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Hawking Our Wares in the Marketplace of Values—Sell Quality Not Cost When Promoting Mediation; the Interplay of Global Norms of Justice and Harmony in the Mediation Forum

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I. INTRODUCTION: A TALE OF TWO PANELS—META CONSIDERATIONS EMERGING FROM THE CONFERENCE

One benefit of an event like Fordham's 6th Annual Conference on International Arbitration and Mediation is that it affords participants the occasion to hear experts in the field—those on the panels and those in the more comfortable audience seats—express observations and insights that lead the listeners to further, general reflections on ADR. My presentation for this conference, titled *Attitude, Atmospherics and Techniques in Transforming Impasse into Opportunity* was delivered for the first day's panel: "Mediation: a Functional Approach." The Conference director, Art Rovine, so dubbed our panel to distinguish it from the next day's mediation panel, which focused on variations in mediation across the international spectrum and thus was named: "Mediation: Geography and Institutions."

Our own, earlier panel's focus was on approaches, skills, insights, and techniques in mediation, and process variations, without necessarily making comparative references across nations or cultures. For that panel I drew on an article that I contributed to a recently published book on impasse breaking.[1] This article bore the pithy title: *The Technique of No Technique: A Paean to the Tao-te Ching and Penultimate Word on Breaking Impasse.* This piece—appearing in a compendium of impasse breaking techniques—makes a simple point. When it comes to promoting continued party engagement

[1] Definitive Creative Impasse-Breaking Techniques, Molly Klapper, ed. (New York State Bar Association 2011). http://www.nysba.org/AM/Template.cfm?Section=Shop&template=/Ecommerce/ProductDisplay.cfm&ProductID=5141

and resolution, of far greater effect than any technique or method is the mediator's character, orientation and presence. More particularly, this presence communicates a caring and openhanded connection, a quality of deep listening and flexibility, and the trust and respect that engenders confidence and generates a reciprocal attitude from the parties. It is more important to be freshly and deeply attentive and responsive to what actually presents itself in mediation than to be busy sorting through, and applying tools from, one's bag of impasse breaking tricks.

We will return to the central message of that article and my presentation later in this chapter. For now, we should note that the presentation drew heavily on a 2,500 year old Chinese classic: the *Tao te Ching*. This classic is the most central text of the Taoist tradition, which, along with the Confucian and Buddhist traditions, constitutes one of the three major religious-philosophical traditions of China.

Having disposed of my duties as panelist on day one, I relished the opportunity to hear the geographically oriented panelists speak on day two. Sure enough, a second of these three Chinese traditions was featured in Joseph McLaughlin's remarks. When discussing the viability of mediation as a process for use in China, Joe McLaughlin observed that the Confucian tradition, as one which values harmony in the five relations,[2] has long supported the use of mediation. He made this point in the context of discussing cultural differences, and followed a bit later with a memorable tale from his own experience representing the Chinese government in arbitration. When he reported a legal victory, his client's representative, a Chinese minister, to Joe's surprise described it as a "catastrophe." This victory had caused the counterparty to "lose face," making it much harder to negotiate a compromise through the use of a neutral third party and to do business together in the future. Again, there, a higher value was placed on harmonious relations than on being "right" and victorious.

Another aspect of Joe McLaughlin's remarks caught my attention. Joe began his presentation with the question of how to incentivize parties around the world to enter the mediation process—this was not specifically a geographical question but a universal question to institutions and parties. His response lists the most commonly referenced grounds: savings in time and cost, and reduction of disruption. He adds to the list the results of a

[2] These relationships run between: (1) ruler and subject; (2) father and child; (3) husband and wife; (4) older sibling and younger sibling; and (5) elder and junior friends. Harmony in these relations is supported by cultivating the qualities of: li, propriety; jen, humanity; reciprocity; yi, righteousness; http://faithresource.org/showcase/Confucianism/confucianismoverview.htm, Chan, Wing-tsit, A Source Book in Chinese Philosophy.

recent study which shows that parties are often ineffective at predicting court outcomes. Plaintiffs frequently reject offers in mediation that exceed what they get at trial. Defendants, while less frequently wrong, are on average off by over $1 million to their detriment when they make the error of rejecting an offer and waiting for the trial outcome. Finally, Joe noted that mediation affords parties flexibility in designing resolutions that take into account not only the relative legal risk and cost, but also other factors, like the possibility of an ongoing business relationship. This places a value on party autonomy, as well.

I came away from Joe's remarks mulling over two interrelated reflections. First, what do we risk when we sell ADR, and mediation in particular, by focusing on savings in time and expense? What should be mediation's chief selling point? For me, Joe's mention of flexibility, autonomy and even his cross-cultural insight into the importance of harmony in Chinese culture hold the key. In selling mediation, we can describe what is unique about the mediation process itself—how it affects parties' communication and relationship; how it liberates parties to consider a wide range of needs, interests and realities; its humanistic focus; its possibilities for empowerment, recognition and understanding; its fostering of creative and appropriate resolutions; and its unique capacity to serve as a forum for the integration of the norms of justice and harmony. Quality of the process, rather than quantitative measures of time and expense, is major in selling mediation.

This leads directly to the second reflection. As a forum that fosters effective communication, respect for parties, and the ability to adjust to party needs, sensibilities, values, principles and circumstances, mediation is an ideal setting to bridge cross-cultural misunderstandings. A corollary is that in mediation, as a facilitated negotiation, it is critical to recognize cultural differences that might, if misunderstood, impede the negotiation. Some of a broader set of classic examples are misunderstandings where one culture might communicate directly where another might communicate indirectly; high or low context cultures; cultures which are more assertive or more accommodating or conflict avoiding; hierarchical as opposed to egalitarian cultures; cultures with different boundaries between the public and the private; cultures more or less comfortable with uncertainty; and cultures focused more on long term relationships or on short term transactional outcomes, such as in the Chinese minister example cited by Joe McLaughlin.[3]

[3] Fascinating work on cross cultural differences has been undertaken by Geert Hofstede. Charts by which he compares cultural differences of various countries can be found at: http://www.geert-hofstede.com.

