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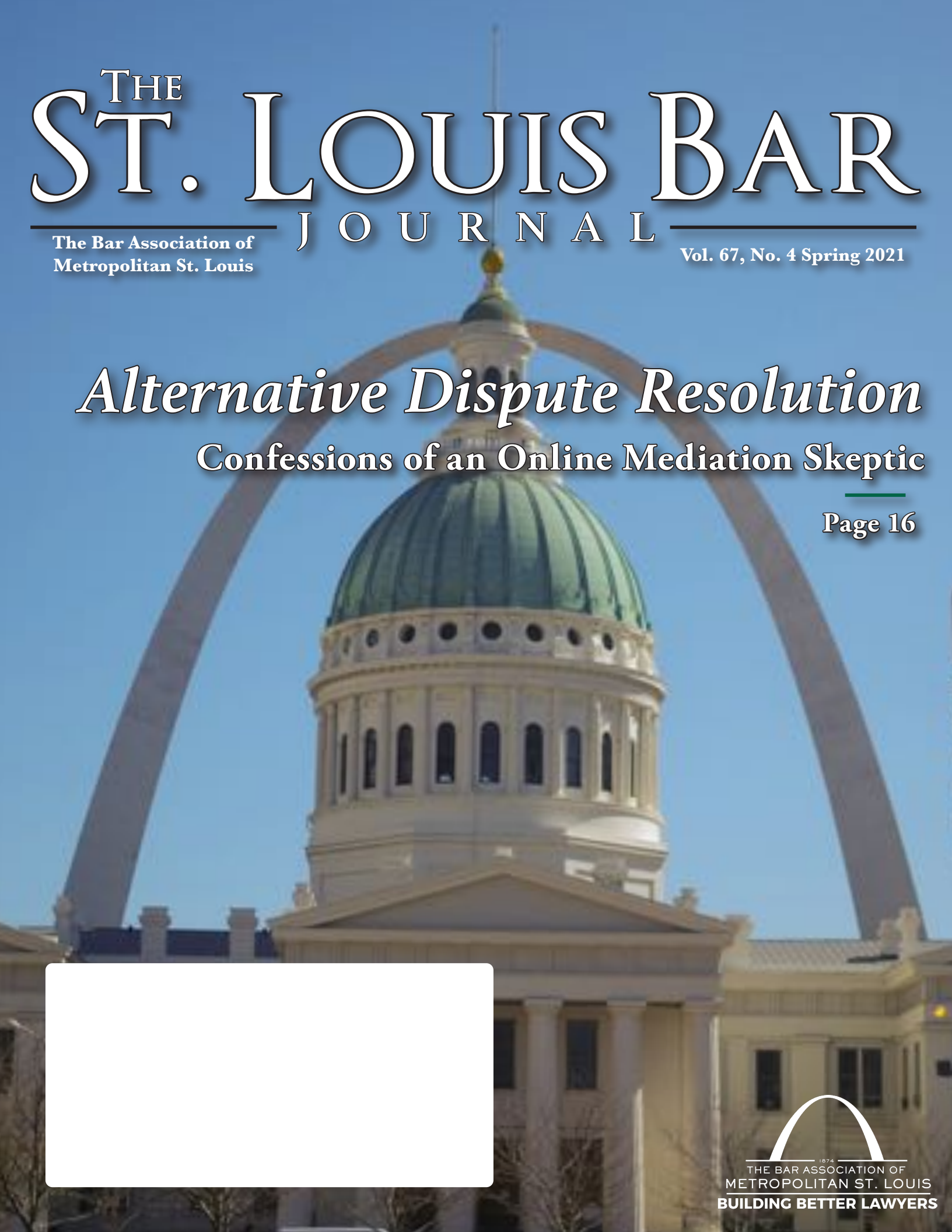
Alternative Dispute Resolution

Confessions of an Online Mediation Skeptic

Page 16



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ARTICLES

FEATURES

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The President's Page

by Jane Cohen and Melvin Kennedy

Editor's Note: The authors of the piece below approached the St. Louis Bar Journal *and proposed an article on increasing diversity in the field of Alternative Dispute Resolution. The Hon. Glenn Norton, president of BAMSL, graciously agreed to provide his President's Page space so that this important matter can be presented to BAMSL membership.*

This issue of the *St. Louis Bar Journal*, focused on Alternative Dispute Resolution, will present a broad range of perspectives on, and applications of, ADR in the modern legal world. It is appropriate to take this opportunity to raise awareness of the importance of diversity in ADR, and our responsibility as ADR professionals and lawyers to increase diversity in this area. As with diversity among judges and juries, increased diversity in ADR will lead to increased credibility in the process as well as better decision-making and better outcomes.

The American Bar Association Section on Dispute Resolution has been consistently working to further the ABA's goal to "eliminate bias and enhance diversity." In 2018, the ABA passed Resolution 105, which "urges providers of domestic and international dispute resolution services (1) to expand their rosters with minorities, women, persons with disabilities and persons of differing sexual orientation and gender identities ("diverse neutrals"); and (2) to encourage the selection of diverse neutrals. It also "urges users of domestic and international dispute resolution services to select and use diverse neutrals." This resolution addresses the two diversity problems in ADR: the "roster" problem and the "selection" problem.

An example of the roster problem became national news in 2019 when rapper/businessman Jay-Z claimed that the arbitration agreement governing a trademark dispute he had related to the sale of his business was void as racially discriminatory under New York law, because only two of the more than 200 arbitrators proposed who had no conflicts identified as African-American. As this case demonstrates, diversity, like beauty, is in the eye of the beholder.

Each ADR service provider must first assess what its ADR consumer base looks like, from diverse perspectives, to make sure its ADR roster includes a fair representation of the consumers of its services, including gender, race, disability, ethnicity, age, religion, sexual orientation, or other characterization. This applies equally to mediation and arbitration. Once the consumer profile has been established, the service provider should then obtain input from the groups it serves about what a diverse panel would look like to them. Creating a more diverse roster, however, means nothing if diverse neutrals are not selected to serve as mediators or arbitrators.

The two largest national ADR service providers have implemented different measures to increase the selection of diverse neutrals. The American Arbitration Association has implemented initiatives to increase panel diversity and diverse selection. Among them are the Higginbotham Fellows program, established in 2009, whose purpose is "training, mentorship and networking opportunities to up-and-coming diverse alternative dispute resolution professionals who have not historically been included in meaningful participation the field of alternative dispute resolution." AAA has also committed to provide, where possible, lists of qualified arbitrators to parties, comprised of at least 20% diverse panelists. JAMS has crafted a sample diversity and inclusion clause for use by parties that provides "[t]he parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation)."

Unfortunately, the tracking and reporting by national ADR service providers of statistics about the selection of diverse neutrals is in its infancy. We are not aware of any organizations that presently track the ADR consumer population.

This mission is important to all of us. The legal community is a stakeholder, as are individuals, families, communities, businesses, and the courts. Most civil disputes are resolved by means other than trial. Civil courts rely heavily on litigants' ability to resolve disputes through mediation, arbitration, and traditional settlement negotiation. In fact, in 2020, the U.S. District Court for the Eastern District of Missouri reported that 98.8% of civil lawsuits were resolved other than by jury verdict.

The first step of change is to acknowledge that ADR panels need to be more diverse for the benefit of ADR consumers. The next step is to create awareness about the lack of diversity in the ADR field (which is what this column is intended to do). Finally, we as lawyers need to make a commitment not only to work to increase diversity in the rosters available to consumers, but also for those who are involved in the selection of ADR professionals (primarily in-house and outside counsel) to consider using diverse neutrals and demand diversity in lists they receive.

BAMSL, through its seasoned ADR professionals, as well as St. Louis-based ADR service providers such as Alaris Alternative Dispute Resolution and USA&M, should be included in the conversation when developing programs to train, mentor, and provide networking opportunities for up-and-coming, diverse ADR professionals who want to develop practices in the ADR field.

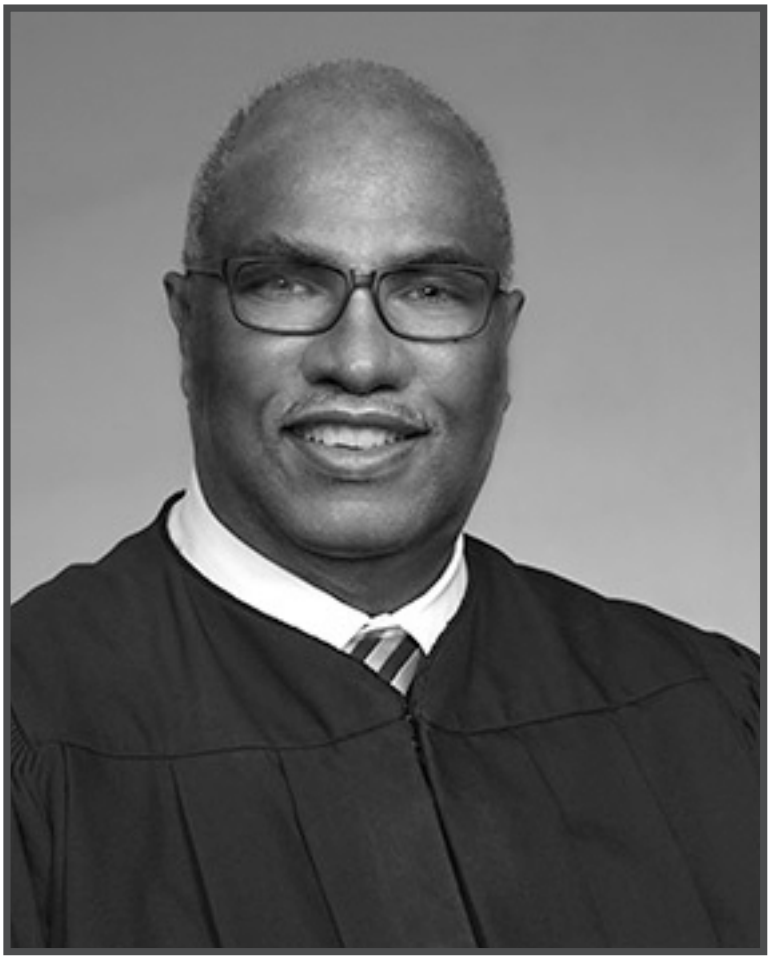
Several training opportunities in the St. Louis community immediately come to mind, such as the Landlord-Tenant Mediation Program in the St. Louis City and St. Louis County courts. The Conflict Resolution Center and Community Mediation Services of St. Louis both provide opportunities for mediators to gain valuable volunteer mediation experience while serving the community.

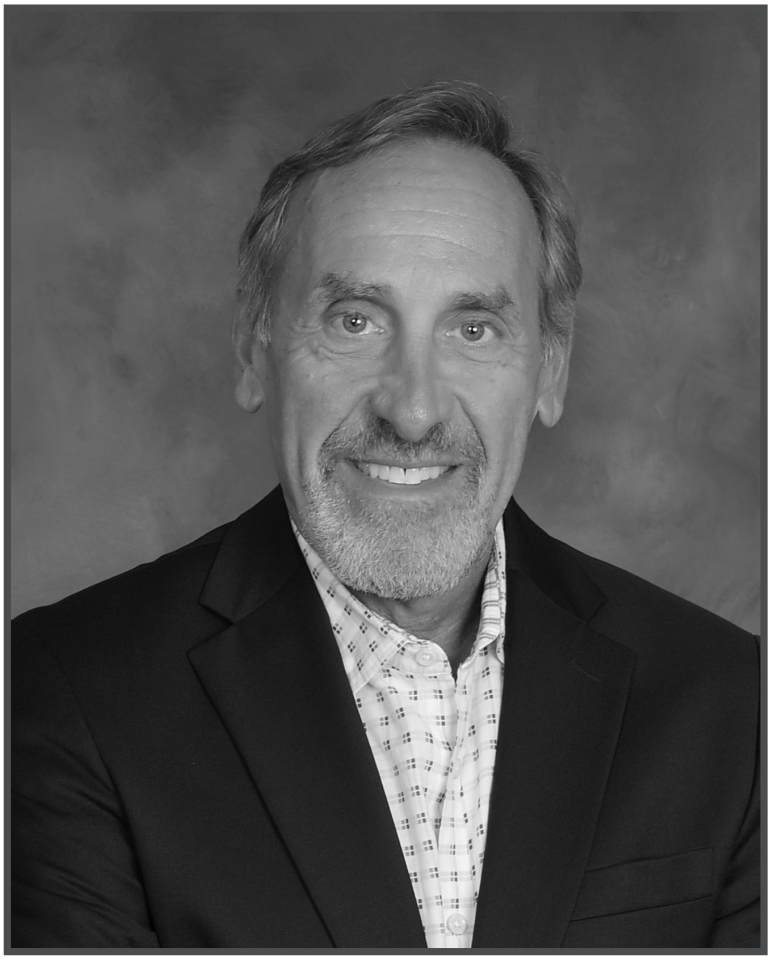
Jane Cohen serves as an arbitrator for AAA; FINRA; Alaris Alternative Dispute Resolution, and other panels. She also serves as a mediator. She is an active member of the ABA Section on Dispute Resolution and is the regional chair (for Missouri) of the Women in Dispute Resolution Committee. She is the current secretary of the Association of Attorney Mediators and is a member of the Association of Missouri Mediators and the BAMSL and Missouri Bar ADR Committees.

Melvin Kennedy provides pre-litigation services to employers and employees through the EEOC St. Louis District Office. He serves on the mediator panel for USA&M and is a member of the St. Louis chapter of the Association of Attorney Mediators. He mediates landlord-tenant disputes in St. Louis County Circuit Court through the St. Louis Mediation Project and is a board member of Community Mediation Services of St. Louis.

Be Prepared: Effective Advocacy in Mediation

by Hon. Michael Jamison and Mitch Margo





"I'll see you in court," still resonates on television dramas, but litigation now almost always includes a stop at mediation. Contracts often require it and many courts now "recommend" it, by which the judge means: do it. Lawyers facing a mediation will fare much better for their clients by heeding these two words: be prepared.

There is nothing a mediator appreciates more than a prepared advocate. In getting your case ready for mediation in 2021, think of these four categories. 1) Prepare yourself; 2) Prepare your client; 3) Prepare the mediator; and 4) Prepare for online mediations.

