthur F. Holmes, *Ethics: Approaching Moral Decisions* (Leicester, England: InterVarsity Press, date unknown), 119.).

<sup>26</sup> Active listening is a series of communication stages whereby the sender conveys a message, which the receiver perceives and gives appropriate feedback to demonstrate to the sender that the message has been understood. The skills of active listening are: (1) Reflecting; (2) Validation; (3) Reframing; (4) Showing empathy, and (5) Summarizing.

have understood the message that was intended and demonstrate continued commitment to dialogue.<sup>27</sup>

Finally is the rarest of qualities in a mediator; calmness. Calmness is a singleness of purpose, absolute confidence and conscious deeply personal power which can be focused. Each of us is born with the inherent spiritual task of learning to focus wisely, responsibly and with full knowledge of our humanity. A mediator who possesses this quality of calmness is morally centered and self-reliant. Combined with practical wisdom or prudence, courage and calmness, the mediator will be able discern the situation and know what to do, when and how.

These qualities, may explain how the mediator adds value. Alternatively, the additional value may be as follows: although settlement may be the hope, the advocates may not know the best means by which to achieve it; or, although experienced, the advocates recognize that the mediator has a superior knowledge base and skill set to call upon gained from mediating cases every day; or alternatively, the advocates may simply be unwilling to bear the risks that are associated with unsuccessful direct negotiations. Since the mediator has no client other than the process, the mediator is a zealous advocate for resolution.

### 3. THE ASSISTANCE OF AN ADVOCATE FOR RESOLUTION

“Chance favors the prepared mind”<sup>28</sup>

-- Louis Pasteur, 1853

Tremendous diversity exists among mediation practitioners and among theorists; which is probably for the best. “To simply look on mediation from an external, functional standpoint, is in large terms, to miss what mediation does for the participants . . . defining mediation by what it is understood to be, by the participants, rather than by how it functions may be both enlightening and necessary to successful conflict resolution.”<sup>29</sup>

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<sup>27</sup> Questioning techniques can be categorized according to the following: (1) Open; (2) Focused; (3) Closed, and (4) Leading, which are based on the amount of and quality of information anticipated in response to the question.

<sup>28</sup> Vallery-Radot, R. *The Life of Pasteur*. Translated from French by R.L. Devonshire. New York, Doubleday, Page & Co., 1924, p. 44, and 76. “Dans les champs de l’observation le hasard ne favorise que les esprits prepares.” translates closer to “In the field of observation, chance only favours the prepared mind.” Louis Pasture (1822-1895) made this statement when he was thirty-one in a speech when he was a chemist and a new professor working on crystals of tartaric acid in the Lille Region of France. This region was and is known for producing starch from potatoes, sugar beets and chicory and is also known for its distilleries and breweries which use those sugars in fermentation. Fermentation was viewed in Pasteur’s time as a chemical transformation. Therefore, when a local distillery was experience problems with production, the owner called the new chemist in town to determine why some vats of sugar converted to alcohol and some spoiled. This chance encounter turned Pasteur’s attention from crystals to the processes of fermentation, specifically as to whether organisms, not chemicals might be responsible. In his attempts to assist the distiller, his observations, experimentation and critical thinking lead to a new field of science that changed the world; microbiology.

<sup>29</sup> D. C. Marsh and S. R. Marsh, “Definition of Mediation”, <http://adrr.com/adr2/pom001.htm>.

Diversity among practitioners is desirable because it is mediation's response to the human dimension of conflict that makes it work so well. Mediation allows the participants to make decisions in the framework that works for them.<sup>30</sup> The basis of a decision might be a sense of obligation or duty, rights or principles, application of objective standards, or a subjective view of justice. Alternatively, the basis of a decision might be preservation of personal relationships, compassion, compromise, empathy or concern for others. The mediator has the task of discerning what framework each party is using and then to design and execute a process that will allow those frameworks to shift towards each other, or to serve as an adapter between differing frameworks, taking input from one source and converting it in some way so as to produce an output the other party can receive. Therefore, mediators are necessarily as varied in their approach as the people served.<sup>31</sup>

In the words of the mediator Bernie Mayer, "I have had the opportunity to work on some incredibly challenging conflicts and with some amazing people, many of whom have appreciated my assistance. I have also encountered people who have wondered what difference the effort made, questioned the resources it took, or worse, thought my intervention made things worse. I used to joke that as a therapist, and later as a mediator, the way to feel successful is to take credit for everything that goes well and blame all the failures on circumstances or people beyond our control. In fact, I think we should appreciate that almost all of our successes are due to fortunate circumstances and to the underlying wisdom and courage of the disputants with whom we are working."<sup>32</sup>