Mediators sensitive to these cross cultural differences can help parties grow in understanding and avoid needless impasse.

It is natural for a regular conference on international ADR to reflect on cross cultural differences and on means for bridging cross cultural misunderstanding. This model presumes a pluralistic global community. While pluralism is rightly in vogue, we cannot fail to observe such remarkable growth in global community that, occasionally, a universal human community emerges. As a, perhaps, novel advance in this discussion, we will take a step beyond simply looking to avoid cross cultural misunderstandings in a pluralistic world. Beyond bridging divergent communities, there are times when we can borrow cultural norms or values from different communities to enhance our own—to the benefit of each. One instance can be found in appropriating the harmony norm that Joe identified, which can be found in both Taoist and Confucian traditions, to clarify the nature of mediation and to enhance the quality and function of that process. Thus the second effort in this piece will be to consider mediation as a forum for integrating the norms of harmony and justice.[4]

II. SELLING QUALITY, NOT QUANTITY, IN ADR AT HOME & IN THE INTERNATIONAL MARKET

The use of alternative dispute resolution processes continues to rise both within the United States and on the international scene. As cross border transactions increase, there is a growing desire to find dispute resolution forums that offer no "home court" advantage. Arbitration and mediation provide an answer to this need. The New York State Bar, for example, has recognized the importance of ADR to international business transactions through the work

[4] For roughly 20 years, I have seen mediation as a unique forum with the extraordinary capability of integrating the norms of justice and harmony. Apparently, I am not alone. Approaching the end of this paper, I found a far more detailed exposition of this theme in the work of Omid Safa, In Search Of Harmony: The Alternative Dispute Resolution Traditions Of Talmudic, Islamic, And Chinese Law (December 2, 2008), http://law.wm.edu/academics/intellectuallife/researchcenters/postconflictjustice/documents/Safacomparativelawpaper.doc. *See, also*, A. Berner, "Divorce Mediation: Gentle Alternative to a Bitter Process", in *Jewish Law Articles*, > www.jlaw.com/Articles/berner.html (visited 12 March 2000), suggesting that the search for peace and harmony is given paramount importance by of the same traditions whose prophets have trumpeted the call for justice. *See, also*, Berner's unpublished, "Pshara: The law of Compromise & Justice in Jewish Jurisprudence."

of a Task Force in which Joe McLaughlin played a significant role.[5] Further evidencing the recognition of the importance of arbitration on domestic and international fronts, the NYSBA Dispute Resolution Section has issued protocols for discovery in domestic commercial arbitration and for international arbitration.[6]

As ADR use spreads, providers and enthusiasts, including counsel who would introduce the idea of mediation to their clients or adversaries, continue to refine their sales pitch. For years, savings in time and cost have been major selling points for mediation, and not without good cause. There is little doubt that cases can be brought to resolution in mediation in far less time and for much lower cost than would be incurred were the case to continue down the litigation track. Despite this intuitively plain observation, years ago, the RAND Corporation issued a report concerning mediation in Federal District Court pilot programs, stating that there was no statistically significant evidence that mediation saved parties time and cost.[7] This caused quite a stir in ADR circles. Closer analysis of that report revealed that emphasis needed to be placed on the concept of "statistical significance"; RANDs data was just too thin. The available data did show, in the limited cases studied, savings of time and cost, after all.[8] Subsequent studies and the wealth of

[5] *See*, Final Report of the New York State Bar Association's Task Force on New York Law in International Matters, with accompanying brochure "Why Choose New York For International Arbitration?" June 25, 2011, http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentFileID=53613. The Report offers reasons to adopt New York law in international transactions, and to feel comfortable resorting to New York courts. Nevertheless, the Report stresses advantages that can be found in using ADR processes as well. It annexes a brochure on international arbitration (beginning at page 85), and also contains a section stressing the importance of mediation as an alternative to both arbitration and litigation. *See, id., at* page 34.

[6] In 2009, while I was Chair of NYSBA's Dispute Resolution Section, a task force led by Carroll Neesemann, John Wilkinson and Sherman Kahn published a Report on Arbitration Discovery in Domestic Commercial Cases. *See*, http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/DiscoveryPreceptsReport.pdf. That report addressed proposes a balance between the extremes of excessive and insufficient discovery aided by a list of factors to be considered by arbitrators in making discovery decisions. The following year, NYSBA's Dispute Resolution Section prepared a set of Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitration. *See*, http://www.nysba.org/Content/NavigationMenu42/November62010HouseofDelegatesMeetingAgendaItems/internationalguidelines.pdf.

[7] RAND, "An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act" (1996) (the "RAND ADR Report").

[8] *See* observations of *Report of New York County Lawyers Association Committee on Arbitration and ADR Comment on ADR Program Implemented Pursuant*

experience with mediation over the years show that mediation does save parties time and cost.[9]

One factor that emerged from the early RAND Report was that, apart from benefits of time and cost, the vast majority of parties and counsel who used mediation were satisfied with the process. Satisfaction studies begin approaching the most significant features of mediation—that there are process differences that create a different quality of experience for participants in this form of dispute resolution. It is important that mediation experts, attorneys, in-house counsel, and corporate representatives responsible for the creation or choice of dispute resolution mechanisms keep their focus on this qualitative benefit of mediation. Beyond quality of the process, flexibility of results and attendant control of the dispute resolution outcome is also a key, related selling point.