Prepare Yourself

Too many advocates approach mediation day as a day of personal learning. Some lawyers think that submitting no pre-mediation brief, or one that cuts and pastes a few paragraphs from the Petition or Answer, is sufficient. The mediation should be viewed as what could be the most important, and last, day of the litigation.

Just as writing jury instructions before a trial helps lawyers synthesize the essence of what needs to be proven at trial, so too can preparing a succinct,

Hon. Michael T. Jamison retired from the Circuit Court of St. Louis County in December 2019, after more than 22 years on the bench. He is a mediator with USA&M and an adjunct professor at St. Louis Community College. Before taking the bench, he was an Associate General Counsel at Anheuser-Busch Companies, a senior associate at Lashly & Baer, P.C., and a field attorney for the National Labor Relations Board.

Mitch Margo is a principal at Curtis, Heinz, Garrett & O'Keefe, P.C. in Clayton, where his practice consists of commercial litigation, probate litigation, arbitration and mediation. He received his undergraduate and law degrees from Washington University in St. Louis and also has a master's degree in Journalism from the University of Michigan. Margo published his first novel, *Black Hearts White Minds,* in 2018 and currently is working on his second.

confidential pre-mediation brief enlighten a lawyer about the strengths and weaknesses of a case. Even the most seasoned but unprepared lawyer is obvious, and not fooling the mediator. The unprepared lawyer has just made the mediator's job more difficult, the day longer and settlement less likely. Mediators do not like that. Mediators, like judges, are people, too.

A prepared advocate knows the case and appreciates the forum. This is mediation, not a time for aggressive lawyer pontification. Beginning your opening statement by staring at the defendants on the other side of the table and proclaiming, "the three of you are thieves," isn't going to help your client walk out of the room with an adequate settlement and may just end the mediation right then and there.

Instead, telling a calm, generally short story that exudes confidence in your claims, recognizes the costs and uncertainties of litigation and welcomes the participation in a good faith effort to resolve the case "today" will yield far better results than overstatement, insults and braggadocio.

Finally, arrive at the mediation with an open mind and flexibility, but some idea, some range, of what your client will be willing to take, or pay, to resolve the dispute. This often involves mathematical computations more complicated than division by thirds, and a general idea of the future costs and expenses if the case does not settle. It also involves prior discussions with your client.

Prepare your Client

All lawyers know that clients come in all shapes and sizes, from unsophisticated minimum wage earners, to CEOs with seven-figure incomes, to insurance company adjusters in a budget cycle. What they all have in common, however, is each needs to be prepared for the mediation before walking in.

In most cases, the mediator will begin the mediation with a set of ground rules and a mediation agreement, but there is nothing quite as frustrating to the mediator as a lawyer's client, who looks at the mediator with a blank stare and, in response to the "release language" in the settlement agreement, says, "No way. Nobody told me that."

Meeting with your client in advance to walk through the anticipated mediation logistics will pay dividends in the mediation. If lawyer and client can arrive together that's always a plus. Having a client sitting alone in an office waiting 45 minutes for her lawyer (who she has never met) is a recipe for disaster in mediation. But it happens.

Talk with your client (and confirm with the mediator) whether your client is going to address the other side in the opening session. There are times when some heartfelt words from a personal injury victim can be helpful and persuasive. Other times it is best for the client to remain silent. A well-prepared advocate who knows the client will know the difference. Keep in mind that although this might be your third mediation this week, it is probably the first of your client's lifetime and is likely to be stressful for them. Warn your client that you might hear some nasty comments, some misconceptions and some outright lies. Don't lose your cool.

Managing a client's expectations in a mediation may be the most important job of an effective advocate in getting to settlement. In preparing your client you might ask yourself: Is the case more emotion than cash? How important is an apology? Or is this case all about moving money from A to B?

Clients going into mediations should understand the basics. A mediation is a process by which an impartial intermediary helps the parties resolve their differences. It is surprising to mediators how many clients come into mediation not knowing the difference between mediation and arbitration. Tell your client that the mediator is not going to select a winner and a loser. Tell your client that a successful mediation leads to a settlement, and a settlement means that everybody gets something. Otherwise, why settle?

The Plaintiff-client needs to know that to resolve the case in mediation, the client is not going to get all the money they believe they deserve. In exchange for taking less, the Plaintiff-client is eliminating the risk of a loss, in many cases putting an end to mounting legal fees and often is freed from the stress that comes with litigation.

The Defendant-client needs to know that they will pay some money they do not believe they owe. In

exchange they will eliminate the risk of a complete loss, including sometimes the payment of legal fees for both sides, and the client can get on with their life, or with running a company, or get the case off the insurance company books.

Advocate attorneys should also prepare their clients for a long, often boring day. The mediator is the only person working all the time in a mediation. When the mediator is meeting with the other side, hours can go by sitting in your conference room waiting for the next demand or offer or lunch. Advise your clients to bring a book, a crossword puzzle or some diversion to make the day go more quickly. Chances are if your case is going to settle, it will not be until late in the afternoon or early evening, when the shuttle diplomacy ends with the material terms of a settlement agreement, which the attorneys will either finalize right then or after the mediation is over.

Prepare the Mediator

For advocates, preparing the mediator starts with finding the mediator who is best suited for your case. Like most states, Missouri has no formal licensing or credentialing practice. As a result, a mediator's training does not mean that the trainee is a "certified mediator," but rather that they meet the requirements to apply to be listed as a mediator. Most mediators have a mediation genre in which they are most comfortable, be it commercial disputes or family law. Find one that fits your case.

Find a mediator who is a good listener. Confidence in the mediator's ability to hear and synthesize the issues goes a long way when you are acting in the capacity of "translator" for your client. Your client must believe and know that the mediator is listening to your side of the story. To successfully advocate for settlement, the parties have to believe the mediator "gets it," and although they are not advocating on behalf of any particular party, they should know that the mediator is advocating for a fair resolution.

Prepare the mediator by making sure the mediator understands what statements to keep in confidence and what may be disclosed at the appropriate moment. The advocate's Pre-Mediation Brief should identify the critical issues in the controversy and allow the mediator to properly frame or reframe the issue(s). This is crucial in order to get the parties to view the problem in a different light, putting them in a problem-solving mindset rather than one of conflict. By actively listening, acknowledging, and paraphrasing each party's issues, the mediator can determine the wants, needs and what is at stake for the parties. This often allows the mediator to offer different views without provocation and may serve as one of the silent movers that motivates you and your client to consider other points of view.

The well-prepared advocate will anticipate the issues to be presented by the other side and alert the mediator about any flaws in those opinions. By preparing the mediator to make your points, you can avoid the phenomenon of reactive devaluation, where a proposal is less desirable simply because it is proposed by the opposing party. If the mediator makes your suggestion, the other side will react to it better. But this only happens if you have prepared your mediator. The mediator is focused on common interest, rather than positions, and trying to create options for mutual gain.

A well-prepared advocate will often arrive with a draft settlement agreement in hand or available on a laptop computer. Once a settlement has been reached, presenting a first draft to the mediator is greatly appreciated and often creates the advantage of beginning the settlement part of the mediation with familiar language.

Prepare for Online Mediation

The COVID-19 crisis has presented many challenges to alternative dispute resolution. There are obvious problems of safety, reluctance by the parties for face-to-face meetings, and the fact that the use of personal protective equipment does not appear to work effectively for ADR and has made traditional mediation impractical and unsafe.

To solve these problems, the legal community has turned to other platforms for ADR, like ZOOM, Cisco WebEx, Skype, Google Meet, GoToMeeting, Adobe Connect and even FaceTime, to name a few. These platforms represent an alternative, if you will, to traditional ADR. Not only do they address the problems presented by the pandemic, they may be the future of ADR.

Improvements in technology and the demands imposed by the pandemic make the use of virtual ADR, or Online Dispute Resolution (ODR), a prime example of the adage that necessity is the mother of invention. The only question is whether the ADR advocate is prepared for the technology involved in ODR.

There are certain "musts" for a successful ODR. Some are provided by the mediator, like consistent high-quality internet service and knowledgeable personnel. Some of the burden of a successful ODR falls on the advocate. Becoming fluent with ODR in advance is prudent to allow the parties to engage comfortability with ODR.

Although we all look forward to returning to in-person ADR when post-pandemic life returns to "normal," ODR will continue to be used post-pandemic and will be a valuable supplement to face-to-face ADR.

There are ample reasons to use ODR now and into the future. With the huge backlog of cases and jury trials being put off for the time being, parties have an incentive to settle and are often willing to explore ODR. Accordingly, for the lawyer-advocate, there are pros and cons which should be considered when exploring the use of ODR.

Pros

ODR is Time Saving. The mediator and parties save travel time and the attorney and client can work from the attorney's office or home, eliminating any downtime that might occur during an in-person ADR. The ODR "host" can place parties in virtual break-out rooms for party caucusing. Hours and days of the week are no longer a deterrent. If the parties are willing, the matter may be conducted outside of traditional weekday business hours; even weekends are an option.

ODR Reduces Expenses. Because an ODR allows parties to participate from anywhere, there is little or no expense for travel. Moreover, the parties are not limited to local mediators. Because the mediator can operate from their own home base, the parties no longer incur the travel expense of out-of-town neutrals. However, although expense and notoriety are important considerations, the parties should not lose sight of the advantages of local mediators who can provide keen insight with their experiences on possible outcomes should the matter have to be litigated.

Cons

Control of the ODR Environment. Discussion with the parties should be held in advance to prevent any unauthorized persons or party's untimely entry. This requires strict policing. Recording the ODR should be completely prohibited. All platforms provide instructions on how to avoid unauthorized entry and hacking. Mediators and advocates should become familiar with these practices, including requiring and protecting passwords, setting up waiting rooms, managing participants, turning off video and muting participants upon entry. Maintaining a stable internet connection is imperative and a separate home office space free of distractions is invaluable for the ODR practitioner working from home.

Final Thoughts

A successful ODR means:
Learning the technology.
Taking charge of the process.
Maintaining a fair and respectful proceeding.
Practice and preparation.

The benefits of ODR during a pandemic are abundantly clear. Online Dispute Resolution will be an equally valuable tool whether done within or without a pandemic. ⚜

Online Resources:

What to Look for In A Basic Mediation Training
https://www.mediate.com/articles/levinD1.cfm

The Candid Guide to Getting Great Mediation Training
https://tammylenski.com/mediation-training-guide/

Become a Mediator in Missouri
https://www.momediators.org/becomeamediator.html

Top 5 Ways COVID Is Reshaping Dispute Resolution
https://www.lexology.com/library/detail.aspx?g=422ce65d-13d1-423c-a731-5970ea1ad341

ODR in the Era of COVID-19
https://www.americanbar.org/groups/family_law/committees/alternative-dispute-resolution/odr/

The Future of ADR, Post-COVID: Personal Musings from a Neutral
https://www.jdsupra.com/legalnews/the-future-of-adr-post-covid-personal-89958/

Three Tips for International Online Dispute Resolution in the Age of COVID-19
https://www.americanbar.org/groups/business_law/publications/blt/2020/10/intl-odr/

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Understanding and Using Psychology in Mediation

by Kim L. Kirn and Ken Chackes

Introduction

Economic theories about financial decision-making traditionally are based upon the premise that people are rational and make thoughtful, logical decisions. Psychologists Amos Tversky and Daniel Kahneman, along with other colleagues, tested this premise and discovered that people may be rational, but their financial decisions, much like other decisions they make, were subject to biases and unconscious factors.[1] Researchers even demonstrated that conscious decisions were biased.[2] The conclusions they reached, after much direct experimentation, were explosive enough to win a Nobel prize in Economics. Although Tversky and Kahneman were psychologists, not economists, they rocked conventional economic theories.[3] As lawyers helping clients make financial decisions, and attempting to influence opposing parties, we need to acknowledge the non-rational side of decision-making. This article

Ken Chackes has extensive experience as a litigator, mediator and hearing officer. Since his graduation from St. Louis University School of Law in 1976, Chackes has specialized in legal matters involving sexual abuse, education law, disability rights, employment and housing discrimination, and other civil matters. He has served as a mediator for more than 20 years, for the Missouri Department of Elementary and Secondary Education, the U.S. Equal Employment Opportunity Commission, the U.S. District Court for the Eastern District of Missouri, and USA&M. Chackes taught full-time at Washington University School of Law for four years in the 1980s, teaching Trial Practice, Pre-Trial Practice, and in the Civil Litigation Clinic.

Kim L. Kirn works exclusively as a mediator and arbitrator throughout the Midwest, and she completed more than 300 personal injury, real estate, contractual, employment and other civil disputes with USA&M and AAA. Prior to joining USA&M, Kirn practiced law with Lord, Bissell and Brook in Chicago and served as legal counsel for Southern Illinois University Edwardsville. She has also taught senior level Business Law and Ethics courses at SIUE. She is a graduate of the University of Missouri-Columbia and the University of Notre Dame Law school. Her blog "Mediation Under the Arch" can be found at: https://kimlkirnlaw.com/blog/.

will delve into the most important psychological forces affecting parties in mediation.

Conformity Bias (Group Think)

Human nature contains a strong bias to conform to the group. This pull to conform can lead to irrational or non-optimal decisions. Psychologist Irving Janis first introduced the concept of "group think" in 1971, after his experiments demonstrated that individuals refrain from expressing doubts or disagreeing with the consensus.[4] For example, six people in a group setting were shown two lines projected on a large screen and asked which was longer. The differences in length were obvious and all was well when the six individuals answered correctly out loud, but later the five confederates in the room gave intentionally wrong answers. Over a series of questions, the non-confederate test subjects ignored their own judgment and conformed to the group between 40% to 75% of the time. This conformity grows as the questions become harder and the subject matter less familiar.[5]

Similar studies, replicated across 17 countries and mroe than 130 experiments, repeatedly prove that conformity bias strongly influences decisions.[6] Just recently, two professors demonstrated that stock market investors made better decisions on their own than when they accessed more public information.[7] The wisdom of crowds is not always so wise.

Why do we conform? Professor Daniel Levitin writes of our "strong desire to conform to others' behavior in the hope that it will allow us to gain acceptance within our social group, to be seen as cooperative and agreeable."[8] Conformity bias occurs when the group experiences an "us versus them" mentality – exactly the mentality present in a lawsuit. Group think can be minimized by encouraging individual members to voice their opinions and respecting even the most radical opinions.