Consistent with that thought, in the American legal system, we place our trust for just decisions in two places: laws (made by people) and people who (as judge and jury) apply those laws.<sup>33</sup> Looking to the inherent wisdom of "people" is not a new concept in any tradition, however.<sup>34</sup> The origin of these ideas in western thought is often traced to Ancient Greece.<sup>35</sup>

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<sup>30</sup> See e.g. Laurence Boulle & Maryana Nesic, "Mediation: Principles, Process, Practice" (2001) (Defining mediation as a decision-making process in which the parties are assisted by a third party, the mediator; the mediator attempts to improve the process of decision-making and to assist the parties to reach an outcome to which each of them can assent).

<sup>31</sup> See Stephen B. Goldberg, Frank E.A. Sander, Nancy H. Rogers, and Sarah Rudolph Cole, "Dispute Resolution: Negotiation, Mediation, and Other Processes" (2003) "Mediator's strategies vary widely. Some mediators attempt to focus the negotiations on satisfying the vital interests of each party; others focus on legal rights, sometimes providing a neutral assessment of the outcome in court or arbitration. Some encourage the active participation of both lawyers and clients; others exclude either clients or lawyers from the sessions. Some mediators endeavor to maintain neutrality; others deliberately become advocates of a particular outcome or protectors of non-parties' interests (cf. Smith, 1985". At page 112.

<sup>32</sup> Bernard S. Mayer, "Beyond Neutrality, Confronting the Crisis in Conflict Resolution" introduction, expanding on ideas presented at the August 2002 ACR conference.

<sup>33</sup> See, Judith Resnik, "Processes of the Law, Understanding Courts And Their Alternatives" (2004) at page 114, "The jury system has its roots in the English common law and remains one of the most distinctive features of Anglo-American jurisprudence."

<sup>34</sup> See e.g., (1) Brahamanism: "Do naught unto others which would cause you pain if done to you." The Mahabharata. (2) Buddhism: "Hurt not others in ways that you yourself would find hurtful." Udana-Varga: 5,18. (3) Christianity: "Always treat others as you would like them to treat you." New Testament. Matthew 7:12. (4) Confucianism: "Do not unto others that you would not have them do unto you." Analects, XV, 23. (5) Islam: "No one of you is a believer until he desires for his brother that which he desires for himself." Sunnah. (6) Judaism:

Some have opined that “[m]ediation probably predates the formal creation and enforcement of law, for humans in the social state seem to have a natural instinct to seek the guidance of others in settling differences between individuals.”<sup>36</sup> This is also not a new idea.<sup>37</sup>

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“What is hateful to you, do not to your fellowmen.” The Talmud, Shabbat, 31a. (7) Taoism: “Regard your neighbour’s gain as your own gain, and your neighbour’s loss as your own loss.” T’ai Shang Kan Ying P’ien. (8) Zoroastrianism: “That nature alone is good which refrains from doing unto another whatsoever is not good for itself.” Dadistan-i-dinik, 94:5. (Amnesty International Handbook. London, (1992), pages 10-11.) Many traditional cultures practice ways of looking at conflict that are not adversarial, for example: the Kalahari Bushmen in Africa, the systems of traditional and now modern ho’oponopono in Hawaii, the Loya Jirga process in Afganastan, and the Panchayat systems in India and Nepal to name a few. See e.g., William Ury, *The Third Side: Why We Fight and How We Can Stop* “Getting to Peace” (William Ury, is often quoted as saying: “it takes two sides to fight, but a third to stop”.) (See William L. Ury, "Conflict Resolution among the Bushmen: Lessons in Dispute Systems Design," *Negotiation Journal* Vol. 11, No. 4 (October 1995), pp. 379-389. Ury concludes that "the secret of the Bushmen for managing conflicts is the vigilant, active, and constructive involvement of the community." The community acts as a third force in all conflicts, and actively intervenes to preserve the community's collective unity. Community norms tend to prevent serious disputes. The community works to create a favorable emotional climate for resolving disputes. The community as a whole participates in reconciling the parties interests to achieve a consensual settlement, and in witnessing and responding to violations of rights and norms. Finally, conflicting parties are under social pressure to resolve their disputes. ); See e.g., the systems of traditional and now modern ho’oponopono in Hawaii (Ho’oponopono means to make right with the ancestors, or to make right with the people with whom you have relationships. Some believe that the original purpose of Ho’oponopono was to correct the wrongs that had occurred in someone’s life including Hala (to miss the thing aimed for, or to err, to disobey) and Hewa (to go overboard or to do something to excess) which were illusions, and even 'Ino (to do harm, implying to do harm to someone with hate in mind), even if accidental. The stages of doing Ho’oponopono are: 1. Ho’omalū-quiet time; time to think about the problem. 2. Kukulu kumuhana-state the problem. 3. Mahiki-discuss the problem with everyone involved. A) What do you like about the other person? B) What does he/she do that irritates you? C) What are some helpful ways we can help him/her improve? 4. Ha’ina- confession; admitting to guilt and asking for forgiveness. 5. Kalana-forgiveness. 6. Panina- closing. A) Response to the session. B) Showing aloha (love, friendship) by patting another on the back, shaking hands, or hugging. <http://library.thinkques.org>; See e.g., the Loya Jirga process in Afganastan (In Pashto, the word Loya means great and Jirga stands for council or meeting. Loya Jirga has been used as a political instrument for finding solutions to issues of great national importance in Afghanistan. Traditionally, tribal elders and political leaders attend Loya Jirgas. Local tribal and even village leaders are selected because of their long-standing service, age and family status.); See e.g.,the Panchayat systems in India and Nepal (The Panchayat, “the five” is a traditional council of five people in each village that is responsible for communication and administration vertically and horizontally across rural areas.).