Apart from RAND type challenges on time and cost, which have generally fallen by the wayside, one reason to stay focused on qualitative benefits is the consequence of quality or value-based critiques. To argue primarily in terms of time and cost can lead purists and persons of integrity to conclude that they are willing to wait and pay the price for the "right" result. These users might believe that they should reject mediation as a poor substitute for justice; a lazy, pusillanimous short cut; and avoidance of cost, delay, risk, and difficulty that persons, or companies, of integrity would face. The argument continues that we need legal outcomes to build the great society; to enhance long term utopian goals of progressive development of social good. If, as a society, we are to send a message to future disputants that certain rules must be obeyed, then short term losses—in the form of cost, delay, risk and disruption in connection with a particular case—must be shouldered by today's disputants for the benefit of future humanity.

In short, the preceding critique puts the norm, value and ideal of justice front and center. We will turn later to examine the role of justice in mediation and to consider the degree to which individualized justice, as well as positive societal impact, is furthered by that process. We will address that in the context of a discussion of mediation as a forum in which we can integrate the norms of justice and harmony. At this point, it bears noting that a focus

to Civil Justice Reform Act of 1990 In the United States District Court for the Eastern District of New York, as sent to the ADR Advisory Group to the United States District Court for the Eastern District of New York, (September 22, 1997), http://www.mediators.com/adr-com.html.

[9] *See, e.g.*, Report to the Judicial Conference Committee on Court Administration and Case Management, entitled "*A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990*," by The Federal Judicial Center, (January 24, 1997).

on quality of the mediation process and the benefits it offers in controlling and fashioning an appropriate outcome does not generate the same offended reaction as do arguments about time, cost, and disruption. This does not, of course, negate the additional efficiency values of saving time, limiting cost, and reducing disruption through mediation.

III. QUALITATIVE ADVANTAGES FOSTERED BY THE MEDIATION PROCESS

Listed and developed below are aspects of the mediation process which provide qualitative advantages over dispute resolution approaches found in litigation and arbitration.

Depth and Range

Mediation has been variously defined. A centrist view is that mediation is a negotiation or dialogue facilitated by a neutral third party. Many things can happen, emerge, and be addressed in a negotiation or dialogue. The wide range of human valences addressed in mediation is part of what makes this so rich and rewarding a process. We go far beyond assessment of legal issues and can span the range from intimate personal disclosures, to business considerations and financial constraints, social pressures, hierarchical concerns and personal, philosophical, cultural or even religious values. A skilled mediator can facilitate discussion in a manner appropriate to each. Empathetic, compassionate listening appears for emotions. Appreciative inquiry applies to values, experiences and perceptions. Creative wonder fosters brainstorming. Reflective questioning and analytic clarity can develop legal alternatives; including risk and transaction cost analysis. Thoughtful encouragement, practical engagement, and creative testing of possibilities foster business discussions. Humor, tact, clarity, and sensitivity keep discussions moving between the parties and overcome snags, awkwardness and entanglements. The ability to have these various human dimensions handled in a way that is appropriate for each is a vital selling point of mediation.

Freedom

Mediation, as Joe McLaughlin pointed out, has some universal features. It is an expression of party freedom. Parties, not counsel, court, jury, or arbitrators,

make the decisions that affect the mode of their interparty communication as well as the outcome of their negotiation. Freedom is a quality worth selling.

Flexible, Free, Creative, Appropriate Resolutions (Individualized Justice)

A corollary to this freedom is the nature and form of the parties' resolution. Parties can fashion agreements that work best for their needs, independent from legal considerations. They can do business deals that a court could never invent. They can issue apologies which a court can never force. They can preserve, restore, and even enhance relationships in ways beyond the capacity of any third party to impose.

Acknowledging Actual Circumstances

Mediation can take into consideration the entirety of parties' circumstances and look to develop a negotiation process and resolution that is sensitive to and works for these circumstances. These are wonderful qualities of mediation, well worth touting.

Process Control, Flexibility and Responsiveness

Unlike trial, mediation is a process which is designed for party control. Mediators check in with the parties, and with counsel, to see whether it makes sense to continue in joint session or in private meetings, known as caucuses. Mediators take cues from parties on what issues they would choose to address. The flexibility and responsiveness of the process, to accommodate the reality, needs, interests, preferences, communication styles, and timing considerations of all participants is yet another selling point worth highlighting.

Fostering Empowerment and Recognition

Mediation theorists identify various quality enhancing features of mediation. The transformative mediation school sees mediation as a process that can focus on the quality of parties' communication, and as a consequence the quality of their relationship. Conflict, itself, is seen as a crisis in relationship. The mediator in this view has the dual purpose of fostering party empowerment, and fostering recognition. Empowerment involves recognizing the wide range

of choices that present themselves at any moment—whether it is the choice to negotiate or not, choices to make or withhold disclosures of information, to express an emotion or simply to note it internally without expressing it, choices to engage in brainstorming, risk analysis, case and transaction cost analysis, to express empathy or understanding of the other party, and how, when and under what terms to resolve the dispute. Understanding that one can make this range of choices builds a feeling of control and empowerment which, consequently, reduces that party's defensiveness. This generates the sense that it is safe to try to understand the other party's perspective and to show recognition of that other party's needs, interests, feelings, and life situation. This growth of empathy or of recognition is the moral transformation from which "transformative" mediation draws its name.

Building Understanding

Similarly, mediators Himmelstein and Friedman promote an "understanding based" model of mediation. This involves digging beneath the opposing positions or claims to understanding more deeply what is going on for each of the parties. The mediator's orientation brings peace, rather than conflict, into the room.