Responsibility falls to the leader. In a mediation, determine who is leading the room and their leadership style. As a lawyer or mediator, you can temporarily wear the leadership hat while you are in the room and ask for individual feedback. When a member voices dissent, use active listening by repeating back to the speaker any criticism of the decision. Your acknowledgment spurs others to speak and move towards a robust discussion.

Even better, head off group think by asking who will attend the meeting and respectfully ask why each person is attending. Discourage anyone other than the ultimate decision-maker to attend. Ultimately, you may have to give on this point. In a recent mediation, a party showed up with four family members to "provide comfort and aid." In such a situation, consider moving the "comfort and aid" group to a separate room for consultation when appropriate. Explain that more people slow down the process and they can reconvene whenever they like. Show all group members where the others are and keep the groups informed of progress. This process, although difficult, will diminish group think.

Power of the Status Quo

In mediation, lawyers are trying to change the other side's mind; clients are arguing with their spouse to re-think an issue; and the mediator is trying to change everyone's mind. The decisions are complicated and can come at you fast. The easiest path is to cling to the status quo, resulting in no settlement, and consequently we dive into more discovery and wait for the all-important trial date. Humans frequently take whatever option requires the least effort, or the path of least resistance. Expect that many people will take the default option even when it is against their best interest.[9] The status quo feels

comfortable and steady; change brings new choices that create uncertainty.[10] Uncertainty and ambiguity lead to paralysis.[11]

Consider this study: a gourmet grocery store set up a table with 24 flavors of jams offering samples. The next day, the same table offered only six flavors to sample. Although the 24-flavor table attracted more customers, customers were 10 times more likely to buy a jar from the six-flavor table. So many choices overwhelmed the customer and discouraged the customer from making a purchase.[12]

Ambiguity is the enemy, so confront it head-on. In mediation, limit the options to two or three and clearly state them. Use pen and paper, or a whiteboard, and lay out the settlement options, including dollar amounts and dates, if necessary. Use good listening skills to confirm your message is being received. Make decisions simple yes or no questions. You can script the critical moves.

Dismissive Positivity

Oftentimes in mediation, plaintiffs have experienced some serious loss, perhaps a death, or the loss of physical "able-ness," employment or money. Possibly defendants, too, have a loss: a good employment relationship has ended, a customer will not be returning, or the chance of future business dealings is gone. When confronted with a loss and its accompanying sadness, humans will turn to positivity and cheerfulness. Maybe it is a way to shut down the pain of the loss, maybe it is a way to distance ourselves from the loss, maybe it is just empathy.

> ***"[T]he quest to determine who is right and who is wrong is a dead end."***

A positive attitude can lead to good results. Positive psychology informs us that optimistic people live longer, earn more money and are healthier.[13] Alas, this can go too far. If cheerful phrases are glib, superficial or one-sided, the person with the loss feels worse after a dismissively positive comment.[14] Upbeat phrases telling an injured person that things will work out, or that life doesn't give more us than we can handle, or that everything happens for a reason, are all examples of dismissive positivity. A recent study asked people what they find most helpful and most unhelpful when they are awaiting important news. Although some people said they appreciated words encouraging them to be optimistic, it was far more common for people to find this kind of interaction downright annoying.[15]

A better strategy for the advocate and the mediator is to listen to the injured person.[16] Let them tell their story. If mediation is successful, this will be their proverbial "day in court," so make it meaningful. This may take time, but clients who feel genuinely heard and respected are happier clients, better for referrals and reviews. Remind the injured person that this is hard; it is hard for everyone there. If you have experienced something similar, consider sharing that experience with the injured person. It can generate a rapport that helps the case along towards settlement.

Engage in Learning Conversations Instead of Delivering Messages

Mediation almost always involves a series of difficult conversations: with your client; opposing party and counsel; and sometimes even the mediator. Often those difficulties arise from three causes: differences about "what happened"; someone's "feelings" have been hurt;

and/or the discussion challenges a person's "identity," their self-esteem or self-image. Lawyers representing litigants in mediation often face the same issues. There are disputes over the facts of the case. The parties have injured feelings about what happened or the fact that they are in litigation. And a defendant accused of improper behavior, or any party whose credibility is attacked, faces a challenge to their self-identity, *i.e.,* "I'm not that kind of person."

People feel vulnerable when their self-esteem is implicated; when issues are important, and the outcome is uncertain; and when they care deeply about what is being discussed. Consider drawing a distinction between delivering messages and engaging in "the more constructive approach … call[ed] *a learning conversation."*[7] It has been observed that "delivering a difficult message is like throwing a hand grenade" and there is no way to throw it with tact or without consequences.[18]

When a lawyer in mediation talks about what happened (the facts of the case), ponder this: "[T]he quest to determine who is right and who is wrong is a dead end."[19]

Mediation does not require agreement on the underlying facts. The alternative is to try to understand and discuss the perceptions and interpretations held by both sides. That allows the participants to move away from delivering messages and toward asking questions, exploring how each side sees the facts, and to offer the lawyer's or party's views as perceptions and interpretations rather than as the truth. The same principles apply when discussing an opposing party's intentions[20] and blame or liability.[21]

Stop arguing about who is right, and instead try to focus the discussion on understanding that each party has their own perspectives and feelings. An advocate in mediation can do that by inviting the opposing party into a conversation to help figure things out and suggesting that both sides have something to learn from the other. That approach makes it more likely that the opposing party will be open to being persuaded, and might even allow each party to learn something that changes the way they understand the problem.

Start with the Third Story

Applying those principles to an opening session in mediation, an advocate should not start with a description of the facts from their own client's perspective. That kind of opening triggers negative reactions, conveys a judgment about the opposing party, and provokes defensiveness. Instead, start with the third story: how an outside neutral observer would describe the dispute in a way that rings true for both sides. Starting with the *third* story entails:

- Removing judgment but describing the difference.
- Acknowledging that the parties see the situation differently.
- Sharing how you and your client see it and that you want to learn more about how the opposing side sees it.

Invite and Request, not Impose and Demand

Moving toward the proposals for an agreement, application of the same principles involves:

- Extending an invitation to the other side rather than trying to impose your side's view.
- Making requests, not demands ("I wonder if it would make sense...").

These practices help in any situation in which a person has to discuss something that involves differences in perspective and understanding, injured feelings, and matters that impact the listener's self-concept. They are doubly helpful for lawyers representing clients in any context, including mediation, and for mediators who are guiding their conversations.

Improve Mediation by Reducing Stress

It is well known that mediation can be stressful to the participants. Science can help identify the causes of stress and teach us how to decrease its harmful effects in mediation.

Conflict situations trigger stress, which has both positive and negative effects on human behavior. The stress response evolved to help organisms deal with threats. We are all familiar with adrenaline, which is one of the stress hormones triggered by conflict. We can feel the effect of adrenaline as it increases our heart rate. Another hormone triggered by conflict is cortisol, which is more subtle than adrenaline, but can have significant and lingering impact on our judgment. Cortisol can

Continued on Page 15

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have positive effects, by helping a person focus and by sharpening their mental abilities, but increased levels of cortisol can also interfere with a person's judgment.[22]

According to research, a stressed party in mediation tends to perceive their opponents as being angrier and more threatening and will be more likely to misinterpret the other party's intentions. High cortisol levels can cause people to become more fixed in their positions and have difficulty seeing things from the other party's perspective.[23]

There are strategies attorneys can employ to decrease the impact of stress in mediations. Attorneys for the participants can use them separately with their clients and/or suggest that the mediator use these methods:

- If there is going to be a joint session, begin the mediation with a separate caucus with each party.
- Talk to the parties about the stress of mediation and suggest ways of dealing with it, such as taking deep breaths, calling for breaks, or taking notes.
- Suggest that parties name their emotions; ask them how they are feeling.
- Build in time to allow parties to recover from stress before making decisions. Following a session that likely caused stress to a party, take a break or engage in a more casual conversation before asking for decisions.
- Minimize venting. This may be contrary to other literature about mediations, but researchers found that venting triggers a stress response in both parties and can make settlement less likely. If a party is determined to "speak their mind" it is best done in a separate caucus with the mediator.
- Summarize what was said earlier in the day to help stressed parties accurately recall what was said.[24]

Conclusion

Attorneys in mediation, whether advocating for a party or acting as the mediator, can borrow from psychology and other disciplines that involve the study of human emotion and behavior to improve their interactions with clients, mediators and just about everyone else.

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21 "[T]alking about fault is similar to talking about truth – it produces disagreement, denial, and little learning. It evokes fears of punishment and insists on an either/or answer.... Talking about blame distracts us from exploring why things went wrong and how we might correct them going forward." *Id.* at 11-12.

22 Tanz, Jill, *Using Neuroscience to Understand Stress and Improve Mediation,* https://www.mediate.com/articles/tanz-using-neurocience.cfm (2019). Tanz is an attorney and mediator who has worked extensively on this topic with Prof. Martha K. McClintock, a neuroscientist, psychologist, and evolutionary biologist. *See, e.g.,* Jill S. Tanz and Martha K. McClintock, *The Physiologic Stress Response During Mediation,* 32 Ohio State J. Disp. Res. 29 (2017).

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Confessions of an Online Mediation Skeptic

By Bradley A. Winters

I am old enough to remember the word processing department, or the "Wang room," as we called it, because of the Wang brand hardware humming away in (and heating up) the room. I remember the printer in the Wang room that was bigger than a refrigerator. I remember the inbox where we would put marked-up documents into the queue for our "Wang operators" to take to their workstations on a first-come, first-served basis (unless a partner "pulled rank" on you). I remember Jenny, who ran the Wang room and who rolled her eyes every time we called it the "Department of Corrections." I remember her repeated kindness when I assured her that I was on a deadline and needed to cut the line.

I remember the lock on the Wang room door and how the Wang room was off-limits to lawyers (except the inbox).

I remember lawyers without computers. And I definitely remember being extremely skeptical – actually, *dismissive* – about the prospect of ever having one on my already-crowded desk.

I was wrong, of course.

Not long after I got my first computer, I asked myself how I ever practiced law without it, and the idea of undertaking work or leisure travel without a laptop/notebook computer and (G-d forbid) the power cord soon became unthinkable.

I had those same skeptical feelings during my first virtual alternative dispute resolution training session using an online platform (including Zoom) back in March 2020. I didn't think online mediations would work for me. I knew that there were others at JAMS who had done them in the past, but I hadn't. I expected there to be serious hiccups and lawyers who couldn't connect or stay connected, strangers stumbling into the wrong mediation and unintentionally dropping all of a session's participants. I expected it to be cold, impersonal and disconnected (in the emotional sense). I believed that the rituals of clients coming to town, meeting for dinner to discuss the following day's mediation and then getting together for coffee in the morning were not only *de rigueur* but somehow essential. "This can't possibly work," is what I thought in March 2020.

But I was wrong – again.

After conducting dozens of online mediations over

Brad Winters is a neutral with JAMS, the world's largest private alternative dispute resolution provider, mediating cases ranging from class actions and complex biotech patents to simple personal injury litigation online and in JAMS's Resolution Center in Clayton, Mo. He has tried tort and commercial cases for almost 40 years and mediated more than 400 cases. Before founding the Winters Law Group in 2019, he was a partner at Sher Corwin Winters LLC, SNR Denton and Thompson Coburn LLP. He is a 2014 Distinguished Alumnus of the Washington University School of Law and a member of the National Academy of Distinguished Neutrals.

the past 10 months, this is now what I think: while there's a lot of good about in-person mediations, online mediations are better – and in many cases, they're the-difference-between-success-and-failure better.

And they're not better just because it may not be safe to hold in-person mediations, but because they're *objectively* superior. It's not exactly an apples-to-apples comparison, but my settlement success rate has been higher for online mediations than it had been for in-person mediations before COVID.

Most litigators with a mediation practice have now participated in at least one online mediation, but I still encounter lawyers who need convincing.

So here's what I tell attorneys who are skeptical, as I was back in March 2020.

Be Careful Not to Call Them "Virtual"

Dictionary.com's first definition of "virtual" is "being such in power, force, or effect, though not actually or expressly such." Online mediations are very real. But they're also very different from in-person mediations.

The Arguments for In-Person Mediations:

There are intangible benefits from having informal time (e.g., chatting at the coffee machine) with opposing counsel.

This is unquestionably true.

I've seen mediating lawyers speaking with each other about discovery disputes in the case they're mediating and in other matters. I've seen them kibbitz about current events. Face time (not FaceTime) with opposing counsel can lower the temperature of a dispute, and is conducive to the day's mediation and to resolution, or the avoidance of discovery disputes if the case doesn't settle. It's not unfair at all to say that face time is a real benefit of in-person mediations.

I need to look the other party in the eyes.

No, you don't. And, during the pandemic: No, you can't.

In 400 mediations as mediator and a lot of mediations as an advocate, I can't say that eyeball-to-eyeball contact with an opposing party or lawyer ever gave anybody an advantage. And eyeball-to-eyeball in person is no better than eyeball-to-eyeball on a screen.