<sup>35</sup> Plato proposed that in the realm of ethics - as well as in the realm of mathematics and aesthetics - there exist abstract, eternal and universal truths that exist as elements of an "unchanging natural order". They exist independently of human observation and can be apprehended by processes of reasoning. The philosophical roots of the idea of natural law are generally located in Aristotle's ethical theories. Whereas Plato's idea of "objective ethical standards" is associated with the idea of an "unchanging natural order", theories of natural law often imply that objective and prescriptively binding principles of right conduct (or right reason) can be derived from certain "facts" about human nature and existence. In Aristotle's view, humans are distinguished by the capacity to reason and to exercise rational choices, and these general features of human nature can provide foundations for accounts of human flourishing or well-being (eudaimonia), human good and good political arrangements ([c.330 B.C.]).

<sup>36</sup> See Alan Scott Rau, Edward E. Sherman and Scott R. Peppet, “Processes of Dispute Resolution: The Role of Lawyers” 3rd Edition (2002) at page 327-328. See, generally, the following examples of the mediator archetype personified: Sophia (Greek); Sapientia (Latin); Hohkma (Hebrew); Isis (Egyptian); Frigga (Norse); Spider Grandmother (Native American); Inanna (Sumerian); Tara (Tibetan); Yemaya (African- Caribbean); Amaterasu (Japanese); Pachamama (Incan); Changing Woman (Navajo and Apache), and Danu (Celtic).

<sup>37</sup> See Eugen Erlich (Ehrlich) “Grundlegung der Soziologie des Rechts” (1913), a.k.a “Fundamental Principles of the Sociology of Law”, New Brunswick reprint (2001). (Formal law lags behind customary law). This work presented Ehrlich’s concept of the sociology of law; that the center of gravity of legal development lies not in legislation, nor

Recall that this Article attempts to address how mediation assists the parties in achieving wise resolutions; and in conclusion I offer mediators, parties and advocates this thought: The mediation process, when properly done, makes the wise resolution self-evident<sup>38</sup> to parties committed to the concept of self-determination<sup>39</sup>.

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in juristic science, nor in judicial decision, but in society itself. See also, Eugen Erlich (Ehrlich), *Freie rechtsfindung und freie rechtswissenschaft* (1903). "Law is not a rigid dogma, but a living power." This essay was translated, with some omissions, as *Judicial Freedom of Decision: Its Principles and Objects*, in *Science of Legal Method: Select Essays by Various Authors* (IX Modern Legal Philosophy Series) (1917) at 70, 77.

<sup>38</sup> What is self-evident is visible without explanation, proof or argument.

<sup>39</sup> Self-determination is the fundamental principle of mediation. Mediation is built upon the ability and right of the parties to communicate, assess facts, events, and issues, and make choices for themselves, and, if they wish, to reach an agreement, voluntarily and free of coercion.