Humanistic Focus Nevertheless Observing the Shadow of the Law

These approaches, as well as the centrist, facilitative, problem solving model have a humanistic focus. Of chief concern is not simply a set of rights that needs to be vindicated or obligations that need to be enforced. People, and life realities—not simply surrounding systems or rules—have primacy in the mediation arena. This is not to say that legal issues do not impinge on the parties' bargaining or undergo analysis and development in discussions held within the mediation context. Particularly in commercial mediation parties come to mediation with counsel, prepare the mediator with pre-mediation statements that can include law and legal analyses, and can participate in risk analysis that includes assessment of legal implications and possible outcomes. This is underscored by the number of times the phrase popularized by Robert Mnookin is quoted: parties "bargain in the shadow of the law."[10]

[10] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale LJ 950 (1979).

Nevertheless, the mediation process is designed to cultivate discussion and exploration of much more than the legal shadow. Using active listening skills—validation, empathy, clarification, summarizing, reflecting back—mediators foster an environment where parties' emotions, perceptions, values, goals, aspirations—as well as hierarchical, social and economic needs and constraints—may be expressed and have significance. Pure legal analysis might limit the locus of truth to a statute or a line of cases and their decisions and verdicts. The humanistic focus of mediation recognizes persons, in all their simple depth and varied complexity, as a legitimate locus of truth.

Holistic Healing—The Great Quality that Needs a Different Marketing Brand

The word "holistic" almost invites a wry "Kumbaya." Its core meaning, though is that not the part, but the whole is involved in defining both problem and solution. Not just the intellect, but emotions; not just the facts, but also values and perceptions; not just legal obligations, but equities and feasibility in light of financial capacity; not just a judgment based on past facts, but a recognition of present circumstances and future possibilities. As indicated above, a comprehensive approach is taken in mediation. Mediators maintain a fully open mind and heart—a 360 degree orientation. We have seen the humanistic focus that respects the person as a whole. We have also seen that all actual circumstances are considered. This openness and comprehensiveness—living people given a forum for genuine encounter in a living world—is major. Law can have its black and white, and also grey. Mediation is in living color.

This living color includes not just the parties to the action, but other affected parties and the broader circumstances as well. Workplace disputes can involve recognition of the broader hierarchy. For example, in addressing a harassment claim against a manager, discussion of that manager's objectives and pressures can, at times, build understanding. When negotiating a settlement with a claim involving insurance, the various levels of authorization above the representative adjuster can be better understood and, possibly, given a human face. Family pressures, social and community pressures—all can be acknowledged in mediation.

The law also bears the weight of the broader society. The need for precedent, *stare decisis*, the compromises that go into the drafting of a governing statute influence the creation of laws that impinge on the parties to a particular dispute. A great difference between the way broader society is seen as operating in law and in mediation, is that with law, the concerns might have

nothing to do with the parties. The parties bear their weight. In mediation, understanding the broader circumstances, social or otherwise, offers illumination and lightens the load. It creates opportunities for greater understanding, acknowledgment, and voluntary acceptance of the social reality. It also, in identifying these surrounding others, can, at times, reveal ways to change the circumstances—arguments, offers, or adjustments that can be made to or for these others to make a resolution possible.

Relationship Preservation or Enhancement; I And Thou

In his seminal work, *I And Thou*, Martin Buber makes the revolutionary point that there are two fundamental modes of being for each of us. These are represented by two word pairs for relationships in which we stand and that define our core selves: I-Thou and I-It. For Buber, all of science, economics, business, aesthetics, law and the rest are in the realm of "I-It" to the extent by which we reduce any living reality to a subset of a field of knowledge for classification and manipulation. Taking the stance of the scientist, economist, philosopher, engineer, accountant, lawyer, judge, businessman, and the like limits not only the "object" of one's examination, but limits the examiner himself (or herself) to the type of "I" that apprehends the "it." By contrast, full encounter with another who is recognized as "You" in his or her living wholeness—person to person—blows away all classifications and manipulations. This is the realm of love, of full appreciation and recognition, of genuine, engaged understanding. As with the "it" pair, so the "Thou" pair defines not just the other, but also oneself, opening a subjectively realized world of infinite, transcendent yet actualizing value. This is an "I" in relation which has a quality of wholeness that obliterates the subject-object distinction.

A beautiful description, but what does it have to do with commercial mediation? For Buber, true humanity is realized only in the I-Thou relationship, but it is the melancholy of our fate that we continually lapse from I-Thou to I-It. Moreover, we need "it" to survive. As we enter commercial mediations, on the domestic or international front, the more participants are capable of relating to each other as full human beings, the more we can break through strategic and positional bargaining and come to deeper understanding that generates a richer deal. There are recorded times in major negotiations where person to person recognition, genuine dialogue, provided an essential break through.

Taken down a notch, there is nearly universal recognition that mediation can create an atmosphere that increases the chance for parties to address and repair their relationships. It is difficult enough, at times, to bridge

cultural divides in international business transactions, let alone in transactions that have gone sour. A process that fosters safe communication on all the multiple levels in which we engage and react is certainly one to be recommended. If, as Joe McLaughlin's Chinese minister understood, there is more value in continuing relations than in winning a particular legal battle, then the process that best fosters that understanding should be enthusiastically embraced for cross cultural dispute resolution, let alone by cultures that value relationships and harmony or our own domestic scene. Even in the so-called individualistic, autonomy loving West, there is a recognition that relationships matter. Witness the JPMorgan Chase "relationship managers," the vast customer relations industry, and or praise of "networking."