In *Joffe v. King & Spalding LLP,* No. 17-CV-3392, 2020 U.S. Dist. LEXIS 111188 (S.D. N.Y. June 24, 2020), Joffe, a former associate at King & Spalding, alleged wrongful termination. In denying Joffe's motion to reconsider her denial of Joffe's request for in-person depositions, Judge Valerie Caproni threw some serious shade on Joffe's claims about the irreplaceable virtues of in-person eyeball-to-eyeball contact during a pandemic:

> Amidst a historic and ongoing pandemic that has killed over 120,000 Americans within the span of a few months and continues to spread like wildfire, Joffe demands that non-party witnesses be deposed in-person rather than via video conference, even though their testimony is unlikely to be central to the case. According to his motion for reconsideration, Joffe's powers of observation allow him to detect lies based on a witness's eye movements – but not if the witness's face is "beamed" through a camera. In fact, direct eye contact is purportedly so paramount that Joffe would prefer to interrogate masked and socially distanced witnesses in-person than to observe each witness's unobstructed facial expressions up-close via video conference. As detailed below, the Court sees no reason to increase the danger to the health of the non-party witnesses by requiring in-person depositions and rejects this latest tomfoolery.[1]
>
> * * *
>
> Joffe has made two arguments as to why an in-person deposition is critical: he wants to observe the witnesses' demeanor to assess credibility, and he wants to question them in a setting similar to trial. In the Court's prior order, the Court assumed – in Joffe's favor – that the witnesses would not be wearing masks during their depositions, due to his professed desire to be able to observe their demeanor. Joffe now

says that the witnesses may wear masks during the depositions, which would literally obstruct Joffe's view of their demeanor. Compounding the mask-wearing is the fact that the witnesses would be sitting at least six feet away from Joffe, which further interferes with his opportunity for careful observation. While the Court does accord some deference to Joffe's personal experience and preferred method of examination (and his professed interest in monitoring eye-contact with the witnesses), there can be no question that mask-wearing and distancing significantly diminish the value of in-person testimony and substantially close the gap between in-person and video depositions. Moreover, if the witnesses were to wear masks during the depositions, Joffe would lose the ability to approximate the trial experience; the Court is highly unlikely to allow trial witnesses to testify in court with a face covering.[2]

Judge Caproni's observations apply to mediations as well as depositions. And I think we remember our pre-COVID in-person mediations with a fond and somewhat gilded nostalgia. After an initial group session (at which parties infrequently make opening statements), the parties retire to their caucus rooms and may not see each other again. There was not much in-person interaction in pre-COVID in-person mediations, and even less during this pandemic, when mediators willing to conduct in-person mediations are taking necessary precautions concerning masks and social distancing.

Parties and lawyers can be distracted.

Sure they can. But so what?

This is actually an advantage of online mediations. (See "Efficiency" on Page 20.) I haven't observed that parties and lawyers working from homes in which kids are attending virtual classes, dogs and cats are demanding attention, phones are ringing, and spouses are also working remotely are less likely to settle than parties and lawyers working in near-empty offices. I've actually seen the opposite.

Parties and lawyers who spend the time and money to travel for a mediation are more motivated to settle their case.

Maybe. But I've never observed a correlation between the amount (and hassle/expense) of travel and the likelihood of settlement.

Advantages of Online Mediations

Safety.

If we can avoid close contact with others right now, we should. If parties and lawyers can avoid getting on airplanes, *they* should.

Everything that can be done in person can also be done online.

Secure discussions with clients? Check. Tossing the mediator out to discuss a proposal? Check. Sharing documents and photos with the mediator and opposing parties? Check. Meetings with just lawyers? Check.

Cost savings.

No travel. No night-before dinners with clients. No billable time spent driving to and from the mediator's office, checking in, hanging up coats, unloading files, getting coffee, getting settled, etc.

Time savings.

In in-person mediations, it takes a few minutes for the mediator to change rooms. Leave, walk, refill coffee, knock, enter, greet, sit, open notepad. In a typical two-party mediation, that happens what? Eight times? Fifteen times? At 2-3 minutes each, that can add up to 15-45 minutes spent just changing rooms. In online mediations, this takes up just a few minutes during a full-day session. In multi-party cases (*e.g.,* a construction case with one owner and many contractors) conducted in person, a couple of hours may be lost just moving between rooms.

In person, it may take 5 to 10 minutes to call and convene a meeting of lawyers. Online, it can take only 5 to 10 seconds.

Things that can take minutes in person can take mere seconds online. In multi-party cases, I can visit with the plaintiff, quickly move all the defendants into my breakout room, report what just happened in the plaintiff's room, return the defendants to their breakout rooms and then go to individual rooms to discuss issues specific to each party. This process can also save hours in a complicated mediation.

I go to my office several times during in-person mediations to work on the evolving settlement term sheet. That takes time. When an agreement is reached, I print copies and present those copies to the parties, who frequently have changes. Back to my office. More typing. More printing. More presenting. More walking between rooms. Sometimes another round of edits, which means even more typing, printing, walking and presenting. Then the parties sign term sheets, which is followed by more walking, copying and presenting.

In online mediations, I'm working on a settlement term sheet all day, sitting in the chair from which I'm conducting the mediation, sometimes while I'm in a party's breakout room. The term sheet is emailed to all counsel immediately after an agreement is reached, and each party can reply to everyone that they are in agreement, thus eliminating the need for signatures. This process can save most of the time devoted to term sheet preparation, approval and execution in in-person mediations.

As an advocate, I took clients to mediations that ended up driving them crazy. "I don't blame you," they'd say (looking as if they *did* blame me), but the hours between mediator visits locked in a sterile conference room was not exactly how they imagined a day of spirited negotiations would play out. I heard complaints: "I'll never put myself through this again." Time savings and improved efficiency help the process, the parties and the lawyers.

Saving time matters. The mediation success formula requires energy and momentum. Bogged-down mediations tend to get, well, bogged down.

And online mediations are not subject to ending abruptly because a key participant has to catch a flight.

Visibility.

Lawyers will sometimes tell me that they want their clients to come to their office for the online mediation. I tell them, "I'm a vendor and I'm fine with whatever you want, but don't think you're doing me a favor by having them sit with you. I'd actually prefer you didn't."

Again, we're all better off these days if we can avoid spending a full day in a conference room with other people. And if every participant is in front of their own camera, I can look straight at the decision maker in your room (without anyone knowing who I'm focused on) while I'm talking and see facial expressions (including the "wince reflex," or lack of it, when I discuss specific numbers), which gives me a lot of important information.

I prefer to have every participant appear in front of their own camera. Seeing all faces clearly on my monitor is superior to sitting at the end of a crowded table with people who may not be facing right at me while I'm talking.

Efficiency.

I want lawyers and parties to multitask during mediations. Some may think that locking parties in conference rooms all day until they settle is part of the mediation success formula, but it's not. And clients who felt they were pressured to settle because they wanted the mediation — and not the litigation — to end are often unhappy clients.

One of the unanticipated benefits of online mediations is that parties and lawyers can spend time together and can spend time keeping up with their lives.

In in-person mediations, you're in a room all day with your client. Neither of you can work very efficiently between mediator visits. You both have to leave the room to make phone calls. You stroll the halls to stretch your legs, checking out the view from other windows, thumbing through magazines and reading ingredient lists on snack labels.

In online mediations, if you're not meeting with the mediator or discussing the case, you and your client can mute your microphones, turn off your cameras and work on other business, or check on your kids, or pay bills, or return phone calls, or relax and do nothing at all.

You may have no choice.

Insurance companies and many clients have enthusiastically embraced, and some will now demand, online mediations.

There's nothing virtual about online mediations. They're very real, very effective and very much here to stay. Whether or not you believe that mediations held online are better than in-person mediations, it's beyond argument that the world of mediations has forever changed. Even after the pandemic ends, many cases will be mediated online, and there will be remote participants Zooming in to in-person mediations. Clients and their insurers will demand them, and mediators and advocates are wise to assure they have the technology and skills necessary to make online mediations productive and successful. ⚜

[1] *Joffe v. King & Spalding LLP,* No. 17-CV-3392, 2020 U.S. Dist. LEXIS 111188, at *1-2 (S.D. N.Y. June 24, 2020).

[2] *Id.* at *14-16.

Serving an Aging Population Through Mediation

by Martha C. Brown and Deborah J. Weider-Hatfield

Americans are living longer, and the elderly are increasing both in numbers and in percentage of the U.S. population.[1] In Missouri, the percentage of the population over the age of 60 is projected to be 26.21% by 2030.[2] The advanced elder population (those over the age of 85) has grown as well. By 2030, that age segment in Missouri is estimated to increase more than 51,000 people from 2015.[3] With this rise in population numbers, disputes about elder care, physical placement, and financial control are likely to increase. As a result, elder mediation has become a growing area in dispute resolution, evidenced by the founding of National Academy of Elder Law Attorneys (NAELA) in 1987 and the establishment of the Missouri chapter of NAELA in 1998.

Definition of Elder Mediation

Elder mediation is defined not solely as a resolution of a court dispute, but rather as a "mediation process that addresses the health, financial, and other concerns of a senior family member, although the term 'adult family decision-making' may provide a better description."[4]

Martha C. Brown has been practicing in the field of Elder Law and Special Needs for more than 30 years and is a Certified Elder Law Attorney as certified by the National Elder Law Foundation. Her firm, Mitchell, Brown & Associates, LLC, concentrates on the unique legal needs of the elderly, people with disabilities and the families who care for them. She has an undergraduate degree in American Studies from the University of Vermont and a J.D. from the University of Missouri-Kansas City.

Deborah J. Weider-Hatfield earned her Ph.D. at Purdue University in 1978. During her first career, she taught communication and conflict management processes at the University of Georgia and the University of Central Florida. In 1999, she received her J.D. from the University of Baltimore School of Law. Although she planned to practice elder law in Connecticut, she returned to the Metro East in 2003 after her husband's passing. In 2006, she started her second career as an Assistant Attorney General for the State of Missouri, representing the Missouri Family Support Division and covering cases in eastern Missouri from St. Charles County to the Iowa border. She retired on December 31, 2018, and since then has completed courses in civil, family, online, and transformative mediation. Currently, she is serving as the Secretary for the Association of Missouri Mediators and plans to volunteer as a mediator with the Conflict Resolution Center-St. Louis.

Some commentators, however, take a broader perspective on elder mediation by focusing on

> "a wellness model that promotes a person-centered approach for all participants… mindful of the older person(s) while respecting the rights of each person participating. Regardless of the numbers present, each person is unique with his or her own narrative, intrinsic value, strengths and weaknesses. Through the Elder Mediation lens, aging is viewed as part of the continuing process of development and change, rather than just a period of physical and cognitive decline."[5]

Unlike most mediations, the elder mediation process "often involves the many people related to the issues, such as family members, caregivers, organizations, agencies and a variety of service providers and networks."[6]

Elder mediation cases include, but are not limited to, the following:

- estate planning
- delegated financial and medical decisions
- will contests
- trust administration
- legacy issues
- conservatorships and guardianships
- elder care responsibility
- elder and medical care services
- facility disputes
- workplace issues
- government benefit issues, including Medicare
- end of life decision making
- family business, operations, and succession
- grandparent visitation
- blended family issues
- intergenerational relationship issues

When to Employ Elder Mediation

As one method of dispute resolution for managing conflicts involving the elderly, mediation has been recognized and employed by lawyers, mediators, and aging and disability advocates since the 1980s.[7] In the late 1990s, one commentator discussed typical conflicts experienced by the elderly and the need to acknowledge the impact of myths and characteristics of the aging population on the mediation process.[8] Others have stressed the importance of selecting qualified elder mediators who provide the best fit for any particular elder care dispute,[9] and encouraged mediators to "rethink the way they handle interventions involving elders and to be mindful of elders' rights, including their right to participate in decision making about their lives, directly or indirectly, and with or without capacity."[10]

Choosing the best intervention to manage conflicts faced by elderly clients is a challenge and an important skill for every elder law attorney. Mediation is only one of many options available. Recognition and understanding of the level of conflict present in a family, along with knowledge of the available options for assisting clients and families to reach their goals, is essential to success as an elder law attorney.

In 2010, St. Louis lawyers Debra Schuster and Wesley Coulson discussed how elder law attorneys had come to realize the limitations of serving as "crisis handlers" for their clients.[11] They recommended Life Care Planning (LCP) to manage "the complex and intertwined legal, financial, medical, care support, housing, practical, and emotional needs of their clients." Using the LCP process, an elder law attorney becomes "more proactive and less reactive" because LCP is based on "a holistic, multidisciplinary approach to addressing all of the legal, care, economic, benefit, social and support issues modern elderly clients face."[12] The LCP process is recognized as a preventative or pre-suit approach for managing low to moderate levels of conflict when parties are generally cooperative, tolerant of differences, and need information and resources.[13]

In high-conflict situations, when a dispute cannot be managed through mediation or when families need assistance after mediation to address subsequent and recurring high-conflict disputes, eldercaring coordination can be an effective and necessary dispute resolution intervention.[14] Eldercaring coordination is defined as

> "a dispute resolution process during which an Eldercaring Coordinator (EC) assists elders, legally authorized decision-makers, and others who participate by court order or invitation, to

resolve disputes with high conflict levels that impact the elder's autonomy and safety by

- enabling more effective communication, negotiation, and problem-solving skills,
- offering education about elder care resources,
- facilitating the creation and implementation of an elder care plan,
- making recommendations for resolutions, and
- making decisions within the scope of a court order or with the parties prior approval."[15]

Eldercaring Coordination begins with the parties' request that a case be referred to that process by a stipulated agreement, or by the court's identification of a high-conflict case. An Order of Referral to Eldercaring Coordination is entered and processed, and the court appoints an EC.[16] "Eldercaring coordination focuses on reducing conflict for families so that court proceedings can flow smoothly, without constant disruptions involving nonlegal issues, which may jeopardize the care and safety of elders."[17]

Ethical Issues

An elder mediator should be guided by the Model Standards of Conduct for Mediators and the Elder Mediation International Network (EMIN) Code of Ethics for Elder Mediators. The Model Standards for Mediators provide direction for conducting mediations in all types of cases and include standards for self-determination, impartiality, conflicts of interest, competence, confidentiality, quality of process, advertising and solicitation, fees and other charges, and advancement of mediation practice.[18] The EMIN Code of Ethics for Elder Mediators offers extensive guidance for the practice of elder mediation. In particular, the EMIN Code lays out 16 professional responsibility guidelines for members of EMIN:

- management of pre-existing personal or professional relationships between participants and the elder mediator,
- duty to maintain impartiality,
- exceptions to duty to maintain confidentiality and guidelines for sharing information about these exceptions with participants,
- duty to assess and foster participants' ability to participate in the mediation process,
- need for cultural sensitivity in providing mediation services to participants,
- need to respect and invite complementary inter-professional relations,
- guidelines for the proper course of action when abuse is identified or suspected,
- responsibility to foster fair negotiations,
- duty to encourage decisions based upon information, knowledge, and advice, along with the desirability of independent legal advice throughout the process,
- steps in explaining the mediation process before the mediator and participants agree to mediate,
- responsibilities of the mediator regarding multi-party mediation and the use of technology for participants who cannot attend in person,
- preparation of the written summary of agreements reached,
- duty to suspend or terminate the mediation whenever continuation of the process is likely to harm one or more of the participants,
- explanation of mediation fees, outreach and promotional activities, including the prohibition against making reference to "success rate" in mediations,
- responsibility to allow for the inclusion of an appointed advocate for a vulnerable person.[19]

Both the Model Standards and the EMIN Code of Ethics make clear that elder mediation creates special ethical issues regarding impartiality, self-determination, diminished capacity, the role of support persons, confidentiality, participant safety, and mediator competence.[20] Elder mediators can assure participant safety by employing the Elder Abuse Screening Tool[21] in addition to their regular screening for the appropriateness of mediation in each case. The Screening Tool includes the following sections:

- An introductory section with information related to the pervasiveness of elder abuse, the role of the elder mediator, and an overview of the elder mediation process,
- A guide to the intake process with lists of emergency referrals, professionals, and services that an elder mediator may need to consult,
- A chart summarizing signs of physical abuse, sexual abuse, emotional/psychological abuse,

abandonment neglect, self-neglect, and financial exploitation,
- A list of questions for family members and other participants in the mediation process,
- A list of initial questions for the elder,
- An interventions action chart outlining how and when to address identified abuses and observations.[22]

The Screening Tool also lists research or evidence-based risk factors that may increase the likelihood that abuse, neglect, or exploitation may be taking place when present:
- women over the age of 80 may be 2 to 3 times at greater risk of abuse, neglect, or exploitation,
- family member controlling the elder's finances or living with, dependent on, or caring for the elder (90% of elder abuse is perpetuated by family members),
- history of violent relationships or bullying,
- abuse of power and control present in an elder's significant relationship,
- weapons in the home,
- caregiver without employment or financially dependent,
- cognitive impairment,
- mental health concerns or substance misuse by elder and/or caregiver.[23]

> ***"Mediation is an ideal process for resolving a variety of conflicts involving the elderly. No elders want poorly managed conflict to be a part of their lives."***

Missouri does not identify attorneys or mediators as mandatory reporters of suspected abuse.[24] Although many care providers, medical service providers, social services providers, and religious service providers are designated as mandatory reporters, elder law attorneys and mediators who become "aware of circumstances that may reasonably be expected to be the result of, or result in, abuse or neglect of an eligible adult may report to the [Department of Health and Senior Services]."[25]

Choosing an Elder Mediator

Elder mediation is a specialized dispute resolution process. The mediator should have "some background in elder law, or knowledge of where to find the expertise"; "a familiarity with the basics of the long-term care regulatory setting, or knowing where to find the basics"; an ability "to recognize the signs of elder abuse, neglect, and exploitation and know how to report to adult protective services"; "an understanding of, or access to information on, the aging network and community resources"; and sensitivity to and ability "to confront the capacity conundrum."[26]

For attorneys interested in practicing elder mediation, two organizations offer certification procedures worth investigating. NAELA offers Certified Elder Law Attorney (CELA) training, and EMIN offers both basic and advanced Certified Elder Mediator training.

Mediation is an ideal process for resolving a variety of conflicts involving the elderly. No elders want poorly managed conflict to be a part of their lives. A successfully mediated outcome is one where the quality of care and the quality of relationships have been maximized for all participants, especially the involved elder.

[1] U.S. Dept. of Health & Human Svcs., Admin. for Community Living, Profile of Older Americans (2020) https://acl.gov/aging-and-disability-in-america/data-and-research/profile-older-americans.

[2] Division of Senior and Disability Services, Missouri Department of Health and Senor Services, Missouri State Plan on Aging 2020-2023, 2 (2019).

[3] *Id.* at 2.

[4] Roselyn L. Friedman, *Focus on Facilitative Mediation: What Estate Planners and Fiduciaries Need to Know, in* Meditation for Estate Planners: Managing Family Conflict 21 (Susan N. Gary ed., 2016).

[5] Judy McCann-Beranger, *"What Is Elder Mediation"* (citing The Elder Mediation International Network (EMIN) Code of Ethics (2018)), https://elder-mediation-international.net/what-is-elder-mediation/.

[6] Dale Bagshaw, *Elder Mediation: An Emerging Field of Practice, in* Comparative Dispute Resolution 203 (Maria Federica Moscati, Michael Palmer, Cheng Yu Tung, & Marian Roberts, eds., 2020).

[7] Erica F. Wood, *Dispute Resolution and Aging: What Is the Nexus and Where Do We Stand*? Bifocal: Journal of the ABA Commision on Law and Aging, Vol. 36, No. 3 (Jan.-Feb. 2015), at 73-77.

[8] Suzanne J. Schmitz, *Mediation and the Elderly: What Mediators Need to Know,* Mediation Quarterly, Vol. 16, No. 1 (1998), at 72-84.

[9] Ellie Crosby Lanier, *What is Quality in Elder Care Mediation and Why Should Elder Law Advocates Care?* Bifocal: Journal of the ABA Commision on Law and Aging, Vol. 32, No. 2 (Nov.-Dec. 2010) at 1, 16-19.

[10] Bagshaw, *supra* note 6, at 202.

[11] Debra K. Schuster & Wesley J. Coulson, *The Evolving Practice of Elder Law . . . Life Care Planning,* St. Louis Bar Journal, Vol. 56, No. 4 (Spring 2010), at 6

[12] *Id.* at 7.

[13] Linda Fieldstone & Sue Bronson, *Eldercaring Coordination in Your Community or Your Law Practice: New Approaches to Dealing with High-Conflict Families,* Naela Journal, Vol 14, No. 1 (Spring 2018), Table 1, p. 8.

[14] *Id.* at pp. 6-7; Sarah J. Gross, *Eldercaring Coordination: A Dispute Resolution Option for High Conflict Elder Disputes in California,* Southern Cal. Interdisc. L.J., Vol. 29 (2020) at 311.

[15] The Association for Conflict Resolution [ACR] Guidelines for Eldercaring Coordination, October 2014; ACR Elder Justice Initiative on Eldercaring Coordination, National Adult Protective Services Association Annual Conference, Milwaukee, Wisc., 2017, at 5-6.

[16] Gross, *supra* note 14, at 315.

[17] Fieldstone & Bronson, *supra* note 13, at 2.

[18] The Model Standards of Conduct for Mediators (2005) were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005, and the Executive Committee of the American Arbitration Association on September 8, 2005. The original version of the Model Standards was prepared and approved in 1994.

[19] The Elder Mediation International Network (EMIN) Code of Ethics for Elder Mediators (9th edition, September 2018) was endorsed by Family Mediation Canada, Mediation PEI, Inc., Alzheimer Foundation PEI, Ontario Association for Family Mediation, Mediator's Institute of Ireland, The Mediation Association of Switzerland, and Elder Mediation Australasian Network.

[20] Barbara Foxman, Kathryn Mariani & Michele Mathes, *A Mediator's Ethical Responsibility in Elder Mediation: What Is at Stake?* ACResolution: The Quarterly Magazine of the Association of Conflict Resolution, Summer 2009, at 3-8.

[21] Zena Zumeta, *About the ABA Dispute Resolution Section Task Force Elder Abuse and Neglect Screening Guidelines for Mediators,* Bifocal: Journal of the ABA Commision on Law and Aging, Jan.-Feb. 2021, vol. 42, no. 3, pp. 65-67.

[22] ABA Dispute Resolution Task Force on Elder Abuse and Neglect Screening Guidelines for Mediators (2020) at 1-9.

[23] *Id.* at 4.

[24] Section 192.2405(1), RSMo. (2017) lists the mandatory reporters of suspected harm or bullying.

[25] §192.2405(2), RSMo.

[26] *Id.*

Addressing the COVID-19 Eviction Crisis Through Mediation

by Karen Tokarz and Elad Gross[1]

The United States currently faces the most severe housing crisis in its history, with an avalanche of evictions still to come. According to the latest analysis of weekly U.S. data, without sufficient state and federal intervention, an estimated 30-40 million people (half of American renter households) are at risk of eviction across the country.[2] Evictions in St. Louis City and St. Louis County mirror these harsh nationwide eviction conditions. Even prior to COVID-19, nearly 16,000 eviction lawsuits were filed annually in the St. Louis City and County courts, an average of more than 43 eviction cases per day.[3]

The costs of evictions are borne by tenants, landlords, the community, and the courts,[4] and these costs are being exacerbated during the pandemic. In evictions, families lose their homes and their possessions, with significant harm to their physical and mental health; children of evicted tenants experience long-lasting consequences, such as asthma, stress, and depression, plus lower grades and delayed graduations.[5] Evictions create increased costs for landlords as a result of the court process, as well as lost income from transitioning tenants. Evictions raise crime rates and lower neighborhood stability, which decrease property values. During this health crisis, the incidence of COVID-19 and mortality has risen in states that lifted their eviction moratoriums, impacting community health and safety.[6] And, last, eviction cases clog the court system, requiring significant time and money, all at the taxpayers' expense, with outcomes that do not necessarily address the problem.

Confronting the COVID-19 Eviction Crisis

The COVID-19 pandemic has taken eviction concerns to new heights. The pandemic has caused catastrophic job loss

Elad Gross is the Outreach Coordinator for the St. Louis Mediation Project. He is a constitutional and civil rights attorney focusing his practice on government transparency and accountability. He is the President and CEO of the Education Exchange Corps, a nonprofit organization that provides leadership training for students in the St. Louis area. He has also launched several initiatives to increase civic engagement in Missouri, including the #EladPod, an online townhall program and podcast that allows members of the public to ask questions of elected officials and experts in a range of fields. For more about the St. Louis Mediation Project, visit https://www.stlmediationproject.org/.

Karen Tokarz is the Charles Nagel Professor of Public Interest Law & Policy, Director of the Negotiation & Dispute Resolution Program, and Director of the Civil Rights & Meditation Clinic at Washington University School of Law. She is President of the St. Louis Mediation Project, and has been named to *Best Lawyers in America* in Mediation every year since 2010. In 2019, she was inducted as a Distinguished Fellow in the International Academy of Mediators. She has worked with law interns in South Africa for 20 years and served as a Fulbright Senior Specialist at the University of Kwa Zulu-Natal in Durban, South Africa, consulting on domestic and international dispute resolution.

and unprecedented unemployment rates. The risk of eviction has dramatically increased, and compounded, systemic race and gender inequalities in housing. Eviction rates are higher among low-income women than men, and higher among people of color. Black single mothers face the highest eviction rate of any group and are particularly vulnerable to being evicted during the pandemic, in part because they occupy some of the professions significantly impacted by the pandemic, such as service and hospital jobs.[7] In St. Louis and nationally, almost 30% of black women renters are evicted each year.[8]

Even in the best of times, the courts struggle to address eviction cases with laws and procedures that do not wholly benefit the parties or the community. The filing of an eviction lawsuit alone creates a significant barrier for renters seeking future quality housing in a safe neighborhood, because many landlords reject housing applicants with recent lawsuits, judgments, or evictions – even if the case was dismissed, and even if the case was prompted by external forces like a pandemic.[9] Experts call this process "blacklisting" because it effectively locks tenants with an eviction record out of the housing market. Because of blacklisting, many evicted tenants and their families find themselves either in substandard housing or effectively homeless – a particularly problematic outcome for the public, as well as the tenants, during this health crisis.

Of all the legal interventions to address evictions, increased access to legal representation for parties has received the most research, and probably the most widespread support.[10] Attorneys are better at navigating the legal system than lay people. Attorneys have the training and skills necessary to understand the law, raise and argue defenses, and use the rules of evidence. Also, not surprisingly, tenants with attorneys have significantly better outcomes than those who are unrepresented. This solution also can raise the quality of housing, because landlords quickly learn that attorneys will raise defenses relating to habitability.

Efforts to increase access to legal representation in St. Louis in the early 2000s were criticized for the high cost of providing attorneys high costs of providing attorneys for parties, with no obvious sources of funding and no political buy-in. However, a recent 2018 study published by the Philadelphia Bar concluded that the City of Philadelphia recouped at least $12.74 in associated savings on other programs - relating to housing and crime, for example - per dollar spent on providing legal counsel to tenants.[11] Perhaps, someday, St. Louis City or County will revisit this option. In the

meantime, the St. Louis Mediation Project was created to help the community and the courts with housing disputes.

St. Louis Mediation Project Provides Mediations in *Pro Se* Housing Court

While eviction lawsuits are an important legal remedy, many aspects of mediation make mediation a more just and effective dispute resolution approach than court evictions. A well-functioning court system is vital for any strong democracy. But, when the court system is hugely overburdened and people do not believe that their voices will be heard or that justice will be done when they walk through the courthouse doors, public trust and confidence are undermined.

To bring the benefits of mediation to the housing courts, while rebuilding tenants' and landlords' trust in the court system in St. Louis, and at the same time providing learning opportunities for law students, the Civil Rights & Mediation Clinic at Washington University School of Law (Clinic) developed the St. Louis Mediation Project, in partnership with Metropolitan St. Louis Equal Housing and Opportunity Council (EHOC), well over a decade ago. The Mediation Project collaborated with judges in the St. Louis City Circuit Court to explore the benefits of mediation for *pro se* parties and to address a serious overcrowding issue in housing court.

The Mediation Project provided free mediation services by law students and volunteer lawyers for the St. Louis City Circuit Court *pro se* housing docket, where neither landlords nor tenants are represented by counsel, every Friday for more than 10 years.

The need for an intervention in St. Louis housing court was confirmed in an early study by the Clinic and EHOC of eviction cases filed in St. Louis City, which revealed that tenants face an almost unsurmountable hurdle when their cases are brought to trial.[12] According to the study of all landlord-tenant cases that concluded with a trial or default judgment in 2012, only two cases (0.04%) ended in favor of the tenant, while 4,934 cases (99.96%) ended in favor of the landlord. At least 2,282 cases (or 46.23% of the total) were forwarded to the sheriff for execution of the eviction, *i.e.,* forcible removal of the tenant from the property.[13] As these numbers starkly show, the chances of tenants succeeding in court were virtually zero, and the odds that tenants would be forcibly evicted from their home by court action and sheriff eviction, with all of its attendant costs, were very high.