Enhanced Communications and Problem Solving

Use of active listening, "looping" [FN] in the understanding based model, reflecting back in the transformative model [FN], and generally setting a tone induces the parties to engage in constructive conversation is yet another feature of mediation that provides a qualitative basis that should make it attractive. If one has the choice of entering a process in which one can speak and possibly be understood as opposed to a discussion in which words are weapons in a battle, which process would most people choose? If one sees an opportunity to grow in understanding and has a choice of that route or a route that keeps one frozen in one's own, limited perspective, which route would one choose?

The same questions can apply to the problem solving dimensions of mediation. The Fisher/Ury model developed in *Getting to Yes* and its progeny, presents a way for negotiators (and participants in mediation) to shift from being hard on the people to being hard on the problem. These negotiation theorists suggest that as we focus on the parties' interests and needs, we can develop options that can meet these needs and promote mutual gain. They suggest that this cooperative effort, which requires candid disclosures and flourishes with creative brainstorming and clear comparison of deal proposals against the parties' present alternatives (including anticipated outcomes of any pending or potential litigation), produces outcomes that are superior to the win/lose outcomes of litigation or the rough, and harsh, compromises achieved through hardball positional bargaining. Decent, supportive communication, rather than provocative use of threats and *ad homina*, increase the likelihood that parties will take the risk to engage in this brainstorming, disclose interests and assessments, and generate the options that lead to mutually satisfying deals. Mediation provides a forum and process designed to overcome the chicken and egg problem of generating the trust necessary

to lead disputing parties to essay this joint, mutual gains problem solving approach. Given this possibility, would the autonomous, aware user choose the battles of litigation, arbitration and positional bargaining, or the possibility of integrative gains and civil process offered by mediation?

Bridging Cross Cultural Differences

While not the focus of this piece, it is widely recognized that mediation is an excellent forum for bridging misunderstandings that are rooted in cross cultural differences. There are cultural differences in approaches to time. A culturally sensitive mediator in a matter with German and Syrian parties might be better able to handle the German indignation when the Syrian negotiators appear a half an hour late to the mediation. Cultures communicate with varying degrees of directness. Culturally sensitive mediators can aid American or Israeli negotiators, *e.g.*, in understanding, accepting and learning to work with, what might appear to be elliptical, non-committal, or fuzzy communications and bargaining by Chinese or Japanese counterparties who come from high context cultures that also have high regard for "face."

In short, behaviors and communications which are natural in culture can be so greatly misunderstood by members of another culture that potential deals can be gutted. Given the chance to enter a process that can make transparent the cultural source of some of these differences and eliminate the misunderstanding, would the rational user prefer a process that preserves ignorance, abreactions, severed relationships and lost opportunities, or one which limits this misunderstanding?

In sum, there are a host of qualitative features of mediation, beyond savings in time and cost, which should be the chief reason for parties to select the mediation option. It is the responsibility of the ADR community, as well as sophisticated counsel, to present these qualities with the clarity required to transform skeptics into users.

IV. MEDIATION AS FORUM FOR THE INTEGRATION OF THE NORMS OF JUSTICE AND HARMONY

A. Examination of Justice

In this piece I would like briefly to introduce an idea that could form the basis of a book. Putting aside the question of time and cost, why choose litigation or mediation as dispute resolution process? As mentioned in Section II,

above, pursuit of justice might be identified as a reason to prefer litigation. In our noble judicial system, or in a well conducted arbitration run by experts in the substantive field at issue, parties, with the help of counsel, present the facts to decision makers in a process designed to subject assertions of fact to the harsh light of cross examination and doubt. The judicial or arbitral decision makers apply what are believed to be community standards, represented by the law or norms and customs of commercial practices, to produce an outcome which that community believes is fair. Indeed, justice theorists like Rawls assert that the very heart of justice is fairness. We seek a fair process and a fair outcome.

This ideal of justice is great and profound. It produces order in society. It unsettles corrupt orders. It saves the weak from oppression and rights wrongs. Fern Bomchill, in her inaugural speech when she assumed her position as President of the Federal Bar Association, aptly said: "justice saves, so we should save justice." Our Judaeo-Christian traditions reinforce our sense of the great importance of justice: "justice, justice shall thou pursue." [FN: Isaiah or Jeremiah] The ideal of justice likewise finds concrete expression in the *shariah* of Islam.

Our justice ideals are imbued with the notion of truth. We seek the "real facts." We seek to apply the correct law. Our system works with this dualism of universal ideal (law, or community value) and particular (fact). This approach has its roots in Plato, Aristotle, and the ancient Greeks. They struggled to define the "good." We have long lived with these and other dualisms: essence and existence, ideal and actual. As we look more closely at the justice system, which is aided by these distinctions, we should keep in mind that exposure of flaws and shortcomings do not require us to throw out the baby with the bath water. Nevertheless, recognition of flaws and shortcomings may open us to another possibility—one which is found in mediation.

What are some of these shortcomings? Joe McLaughlin cites the recent study underscoring the unpredictability of judicial outcomes. Our concept of justice contains the ideal that there is a single right answer to the question of what should be done in any case. Our judges and juries apply the dialectical Aristotelian either/or to judge the truth or falsity of each assertion of fact, to arrive at the correct picture of the material past, to select the proper standard or set of standards to be applied to those facts (and that picture), and properly to apply those standards to produce the correct outcome. We narrow and further narrow down the various possibilities of fact and law to the single right choice, excluding all the rest. This image of the development of justice in a single case is like that of a pyramid, finally reaching the correct apex.