In 2013, the Mediation Project expanded to include mediators affiliated with United States Arbitration & Mediation (USA&M) and other volunteer mediators. In summer 2018, the Mediation Project began providing

mediations for the St. Louis County Circuit Court *pro se* housing docket at the request of judges who expressed interest based on the successful outcomes the Mediation Project had brought to the City. In summer 2020, the Mediation Project handed off St. Louis City mediations to the St. Louis Conflict Resolution Center, shifted to Zoom mediations in the St. Louis County *pro se* housing docket, and began providing pre-filing eviction mediations in the St. Louis County community.

Mediations Successfully Resolve Landlord-Tenant Cases and Help Reduce Evictions

The St. Louis Mediation Project has been quite successful at resolving landlord-tenant cases in the courts and helping to reduce evictions. For example, over 70% of the *pro se* landlord-tenant cases mediated by the Mediation Project in St. Louis City resulted in settlement in 2018.[14] Similarly, in St. Louis County, 75% of mediated *pro se* cases resulted in an agreement in 2019.[15] The percentage decrease in evictions in mediated *pro se* cases is beneficial for all involved. The successful completion of mediated agreements means not just fewer evictions, but that tenants have more control over their housing, landlords receive the money and/or premises owed to them, neighborhood are more stable, and the courts spend less time and money adjudicating these cases.[16]

In addition, mediated settlements result in significantly improved outcomes and compliance for both parties. In 2018, over half of all the St. Louis City cases that settled through mediation resulted in a dismissal, *i.e.,* the parties successfully completed the terms of the agreement, significantly decreasing the number of eviction judgments for that docket and resulting in approximately 250 fewer evictions per year. Only 33% of mediated settlements resulted in a judgment against the tenant (after the tenant violated the agreement), and only 25% of mediated settlements resulted in an execution of the judgment. By contrast, 92% of non-settled cases that went to trial resulted in a judgment against the tenant, and the landlord was forced to execute the judgment in 40% of those cases. (Of a total of 1,382 cases docketed on the St. Louis City *pro se* housing dockets in 2018 in which both parties appeared, 149 cases went to trial while 476 settled through mediation. Landlords won all but 12 of the cases that resulted in trial, but 250 of the 476 cases settled through mediation resulted in a dismissal and no eviction on the tenant's record.)

These results are consistent with studies showing that there is a greater compliance rate for settlements resulting from mediations rather than judgments reached through trial, and that mediated agreements result in better outcomes for all parties.[17] This may be because tenants and landlords experience "procedural justice" and, thus, are more likely to comply with the terms of the settlement. Mediation is flexible and allows the parties to come to their own unique private contract, instead of being bound by a rigid statutory scheme. Mediators can facilitate alternative options, not available to a judge, to resolve a case. In Missouri, for example, if a tenant owes a landlord *any* money, the court must grant the landlord possession of the property. Although the court has discretion in determining the amount of damages owed, particularly in cases involving issues of habitability, an order for a "rent and possession" eviction gives the tenant only 10 days to move out or redeem their lease before the landlord can execute the order. If the landlord wishes to execute the order, the landlord must then pay the sheriff and pay for the removal of the tenant's belongings if the tenant has not already removed them.[18] By contrast, because mediated agreements follow contract law instead of the eviction statutory scheme, the parties can extend move-out dates, reduce the expense of eviction for the landlord, and even identify pathways for tenants to remain in the unit through a rental payment plan and other approaches.

Addressing the Eviction Crisis Through Pre-Filing and Court Mediations via Zoom and Access to Justice Centers

Both the City and County courts stopped hearing in-person eviction cases in late March 2020 due to COVID-19. Both courts resumed their landlord-tenant dockets in June 2020, with cases being heard remotely.

The St. Louis Mediation Project responded to the pandemic and the inability of litigants to access the courthouse by adding new formats for mediation and collaboration with the courts. First, the Mediation Project resumed mediations in St. Louis County *pro se* housing court in June 2020 by shifting to Zoom.

Second, with the help of a small CARES Act grant, the Mediation Project began providing mediations to landlords and tenants, also on Zoom, prior to the filing of an eviction lawsuit in various locations in St. Louis County community. When the parties engage in mediations before filing, the parties enter the mediation having expended less time, energy, and money. Logically, the parties are more inclined to reach a mediated settlement. Any mediated settlement prior to filing or the first court date also saves the court time, energy, and money by removing cases from the court's docket entirely.

One major concern with the shift to virtual court hearings and mediations is lack of internet access. Households with lower incomes, which are the most vulnerable to evictions, are also much less likely to have internet access.[19] To address this, the Mediation Project offers iPads and technical instructions to landlords and tenants participating in pre-filing eviction mediations in the community. This has been especially

effective with landlords serving multiple tenants at one centralized complex.

The Mediation Project also supported the St. Louis County Circuit Court in its efforts to develop Access to Justice Centers, one on the first floor of the County courthouse in Clayton and the other at the new satellite court in north St. Louis County, necessitated because public access to courtrooms has been restricted during the pandemic. These centers have public computer kiosks linked to the main courthouse that allow litigants to participate remotely in mediations and courtroom proceedings, including landlord-tenant, small claims, preliminary criminal, family court, and order of protection dockets. Court staff are available to assist members of the public in using the computers. (In the first 10 weeks that the first center was open in the courthouse, more than 900 individuals utilized the computers for various court matters, including six weddings.)

The St. Louis Mediation Project Moves Forward

The St. Louis Mediation Project has demonstrated that landlord-tenant mediations are effective in reducing evictions in the St. Louis region and improving access to justice for all. Mediations significantly reduce evictions, increase landlords' receiving at least some of what they request without tedious garnishment proceedings or sheriff-led forcible evictions, contribute to housing stability, and benefit the courts. In addition, mediation programs provide positive learning experiences for law students and volunteer lawyers. The Mediation Project has responded to the COVID-19 crisis through pre-filing eviction mediations in the community, as well as the continuation of post-filing eviction mediations in the courts, on Zoom, and plans continued expansion in the future in service to the St. Louis community and courts. ⚜

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[1] The authors wish to thank Mike Geigerman (Managing Director, U.S. Arbitration & Mediation and Treasurer, St. Louis Mediation Project); Sam Stragand (former Staff Attorney, Metropolitan St. Louis Equal Housing & Opportunity Council and Secretary, St. Louis Mediation Project); Zack Schmook (former Staff Attorney, Metropolitan St. Louis Equal Housing & Opportunity Council); Wolf Smith (Executive Director, St. Louis Conflict Resolution Center); and Hon. Michael Burton (Presiding Judge, St. Louis County Circuit Court).

[2] Emily Benfer, *et al., The COVID-19 Eviction Crisis: An Estimated 30-40 Million People in America are at Risk,* Aspen Inst. (Aug. 7, 2020), https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/ .

[3] Emails from Thomas Kloeppinger, Circuit Clerk, 22nd Judicial Circuit, and Joan Gilmer, Circuit Clerk, 21st Judicial Circuit (on file with Professor Tokarz).

[4] Matthew Desmond, Evicted: Poverty and Profit in the American City 1-5 (2016).

[5] Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health,* 94 Soc. Forces 295, 295–301 (2015).

[6] Kathryn M. Leifheit, *et al., Expiring Eviction Moratoriums and COVID-19 Incidence and Mortality,* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3739576 .

[7] Tasbeeh Herwees, *Housing Insecure*, ACLU Magazine (Winter 2021), https://www.aclu.org/sites/default/files/field_document/aclu_winter21_singles-compressed.pdf .

[8] Matt Desmond, *Americans Were Told to Stay at Home. Black Women Are the Most at Risk of Losing Theirs,* The 19th News, Dec. 21, 2020, https://19thnews.org/2020/12/eviction-moratorium-black-women-housing/ .

[9] In Missouri, through Case.net, anyone can access eviction court records, which remain in the system even when cases are dismissed. Some other jurisdictions have addressed this by sealing files in dismissed cases. See Sophie Beiers, *et al., Clearing the Record: How Eviction Sealing Laws Can Advance Housing Access for Women of Color,* ACLU (Jan. 10, 2020), https://www.aclu.org/news/racial-justice/clearing-the-record-how-eviction-sealing-laws-can-advance-housing-access-for-women-of-color/.

[10] Heidi Schultheis & Caitlin Rooney, *A Right to Counsel is a Right to a Fighting Chance: The Importance of Legal Representation in Eviction Proceedings,* American Progress (Oct. 2, 2019), https://www.americanprogress.org/issues/poverty/reports/2019/10/02/475263/right-counsel-right-fighting-chance/ .

[11] *See* Stout Risius Ross, LLC, *Economic Return on Investment in Providing Counsel in Philadelphia Eviction Cases for Low-Income Tenants,* The Philadelphia Bar (2018), https://www.philadelphiabar.org/WebObjects/PBA.woa/Contents/WebServerResources/CMSResources/PhiladelphiaEvictionsReport.pdf.

[12] Zachary Schmook & Karen Tokarz, Equal Housing & Opportunity Council, The Study (2012) (unpublished study) (on file with Metropolitan St. Louis Equal Housing & Opportunity Council).

[13] These numbers demonstrate that a judgment in favor of the landlord is also not an ideal outcome for landlords, because nearly half of the landlords still had to pay the sheriff to execute the judgment, pursue garnishment proceedings, etc.

[14] Data for cases mediated in St. Louis City Circuit Court in 2018, on file with Professor Tokarz.

[15] Data for cases mediated in St. Louis City County Court in 2019, on file with Professor Tokarz.

[16] Data for cases mediated in St. Louis City Circuit Court in 2018, on file with Professor Tokarz. For more about the impact of the Mediation Project on St. Louis City and County Courts, *see* Karen Tokarz, Sam Stragand, Michael Geigerman, Wolf Smith, *Addressing the Eviction Crisis and Housing Instability Through Mediation,* 63 Wash. U. J. L. & Pol'y 243, 261 (2020).

[17] Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research,* 17 Ohio State J. Disp. Res. 641, 694 (2002).

[18] *See, e.g., Eviction Procedures and Policy,* City of St. Louis, https://perma.cc/7VQN-2G5C.

[19] Based on 2016 census data, only 58.8% of households making less than $25,000 annually and 77.5% of households making between $25,000 and $49,999 have internet access at home. Camille Ryan, American Community Survey Reports, Computer and Internet Use in the United States: 2016 (Aug. 2018); Monica Anderson and Madhumitha Kumar, Pew Research Center, Digital Divide Persists Even as Lower-Income Americans Make Gains in Tech Adoption (May 2019).

The Brief Case by Charles A. Weiss

MISSOURI SUPREME COURT HOLDS THAT WRONGFUL CONVICTIONS MAY NOT BE CHALLENGED THROUGH UNTIMELY MOTIONS FOR NEW TRIAL

***State v. Johnson,* No. SC98303 (Mo. banc March 2, 2021).**

In 1995, Lamar Johnson was convicted of first-degree murder and armed criminal action in the St. Louis City Circuit Court, which the Missouri Court of Appeals, Eastern District, affirmed on direct appeal. In the early 2000s, Johnson made several unsuccessful pro se attempts to obtain habeas corpus relief in state and federal court. In 2018, the newly established Conviction Integrity Unit of the St. Louis Circuit Attorney's office investigated Johnson's conviction. As a result of that investigation, the Circuit Attorney, joined by Johnson, filed a motion for new trial in 2019 under Rule 29.11, "based upon evidence of prosecutorial misconduct that affected the reliability of the verdict and newly discovered evidence of actual innocence."

The circuit court, *sua sponte,* entered an order appointing the Attorney General to appear on behalf of the State alongside the Circuit Attorney. The Circuit Attorney and Attorney General then took opposing positions on the circuit court's authority to hear the motion. The Circuit Attorney argued that she had a duty to file the motion, notwithstanding any untimeliness under Rule 29.11, and that the circuit court could consider the motion based on its inherent authority to prevent a miscarriage of justice. The Attorney General argued that the Circuit Attorney had no authority to file a motion for new trial over 20 years after Johnson's conviction and sentencing, and that the circuit court therefore lacked jurisdiction over the motion.

The circuit court dismissed the motion as untimely, based on Rule 29.11's 25-day deadline for motions for new trial and determined that it lacked authority to hear the motion. Johnson and the Circuit Attorney both appealed the order dismissing the motion for new trial, but the Attorney General dismissed the State's appeal, which left only Johnson's appeal before the Missouri Supreme Court. (The parties had initially appealed to the Court of Appeals, which transferred the matter to the Supreme Court.)

The Supreme Court limited its analysis to the narrow issue of "whether there is any authority to appeal the dismissal of a motion for a new trial filed decades after a criminal conviction became final." The Court determined that no such authority existed. The right to appeal in criminal cases arises under Section 547.070, which concerns only "final judgments." Because Johnson's criminal judgment became final once his sentence was entered, the Court held that the trial court's jurisdiction had been exhausted, meaning that the circuit court had no authority to sustain Johnson's untimely motion for a new trial. For the same reasons, Johnson had no statutory right to appeal the circuit court's order denying that motion. As a result, the Supreme Court itself had no authority "to do anything but dismiss the appeal."

The Court acknowledged that *State v. Terry*, 304 S.W.3d 105 (Mo. banc 2010), recognizes the inherent power of appellate courts to remand a case for consideration of newly discovered evidence in order to prevent a miscarriage of justice. The Court distinguished *Terry,* however, because that appeal was brought properly from a final judgment, meaning the Court had statutory authority to exercise its inherent powers when the defendant brought the newly discovered evidence to its attention.

Chief Justice Draper, joined by Judge Stith, filed a concurring opinion, agreeing that filing a motion for new trial was improper after the judgment was affirmed on appeal and the appellate court had issued its mandate. Chief Justice Draper proposed, however, that the Circuit Attorney could file an independent action under

Rule 74.06 to seek relief from Johnson's final judgment because "it is no longer equitable that the judgment remain in force." In a footnote, however, the majority responded to Chief Justice Draper's argument, stating that such a filing would be improper because Rule 74.06 applies only to civil actions, and that the Circuit Attorney's ability to appear as a "party" on behalf of the State ceased when the circuit court entered its final judgment.

Judge Stith, joined by Chief Justice Draper and Judge Breckenridge, filed her own concurring opinion suggesting that Johnson could file another petition for a writ of habeas corpus, which the majority did not dispute. Judge Stith responded to the Attorney General's argument that the Attorney General was "required to oppose Mr. Johnson's attempts to obtain a hearing on his newly discovered evidence" because the Attorney General would otherwise "become an advocate for defendants and would show a bias in defendants' favor." Judge Stith remarked that more than 10 criminal convictions had been vacated in the past decade, based on *Brady* violations or newly discovered evidence, and that in each instance the Attorney General had opposed relief. Judge Stith wrote that the Attorney General "misunderstands the full extent of the prosecution's role in the justice system," which is "not simply one of being an adversary to the defense," but rather a representative of the State whose interest "is not that it shall win a case, but that justice shall be done." Furthermore, prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." As a result, Judge Stith wrote, "[t]his Court anticipates and expects the attorney general will apply these principles when called upon to consider whether to oppose a petition for writ of habeas corpus or other pleading filed by Mr. Johnson or others."

Editor's Note: Charles A. Weiss, along with Jonathan B. Potts, filed an amicus curiae *brief , on behalf of 45 elected prosecutors from 25 states, in the Lamar Johnson case, in support of the motion for new trial filed by Johnson and the Circuit Attorney. One of the 45 prosecutors among the* amici curiae *is St. Louis County Prosecuting Attorney Wesley Bell.* The St. Louis Bar Journal *Editor-in-Chief David R. Truman is an employee of the St. Louis County Prosecuting Attorney's Office.*

SUPREME COURT ORDERS TRANSFER TO ST. LOUIS COUNTY OF CASES FILED BY PLAINTIFFS IN ST. LOUIS CITY WHO WERE NOT INJURED IN ST. LOUIS CITY.

***State ex rel. Janssen Pharmaceuticals Inc. et al. v. Hon. Michael Noble,* 613 S.W.3d 58 (Mo. banc 2020).**

In May 2015, 68 plaintiffs filed an action in the Circuit Court of the City of St. Louis against several pharmaceutical companies, stating various causes of action arising from the sale and use of Risperdal, a prescription drug. The pharmaceutical companies filed a motion to dismiss, based on improper venue and *forum non conveniens* for all plaintiffs not injured in the City of St. Louis. Alternatively, the pharmaceutical companies asked the circuit court to transfer those claims to proper venues.

Subsequently, 10 individuals voluntarily dismissed their claims. Of the remaining plaintiffs, only one was purportedly injured in the City of St. Louis. Two other plaintiffs alleged injury in other Missouri counties. The circuit court overruled the pharmaceutical companies' motion, but after the motion was overruled, the Missouri Supreme Court handed down *State ex rel. Johnson & Johnson v. Burlison,* 567 S.W.3d 168 (Mo. banc 2019), which held that permissive joinder under Rule 52.05(a) cannot create venue in an otherwise improper forum.

In light of *Johnson & Johnson,* the pharmaceutical companies sought reconsideration of the motion to dismiss or, alternatively, transfer. Subsequently, all of the out-of-state plaintiffs ultimately consented to transfer their claims to St. Louis County, where the registered agent of one of the pharmaceutical companies is located. Of the three plaintiffs who were injured in Missouri, two of them sustained injuries in Missouri counties, not St. Louis City. Consequently, the pharmaceutical companies petitioned the Missouri Court of Appeals, Eastern District, for a writ of prohibition or mandamus, asking that the two plaintiffs who were not injured in the City of St. Louis be dismissed or transferred. After that petition was denied by the Court of Appeals, the pharmaceutical companies petitioned the Missouri Supreme Court to issue a writ of prohibition, precluding the trial court from taking any action regarding the two non-city plaintiff other than transferring the cases to St. Louis County.

The Supreme Court stated that § 508.010.4 dictates that the venue of the plaintiffs not injured in St. Louis be transferred. That section provides that "in all actions in which there is any count alleging a tort and in which a plaintiff is first injured in the State of Missouri, venue shall be in the County where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action."

Much like the plaintiffs' claim in *Johnson & Johnson,* the two Missouri plaintiffs whose injuries occurred outside the City of St. Louis based the venue for their claims on joinder with a claim properly brought in St. Louis City. The Supreme Court explained that, as was held in *Johnson & Johnson,* venue cannot be created through permissive joinder.

Plaintiffs, however, cited a recently enacted statute, § 508.013.1, which essentially provides that a plaintiff who was a resident of Missouri; who has a case that was pending in Missouri as of February 13, 2019; with proper jurisdiction in Missouri; and has been set at any time prior to February 13, 2019 for a trial date beginning on or before August 28, 2019, may continue to trial in the venue as filed. Plaintiffs argued that under the St. Louis City Circuit Court local rules, within 30 days of filing a case is assigned to Division 1 and scheduled on an initial trial docket. Division 1, however, typically does not hear or try cases, and ultimately cases are assigned from that division to a general trial division within the circuit for trial. Here, even though the case was scheduled on an initial trial docket, the scheduled date was not an actual trial setting. At the time the date was set, the litigation was at an early stage, with defendants not served and no discovery initiated. Thus,

the Court found that the requirements of § 508.013.1 were not satisfied.

The Court made permanent its preliminary writ, ordering that the claims of the two plaintiffs who were not injured in the City of St. Louis be transferred to St. Louis County.

Judge Wilson, joined by Chief Justice Draper, dissented, arguing that the language of § 508.013.1 was satisfied as soon as the April 2016 trial date had been set, and that the majority's dismissal of that date as "aspirational" and "highly unlikely" had the effect of adding additional statutory requirements where they did not exist.

SUPREME COURT HOLDS THAT FAILURE TO REPLY TO A MOTION TO TRANSFER VENUE REQUIRES TRANSFER.

***State ex rel. Vacation Management Solutions, LLC v. Hon. Joan L. Moriarty,* 610 S.W.3d 700 (Mo. banc 2020).**

Plaintiff Kyle Klosterman filed an action against Vacation Management Solutions and Innsbrook Properties Inc., in St. Louis City Circuit Court, alleging violations of the Missouri Merchandising Practices Act. He alleged that, using vrbo.com, he purchased a vacation package for a condominium owned by Innsbrook Properties, and that after he bought the package the reservation was cancelled and rebooked for a higher price against his wishes. He later voluntarily dismissed Innsbrook from the suit but proceeded against VMS, the managers of the property.

VMS filed a motion to dismiss and a motion to transfer venue. Klosterman did not file a reply to the motion. The circuit court, nevertheless, overruled VMS's motion to dismiss, but did not rule on the motion to transfer. VMS filed a petition for writ of prohibition in the Missouri Court of Appeals, Eastern District, which was denied, and VMS then petitioned the Missouri Supreme Court for a writ of mandamus prohibiting the trial court from taking any action other than transferring venue.

Rule 51.045 outlines the procedure for seeking transfer based on improper venue. Rule 51.045(a) states that a motion to transfer, which alleges an alternative, proper county and explains the basis for venue there, must be filed by the party alleging improper venue within 60 days of service. Rule 51.045(b) provides the opposing party can file a reply demonstrating that venue is proper in the current forum, or improper in the suggested county or counties, within 30 days of filing the original motion. If good cause is shown, the circuit court can extend the period for filing a reply, but if no reply is filed, pursuant to Rule 51.045(c), "the court shall order transfer to one of the counties specified in the motion."

As required by the rule, VMS filed a proper motion to transfer venue, which suggested potential proper venues, namely Warren County or St. Charles County, and explained why venue was appropriate in those counties. The motion was filed within 60 days of service, but Klosterman failed to file a reply within 30 days of the filing of the motion. Consequently, the Court held, Rule 51.045(c) required the circuit court to order transfer to either Warren County or St. Charles County.

Klosterman argued that in St. Louis City Circuit Court, Local Rule 33.7.2 requires every motion to be called for a hearing before a ruling can be issued. The court explained that this rule merely states prescribes the division in which pretrial motions should be heard, and clearly does not require a hearing to be held on a motion to transfer venue before a ruling is made. Further, local rules cannot be inconsistent with Supreme Court rules, and therefore Local Rule 33.7.2 cannot alter or prevent the application of Supreme Court Rule 51.045.

COURT OF APPEALS HOLDS PUNITIVE-DAMAGES CAP VIOLATES CONSTITUTIONAL RIGHT TO TRIAL BY JURY.

***All Star Awards & Ad Specialties Inc. v. HALO Branded Solutions, Inc.,* Nos. WD83327 and WD83352 (Mo.App. W.D. January 12, 2021).**

All Star Awards & Ad Specialties is a family-owned operation with 20 employees, involved in the promotional business. HALO is a large, full-service promotional-products distributor with some 2,000 employees. Doug Ford, a key employee of All Star, left the company and went to work for HALO, but, while still working for All Star, he provided competitive information to HALO. All Star sued HALO and Ford in March 2018 in Jackson County Circuit Court, alleging claims of breach of the duty of loyalty, civil conspiracy and tortious interference with business expectancy. All Star also alleged evil motive or reckless indifference to support liability for punitive damages.

The trial court entered judgment on the jury's verdict, awarding All Star $525,541 in actual damages, $5,500,000 in punitive damages against HALO, and $12,000 in punitive damages against Ford. The trial court, applying § 510.265 which caps punitive damages, reduced the punitive damages award to five times actual damages, or $2,627,709. The court determined that All Star's claims were not common law claims and therefore the punitive damage cap applied.

All Star appealed the reduction of the punitive damage award to the Missouri Court of Appeals, Western District. All Star argued that the applicable analysis is not whether All Star's claims are common law claims, but rather whether the claims for which the jury awarded the actual damages – namely, civil conspiracy to breach the duty of loyalty and tortious interference with business expectancy – are civil actions for damages involving a fact issue that would have been determined by a jury in 1820 when the Missouri Constitution was first adopted. All Star contended that the court misapplied § 510.265.1, the punitive damage cap, because its claims would have been tried to a jury under the law that existed when the Missouri Constitution was adopted.

The Missouri Supreme Court, in *Lewellen v. Franklin,* 441 S.W.3d 136, 143-44 (Mo. banc 2014), had held that any change in the right to a jury determination as it existed when the constitution was adopted in 1820 is unconstitutional. The Court

of Appeals explained that Missouri's common law is based on the common law of England as of 1607, and that fraud claims, which are akin to the types of claims asserted by All Star, are recognized as a matter of English common law. Therefore, such claims were part of the Missouri common law when the state constitution was adopted.

The Court of Appeals found that conspiracy to breach the duty of loyalty and tortious interference with business expectancy would have been cognizable at English law when Missouri's constitution was adopted. These are wrongs to the person or property for which money damages are claimed and would have been tried by a jury.

The Court of Appeals did not determine whether the trial court properly reduced the punitive damages award as a matter of due process or a matter of remittitur (a separate determination from the issue of whether the cause of action exists as a common law), and remanded the case to the trial court to determine whether the punitive damages award violates due process and whether the punitive damages award should be remitted under § 537.068.

SUPREME COURT HOLDS A SUIT ON AN ACCOUNT EVIDENCED BY A SIGNED INVOICE IS GOVERNED BY THE FIVE-YEAR STATUTE OF LIMITATIONS.

***DiGregorio Food Products, Inc. v. Racanelli, et al.,* 609 S.W.3d 478 (Mo. banc 2020).**

At some point in the late 1980s or mid-1990s, DiGregorio Food Products became an ingredient supplier for Racanelli's Pizza restaurants. The course of business between DiGregorio and Racanelli's restaurants was carried out by the following process: a manager from one of Racanelli's restaurants would call DiGregorio and place an order. After receipt of the order, DiGregorio's warehouse employees would gather the requested goods and prepare them for delivery on the following day. The next day, the delivery driver would receive an invoice for the order and transport the goods to the appropriate Racanelli's restaurant. Upon arrival at the restaurant, a Racanelli's manager would sign the invoice and return it to the driver.

Racanelli's usually paid DiGregorio on "seven-day terms." In 2009 or 2010, Racanelli's failed to make any payments altogether. Racanelli's unpaid invoices totaled $44,383.85. DiGregorio requested payment, but Racanelli's refused to pay. DiGregorio then terminated its business relationship with the Racanelli's restaurants.

On December 5, 2016, more than 5 years after Racanelli refused to pay and the business relationship was terminated, DiGregorio filed suit in St. Louis County Circuit Court on account and account stated. Racanelli moved for summary judgment, arguing that both of DiGregorio's causes of action were barred by the five-year statute of limitations contained in § 516.120(1). DiGregorio responded that its lawsuit was timely because the 10-year statute of limitations contained in § 516.110(1) applied. The case proceeded to a bench trial in which the trial court found for DiGregorio and against Racanelli. Racanelli appealed to the Missouri Court of Appeals, Eastern District, which affirmed the judgment, holding, in an unpublished opinion, that the 10-year statute of limitations applied because the signed invoices were evidence of a written promise by Racanelli to pay DiGregorio. Racanelli's application to transfer was granted by the Missouri Supreme Court.

Missouri has two statutes of limitations relating generally to contract actions: § 516.110(1) and § 516.120(1). Section 516.120(1) requires "all actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110, and except upon judgments or decrees of a court of record, and except where a different time is herein limited," to be brought within five years. On the other hand, § 516.110(1) allows "an action upon any writing, whether sealed or unsealed, for the payment of money or property" to be brought within 10 years.

The Supreme Court explained that the interplay between § 516.110(1) and § 516.120(1) was discussed in *Rolwing v. Nestle Holdings Inc.,* 437 S.W.3d 180 (Mo. banc 2014):

> Section 516.110(1) is an exception to the general five-year limitations period established by section 516.120(1). The exception mentioned in section 516.110(1) consists of actions upon a written contract … for the payment of money or property. The plain language of section 516.120(1), however, applies generally to all breach of contract actions, including written contracts containing a promise for the payment of money or property. [*Rolwing, supra* at 182 (alteration in original) (internal footnote and quotation marks omitted).]

The Court observed that the issue presented was whether the signed invoices actually contain a written promise to pay money. If so, the 10-year statute applies and DiGregorio's claims were timely filed. If not, DiGregorio's claims are barred.

The Court noted that, "The essence of a promise to pay money is that it is an acknowledgment of an indebtedness, an admission of a debt due and unpaid." Extrinsic evidence cannot supply the promise. Although Racanelli urged the Supreme Court to resolve the issue as to whether a seller's invoice to its buyer constitutes a promise to pay money within the meaning of section 516.110(1), the Court refused to declare a bright-line rule, as each case turns on the language of the relevant contract or writing.