Unfortunately, there are many ways in which we fall short of the ideal. Key facts might be omitted or dismissed from consideration as the result of ignorance, poor memory, lack of witnesses, lack of documentary support,

exclusionary rules of evidence, ineffective presentation by advocates and parties, and even confusion of judge, arbitrator or jury.

Key standards can also be missed. Rife are the instances of appeal for failure of the court to select or properly apply the law. In arbitration, the standards applied by the arbitrators are often unstated or unknown. Both with arbitrators and with juries, it is not always clear whether the decision makers themselves are fully conscious of the values, assumptions and core myths that motivate their decision making process. To the extent that decisions are appealed, who is to say that appellate courts actually get them right?

Beyond this, we can examine the source and nature of standards themselves. An Illinois legislator, who predated Bismarck,[11] observed that there are two procedures it is best not to watch: the making of sausages and legislation. Our laws can reflect compromises between different interest groups that can produce something short of the Platonic ideal. Moreover, the interests of society in forming a given law or rule might not be entirely aligned and appropriate for the parties to a particular dispute. We might need to develop statutes of repose, in light of the tendency of witnesses to forget or disappear and the reliance that forms by parties against whom an otherwise rightful claim might be brought. Nevertheless, there might be instances where, even absent a formal tolling agreement, ongoing discussions or other factors would lead to a conclusion that the more just result is to afford a remedy for the claim. Examination of any body of substantive law—*e.g.*, laws affecting the environment, healthcare, commerce, securities, intellectual property, and the like—will produce instances of seeing greater possibilities for justice in individual cases than the law will permit. Moreover, there are significant instances of parties with competing interests in these cases which, with integrity, might assert that diametrically opposite results are the just and superior outcome.

In this postmodern era, we live with a large dose of doubt. Multiculturalism brings with it recognition that any single culture is limited in its right to make absolute truth claims that can be imposed on all others. Relativism abounds. Yet relativism itself is subject to the critique that its own claim to absoluteness is relative. In a postmodern era, in the wake of Freud, logical positivists, radical empiricists, Wittgenstein,[12] and phenomenologists,[13] we are more skeptical about asserting the existence of ideals, and can see these as human constructs, projections, or, more simply phenomena. Phenomenology recognizes the interplay and mutual dependence of "fact" and mind. We

[11] *See*, http://en.wikiquote.org/wiki/Talk:Otto_von_Bismarck.

[12] The meaning of a word is in its use in the language. Wittgenstain, L., *Philosophical Investigations*, 43.

[13] This includes Husserl, Heidegger, Merleau-Ponty, *et al.*

live in a tangled, interwoven real of subject and object, unable to know the "*ding an sich.*"[14]

Nevertheless, somehow we muddle through. The good news is that postmodernism can produce a refreshed outlook. We are a bit clearer on the limits of knowledge and of truth claims. We are aware of our living embeddedness in actuality. Truth, value and meaning are the waters in which we swim, interpenetrating phenomena. Basically, we can go easy on ourselves and one another. We do our best, living rich meaningful lives permitting, but not being crippled by, doubt.[15] We promote respect for and acceptance of other cultures in a multicultural world. Perhaps we learn better the dignified humility that is a precondition for the arising of truth.

Returning to justice, the judicial system, and the legislative system in which it is, in part, embedded, we observe again, that the purposes of a legal system, while of tremendous importance, are not always consonant with pure justice for individual parties. Tort laws make society a safer place. We need, as a society to send messages that set a standard of care to manufacturers, distributors, retailers, professionals, and Boards. Nevertheless, confidential settlement of individual claims might, in a given instance produce a greater good than the legal outcome in that case. It might keep an otherwise valuable producer of pharmaceuticals out of bankruptcy. It might allow certain businesses to continue supporting the families and charities that would suffer from their collapse. It might produce a business reorganization whereas a judgment in an accounting proceeding might simply kill the goose that lays the golden egg. It might preserve a relationship or set of relationships that would otherwise be severed.

This leads us now to look at another cultural value: that of harmony.

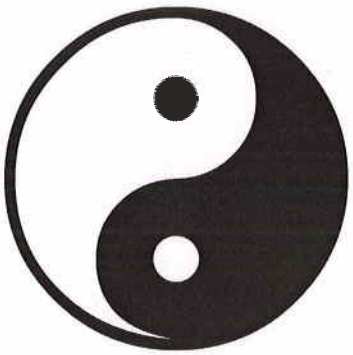
B. Consideration of Harmony

As mentioned in the Introduction, the norm of harmony has been highly valued in different ways in the Taoist and Confucian traditions. Again, while books could be written exploring this topic, here we touch just the tip of this

[14] *Compare* Berkeley's idealism with Kant's *Critique of Pure Reason* expressing the view that we may develop and utilize categories of understanding, but cannot know the thing-in-itself.

[15] 20th Century Protestant and Buddhist theologians have used the phrase "the faith to doubt" to capture this sensibility. *See, e.g.*, Hartshorne, M. Holmes, *The Faith to Doubt—A Protestant Response to Criticisms of Religion* (Prentice-Hall 1963); Tillich, Paul, *The Courage to Be*; Batchelor, S., *The Faith to Doubt—Glimpses of Buddhist Uncertainty* (Parallax Press 1990).

normative iceberg. One simple and direct introduction to this topic may be found in considering the widely recognized *yin-yang* symbol[16] depicted below.



In contradistinction to the Aristotelian "either/or," *yin* and *yang* are depicted as mutually dependent and co-arising, complementary opposites. Each opposite supports the other. Indeed, as depicted above, the seed of *yang* (portrayed as a white circle) is found within *yin* and vice versa. Traditionally, *yin* is seen as representing feminine, receptive, passive, weak, destructive, and negative, while *yang* represents masculine, active, strong, constructive and positive aspects of reality.[17] These opposites are seen linguistically, conceptually and ontologically as having no independent existence, being dependent upon each other and forming a whole. They are constantly in flux, each shifting into the other, and further represent a constantly readjusting function of balance.