Here, the invoices at issue were prepared by DiGregorio and contained the following terms: the date the shipment was ordered, the location of delivery, the date the order was shipped, the shipping method, the payment terms, the quantity of each item shipped, units of measurement, item number, description of the goods delivered, unit and extended prices of the goods delivered, and the total cost of the shipment. None of those terms can be said to be Racanelli's acknowledgement of a debt or an admission that a debt is due and unpaid. Because DiGregorio's claims do not seek to enforce a written promise to pay money, § 516.110(1) does not apply and the five-year statute of limitations bars DiGregorio's suit. The circuit court's judgment was reversed and vacated.

INCOMPLETE TRIAL TRANSCRIPT RESULTS IN REVERSAL OF JUDGMENT AND REMAND FOR A NEW TRIAL.

***State of Missouri v. Slayton,* ED107188 (Mo.App. E.D. January 19, 2021).**

Slayton was convicted by a jury in St. Louis City Circuit Court of domestic assault in the fourth degree, burglary in the first degree, and violating an order of protection. On appeal, he filed a motion to remand for a new trial for the failure to obtain a complete transcript on appeal.

During the preparation of the appeal, it was discovered that portions of the transcript were missing. The court reporter produced a transcript on July 1, 2019, containing pre-trial proceedings, opening statements, the testimony of the victim, a record of Slayton's decision not to testify, closing arguments, proceedings during jury deliberations, the verdict announcement, and the sentencing hearing. Subsequently, the court reporter produced a supplemental transcript, containing *voir dire.* A review of the transcript produced shows that at a pre-trial hearing, the State announced its intention to call as witnesses April Becton, Larry Elbert, Joan Noelker, Officer Julia Newberry, Detective Elijah Simpson, and the victim. During closing arguments, the State referenced the testimony the jury had heard from April Becton, Larry Elbert, Dr. Joan Noelker, and Officer Onwumere. The defense in closing arguments referenced testimony the jury heard from Detective Simpson. However, no testimony from any of these witnesses, other than the victim, appear in the transcripts submitted on appeal.

Later, the court reporter submitted an affidavit to the appeals court attesting that her reporting equipment had malfunctioned, and that she was unable to recover the testimony of Elbert, Beckton, and Noelker.

The appellate court explained that a losing party is entitled to appellate review based upon a full, fair and complete transcript on review. Where no transcript of the trial exists at all, prejudice is assumed. However, where the transcript is merely incomplete or otherwise defective, that alone does not entitle an appellant to reversal as a matter of right. In that case, the appellant must show both that (1) they exercised due diligence to correct the transcript or to obtain a complete transcript, and (2) they were prejudiced as a result of the inability to present an accurate and true record.

The parties conceded that the appellant exercised due diligence and the only issue for the Court to consider was whether the appellant was prejudiced by the incomplete transcript. Here, the closing arguments revealed that at least six witnesses testified. However, the transcript included testimony from only one witness. With the testimony from the vast majority of witnesses missing in their entirety, the court stated it was unable to conduct meaningful review of the record, and under the circumstances the appellant demonstrated prejudice from the transcript deficiencies. The judgment was reversed and remanded for a new trial.

Where Were the Advisors?

by Richard M. Wise, CPA, JD

Background

Steve Hairston was approaching retirement age when he suffered a disabling injury on the job. He began receiving workers' compensation benefits in March 2013, but it took some time for the Social Security disability benefits to commence. When they finally did, in January 2014, he received a retroactive payment back to early 2013, offset by the amount of the workers' compensation benefit he had been receiving.

In the meantime, in October 2013, Hairston's workers' compensation benefits had been cut off, although exactly why is unknown. When the Social Security Administration learned of this, his disability benefit was increased to make up for the shortfall, again with a retroactive payment back to October 2013.

Over the course of calendar year 2014, Hairston received about $36,000.00 from Social Security, approximately half of which represented benefits he should have been paid during calendar year 2013. For whatever reason, he failed to report any of these receipts on his 2014 tax returns.

In February 2016, the Virginia Workers' Compensation Commission decided Hairston should not have been cut off in October 2013 after all. So, his benefits were reinstated and he was issued a check for close to $50,000.00, to make up for the missed payments. All of a sudden, Hairston owed the Social Security Administration $50,000.00, which he did pay back over a period of several years.

But all of this back and forth had complicated Hairston's income tax situation.

Be careful what you ask for

As a general rule, workers' compensation benefits are not taxed as income.[1] There is, of course, an exception. If the injured worker is also receiving Social Security disability benefits (SSDI) – which, to the contrary, are taxable[2] – that benefit is reduced by the amount of the workers' compensation benefit,[3] as we have seen in Hairston's case. The difference will nonetheless be treated as though it were SSDI and taxable.[4]

No one had ever explained any of this to Hairston, apparently, and it is hard to say what choices he might have made had he known.

In any event, the Internal Revenue Service did notice that Hairston had not paid tax on the SSDI benefits he had received during calendar 2014, and they issued a statutory Notice of Deficiency, also referred to as a "90-day letter." Hairston filed a timely petition to the Tax Court to contest it.[5]

The IRS' position was that the entire $36,000.00 was taxable in 2014, regardless of the fact that almost $19,000.00 was a retroactive payment for calendar 2013. In addition, the IRS was not impressed by Hairston's argument that starting in 2017, he had been required to pay it all back, and it should therefore not be treated as income to him at all.

Neither, unfortunately, was the Tax Court.

Despite all the difficulties and confusion Hairston had experienced with the status of his workers' compensation benefits – the offsets, the suspension of benefits, the retroactive payments, the burden of repaying what turned out to be an overpayment – in the end, the tax consequences were simple: Hairston was taxable on the full amount of his SSDI benefits, in the years in which

he actually received them, regardless whether some of it represented a retroactive payment attributable to a prior year.

The fact that he was required to repay the benefit several years later did not alter that fact. There is already a mechanism in the Internal Revenue Code allowing a qualifying taxpayer an adjustment for amounts he was required to repay, as an offset against otherwise taxable benefits received in the year in which he made such repayments.[6] In other words, both the taxable benefits and any later adjustment are handled on a cash flow basis. Hairston's repayment in 2017 and later years would offset otherwise taxable benefits he received in those years. Unfortunately, this would not help at all with his 2014 tax liability.

Consider the alternative

Although the details are not made entirely clear in the text of the Tax Court's opinion, apparently at some point Hairston reached an age at which he could have elected to take his Social Security retirement benefits, rather than the disability benefits, and there would have been no offset for the workers' compensation benefits. The conversion would happen automatically when he reached the statutory retirement age, but he might have elected to take the retirement benefit at an earlier age.

One imagines that an attorney helped Hairston get his workers' compensation benefits reinstated, and almost certainly an attorney helped him establish his eligibility for SSDI, but apparently no one advised him on the interplay among these various benefits, or the tax implications of choosing one course of action over another.

In this connection, it is worth quoting in full the last paragraph of Judge Colvin's summary opinion for the Tax Court:

> Petitioners also raise three questions regarding actions taken by the SSA and their former attorney: (1) why did petitioner husband receive Social Security disability benefits rather than retirement benefits starting in 2013; (2) why did petitioners' attorney tell petitioner husband to sign up for Social Security disability benefits; and (3) why did neither the SSA nor petitioners' attorney inform petitioner husband about his receipt of Social Security benefits. We do not consider those questions because they do not relate to matters within our jurisdiction, which in this case is limited to petitioners' tax liability for 2014. See sec. 6214(a).[7]

The citation is to the Code section limiting the jurisdiction of the Tax Court to reviewing only the deficiency determination at issue. Although subsection (b) of the same section does permit the court to consider "such facts with relation to the taxes for other years or calendar quarters as may be necessary correctly to redetermine" the deficiency at issue, "in so doing [the court] shall have no jurisdiction to determine whether or not the tax for any other year or calendar quarter has been overpaid or underpaid," unless the doctrine of "equitable recoupment" might apply.[8]

With a side order of humility

Judge Colvin's closing remarks might be read as a rebuke to the advisors who failed Hairston along the way. Certainly they can be taken as an admonition to attorneys that ours is a service profession, and that our primary responsibility is to the needs of the client.

Almost every transaction involving money or property has a potential tax consequence. Attorneys handling workers' compensation, or personal injury, or divorce may not always know what those consequences are, but they do need to know when to call in the necessary outside expertise. This is literally Rule 1.1 of the Rules of Professional Responsibility.[9]

Hairston and his spouse, who had filed a joint return for the year at issue, represented themselves before the Tax Court, and agreed to have the case heard as a "small" tax case,[10] from which there could be no appeal. An attorney did enter the case very briefly, after the trial had already concluded and shortly before opening briefs were to be filed, but she withdrew almost immediately, with the court's permission.

The IRS conceded the late payment penalty.

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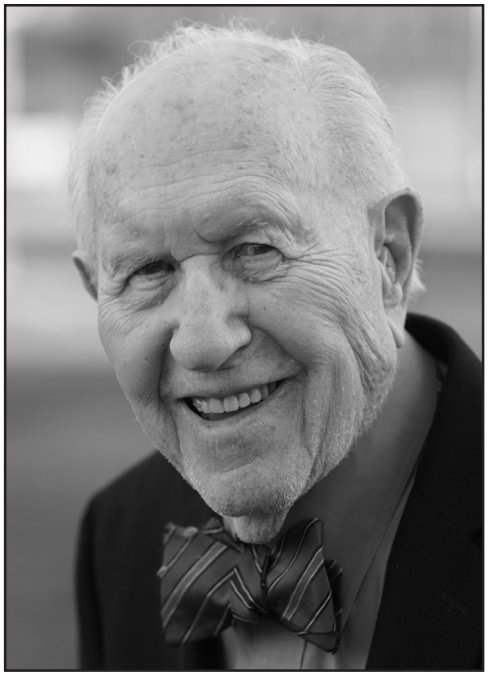
1 26 U.S.C. § 104(a)(1).
2 Above a threshold calculated with reference to adjusted gross income. 26 U.S.C. § 86(a).
3 Subject to a formula that was not at issue here, limiting the combined benefit to 80 pct. of what had been the worker's "average current earnings."
4 26 U.S.C. § 86(d)(3).
5 *Hairston v. Commissioner,* T.C. Summary Opinion 2021-2 (not precedential).
6 26 U.S.C. § 86(d)(2).
7 *Hairston v. Commissioner, supra.*
8 26 U.S.C. § 6214(b).
9 Model Rules of Prof'l Responsibility 1.1 and cmt. 1-2 (Am. Bar. Ass'n 1983). *See* also Missouri Supreme Court Rule 4-1.1.
10 26 U.S.C. § 7463.

Books in Brief

Reviewed by Hon. Arthur Litz

Editor's Note: With the publication of these reviews, Judge Litz begins his 55th year of reviewing books for **The St. Louis Bar Journal.**



A Time for Mercy, by John Grisham

Doubleday, 464 pages, 2020

As readers of these pages know, John Grisham, dean of legal thrillers, is one of my favorite authors. His latest book is one of his best. The locus again is his fictional Clanton, Mississippi. The prime characters are not black but primarily white, except the sheriff and his young legal assistant. Grisham brings back the lawyer-hero Jake Brigance, a sole practitioner who was introduced in Grisham's first book *A Time to Kill* (which became a brilliant movie), in which he successfully represented a black defendant accused of two murders. Now Brigance is appointed to represent a 16-year-old boy, Drew Gamble, charged with killing Stuart Kofer, a drunk and abusive deputy sheriff, with his own gun.

Drew lived in Kofer's house with his younger sister and his mother, who was the sheriff's live-in girlfriend and was constantly beaten and abused during drunken rages. The appointing judge, Omar Noose, is an old timer and the only trial judge in a five-county circuit. (I have to assume that Grisham chose this name as a tribute to Omer Poos, a former U.S. District Judge in the Southern District of Illinois who also taught at St. Louis University Law School.) Drew had a terrible childhood, vividly described by Grisham.

In the trial preparation and the trial itself, the lawyer, his two lawyer buddies, his office staff and ex-wife combine in a finely crafted story. Concurrently with the criminal case, Brigance also represents the plaintiffs in a civil wrongful death case in which a family of four died when their car ran into a train at a dangerous crossing. That venture alone could have been the subject of another book, but Grisham does a provocative and finely crafted job of balancing it with the other big case. He handles the emotional aspects and details of both cases remarkably well, as only he can do. The story flowed so easily that before I knew it, I came to the end. Not many authors can do this. The ending is typical Grisham and not the way I thought it would end. But superbly done. The book is a briskly paced narrative and livened with finely crafted characters. Lawyers will enjoy this book.

The Law of Innocence, by Michael Connelly

Little Brown, 421 pages, 2020

Mickey Haller of Los Angeles – the Lincoln (auto, not President) lawyer – is back in another thriller. Here he has to defend himself on a charge of murdering a former client/scam artist for not paying his large fee. The facts are simple. Haller is stopped by a police car for having no rear license plate. The officer opened the trunk after seeing blood dripping from the trunk, claiming exigent circumstances, and opened it to find the body with bullet wounds. After his arrest, the hard-nosed prosecutor, Dana Berg, persuades a judge to set bail at $5 million, which of course Haller cannot make. So, he must prepare for trial from jail.

Connelly does a masterful job of building a dramatic series of strategic steps that Haller devises in his defense. He has his whole office staff, including his half-brother Harry Bosch (the subject of several other books), a private investigator and his mentor David (Legal) Siegel, engaged in his defense. Even his ex-wife joins the defense team and co-chairs with him at the trial.

From a single case of murder, the story reveals an FBI investigation of a scheme to defraud the government in which the murder victim was involved, eventually leading to the real killer. Haller wants not only an "NG" (not guilty) for his charge, but to apply what he calls the "law of innocence" to establish his complete innocence. Connelly shows his knowledge of the justice system including well-conceived courtroom dramas and strategy. His characters are well defined and presented. He demonstrates his mastery as a fine craftsman of legal thrillers. Connelly is the first author of fiction I have come across who has mentioned the COVID virus pandemic, including the wearing of masks, doing so here in a chapter focusing on jury selection.

Trivia note: Grisham and Connelly both wrote 34 previous novels. In these two books, both of the protagonists were assisted by their wife or ex-wife; they each have one child, a daughter; and both of the protagonists were severely beaten while preparing their defense.

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