[16] Thousands of publications have been written on the *yin-yang* symbol. One very helpful piece, in the context of the comparative study of religion, is a chapter on this symbol in Wilfred Cantwell Smith's book, *The Faith of Other Men* (Harper & Row, 1972). Also illuminating are various descriptions and texts included in Chan, Wing-tsit, *A Source Book in Chinese Philosophy* (Princeton University Press 1969), *e.g.*, Chapter 11, pp. 244 *et seq.*

[17] Chan, *supra*, at 244. Despite the above suggestion that the masculine is procreative or constructive and the feminine is destructive, it should be observed that in a note to his translation of the *Tao te Ching*, which draws heavily on the imagery and theoretical foundation of *yin* and *yang*, the same scholar-translator cites Yu Yueh's description of the feminine, *yin*, "spirit of the valley," is a source of fecundity. *See*, Chan, Wing-tsit, *The Way of Lao Tzu (Tao-te Ching)*(Bobbs-Merrill 1963)(hereinafter "*Tao te Ching*"), Chapter 6, note 1.

A core takeaway is that rather than reject opposites, we need to recognize that all are an interrelated, interdependent part of the whole.[18] We should seek to blend opposing forces. As noted by Joe McLaughin, the Analects of Confucius, recommend harmony in the five social relations.[19] The *Tao te Ching*, perhaps the major classic of the Taoist tradition, expresses a profound appreciation of harmony.[20] The Taoist sage does not compete with others.[21] He sees the world as his body.[22] He, like the Tao, nurtures all things.[23] The sage, like water, a major image in the text, is said to benefit all.[24] He takes the needs and interests of all people as his own. The sage is good to the good and to the bad, in this way the good is accomplished. He trusts the trustworthy and the untrustworthy, in this way is trust developed.[25] The good man is the teacher of the bad and the bad is the charge of the good.[26] The sage does not compete. He does not strive to be ahead, and for this reason is at the forefront.[27] Over and over again, the *Tao te Ching* sends the message of collaboration. We are all in this world together. Rather than isolate and condemn those who do not embody our vision of the ideal, let us

[18] A good example of a listing of complementary opposites and their implications for ethical action can be seen in Chapter 2 of the *Tao te Ching*. ("When all the people of the world know beauty as beauty, There arises the recognition of ugliness. When they all know the good as good, There arises the recognition of evil. Therefore: Being and non-being produce each other; Difficult and easy complete each other; Long and short contrast each other; High and low distinguish each other; Sound and voice harmonize each other; Front and behind accompany each other. Therefore the sage manages affairs without action And spreads doctrines without words. All things arise, and he does not turn away from them. He produces them but does not take possession of them. He acts but does not rely on his own ability. He accomplishes his task but does not claim credit for it. It is precisely because he does not claim credit that his accomplishment remains with him.")

[19] *See* note 2, *supra*, and related text.

[20] *See, e.g.*, Chan, *Tao te Ching*, Chapter 55 ("...his (natural) harmony is perfect. To know harmony means to be in accord with the eternal. To be in accord with the eternal means to be enlightened.").

[21] Chan, *Tao te Ching*, Chapter 8 ("The best (man) is like water. Water is good; it benefits all things and does not compete with them.").

[22] Chan, *Tao te Ching*, Chapter 13 ("What does it mean to regard great trouble as seriously as you regard your body? The reason why I have great trouble is that I have a body (and am attached to it). If I have no body, What trouble could I have? Therefore he who values the world as his body may be entrusted with the empire. He who loves the world as his body may be entrusted with the empire.").

[23] Chan, *Tao te Ching*, Chapter 51.

[24] Chan, *Tao te Ching*, Chapter 8.

[25] Chan, *Tao te Ching*, Chapter 49.

[26] Chan, *Tao te Ching*, Chapter 27.

[27] Chan, *Tao te Ching*, Chapter 7.

find a way to make the best use of their skills and inclinations so that nothing and no one goes to waste.[28] This organic view of an interrelated society expresses early roots of the collectivism found in China over the centuries, up to today.

This spirit of inclusiveness applies not just to ethical relations with other people but to acceptance of circumstances, as well. The *Tao te Ching* and its progeny, such as the *Chuan tzu*, are permeated with a spirit of adjustment and accommodation. The sage is fluid as water, flexible as bamboo, receptive as a valley, rejecting nothing. The Taoist ideal of *wu wei*, or taking no (unnatural) action[29] is a natural extension of this world view.[30] Each being has its place in the whole and moves and adjusts in a dance in harmonious interrelationship with all. This can generate great power, just as a skillful surfer learns to ride the mighty wave. Significantly, *wu wei* means not using force. Non-coercion is a central theme of the *Tao te Ching*.

C. Implications of Justice and Harmony

As noted in the last section, values of accommodation, collaboration and even avoidance of conflict pervade Taoist thought. By contrast, in litigation, as in hardball positional bargaining, a different mode of conflict resolution—competition—comes to the fore. Interestingly, these, along with compromise, consist of the five modes or styles of approaching conflict identified in negotiation literature.[31]

[28] Chan, *Tao te Ching*, Chapter 62 ("Tao is the storehouse of all things. It is the good man's treasure and the bad man's refuge. Fine words can buy honour, And fine deeds can gain respect from others. Even if a man is bad, when has (Tao) rejected him?").

[29] *See, e.g.*, Chan, *Tao te Ching*, Chapters 2 ("the sage manages affairs without action"); 37 ("Tao invariably takes no action, and yet there is nothing left undone."); 38 ("The man of superior virtue takes no action, but has no ulterior motive to do so."); 43 ("The softest things in the world overcome the hardest things in the world. Non-being penetrates that in which there is no space. Through this I know the advantage of taking no action. Few in the world can understand the teaching without words and the advantage of taking no action."); 47, 48; 57; 63 ("Act without action"); 64.

[30] *See, e.g.*, Chan, *Tao te Ching*, Chapter 30 ("He who assists the ruler with Tao does not dominate the world with force. The use of force usually bring requital."); Chapters 38, 55.

[31] *See, e.g.*, the Thomas-Kilmann Conflict Mode Instrument (Tuxedo NY: Xicom, 1974), identifying five conflict modes or styles: competing, compromising, collaborating, avoiding and accommodating.

Beyond their application in negotiation, it is intriguing to see these modes applied in connection with the norms of justice and harmony. Justice makes straight the crooked. With force and the authority of the right, we can take strong action to make the actual conform to the ideal. Harmony, by contrast, involves ones own adjustment, or the group's adjustment, to the actual. The ideal is found in this mode of adjustment, which embodies and actualizes peace, and, perhaps, love.[32]

There can be little doubt that we need a justice norm and the courageous and caring action that expresses it. Without justice, pure accommodation is appeasement, which, when applied to Nazis is, at the very least, controversial. Yet, there are times when it is less than perfectly clear what justice dictates. There are instances, all the more available in cross cultural contexts, when each party is assured that he or it is in the right. And, as noted in subsection "A." above, there are times when the notion of justice dictated by a particular legal system carries out a general societal purpose but does not necessarily create individualized or maximal justice for the actual parties—and in light of the actual circumstances—involved.

Beyond this—and now we may fairly return to the pragmatic considerations initially voiced by Joe McLaughlin—there is a fair degree of unpredictability to the legal outcome of a given case. Moreover, time and expense incurred in pursuit of this goal of legal justice may outweigh the value of the dollars ultimately awarded at the end of the case. This is all the more so when one factors in the opportunity cost of delay, time in depositions, discovery and trial, water cooler gossip, and relationship loss—with loss of future business—between the warring parties. Where the cost of justice exceeds the value of justice received, is that justice?

The norm of harmony has a counterpart within the Judaeo-Christian tradition. Again, recognizing the limits of this paper, we will only point to a couple of them here. Love and forgiveness are major teachings not only in the Christian tradition, but in the Jewish tradition as well. Theologians and religious leaders in each tradition have, for centuries, coupled the norms of justice and mercy. Indeed, Portia's speech on the "quality of mercy"[33] is anti-Semitic to the extent it implies that Shylock represents the core value of his tradition in requiring a pound of flesh, rather than valuing human life

[32] Chan, *Tao te Ching*, Chapter 67 ("I have three treasures. Guard and keep them: The first is *deep love*, The second is frugality, And the third is not to dare to be ahead of the world. Because of deep love, one is courageous. Because of frugality, one is generous. Because of not daring to be ahead of the world, one becomes the leader of the world.").

[33] Shakespeare, W., *The Merchant Of Venice*, Act 4, scene 1, 180-187.

and this superior, unstrained[34] quality of mercy. In the Kabbalistic tradition, Mercy is seen as a higher divine attribute than Justice.[35] As Rabbi Adam Berner points out, *psharah* or compromised, voluntary settlement is preferred over resort to the religious court, the *Bet Din*, as a mode of resolution within the classic Talmudic tradition.[36]

At the very least, making room for harmony does not run contrary to major theistic traditions. More boldly put, harmony and mercy are values that might represent a higher mode of civilization. These values do not make the adverse party into an "other" upon whom one imposes punishment or extracts compensation by use of legal force. Rather, they recognize the humanity of, and affinity with, this other, taking the full person and all his or her circumstances into account—warts and all. When developing dispute resolution processes on the domestic or international front, a process that can foster the application of not only the norm of justice, but also the norms of harmony (or mercy), is a process that maximizes the possibility of richer and greater outcomes. These are outcomes that do not ignore justice, but contemplate multiple views of what is just, and the wide range of values and principles held by the parties. In addition, these outcomes contemplate the person not simply as a subset of a category of particular tortfeasor or contract breacher in a particular legal grid, but as a whole and complete living person with a complex and multivalenced context and series of relationships, limitations, needs, tendencies and obligations.

[34] The notion of being unstrained, or unforced, is notably consistent with *wu wei*.

[35] *See, e.g.*, Scholem, G., *On the Mystical Shape of the Godhead*, (Schocken Books 1991), p. 44, displaying a classic image of the "ten *Sephirot*" or divine emanations of the kabbalistic tradition, with *hesed* or mercy shown as the fourth and *din* or judgment (justice; also called *geburah* or strength) as the fifth. One example of this ordering can be found in the *Tomer Deborah* of R. Moses Cordovero (1522-1570).

[36] Berner, *supra* ("The Torah mandates us "to do that which is right and good in the sight of the Lord."[8] Rashi comments that this refers to *psharah*, looking beyond the letter of the law. In fact, the *halachah* establishes that it is a *mitzvah* to encourage disputing parties to pursue *psharah* over the adjudication and application of *din* (strict law).[9] Capturing the essence of the benefits of mediation, the Talmud states that only *psharah*, not *din*, constitutes the ideal justice of *mishpat shalom* and *mishpat tzedek*—judgment of peace and judgment of righteousness. No modern formulation has so elegantly expressed the uniqueness of mediation, in its ability to provide an integrated justice balancing the values of fairness, peacefulness and compassion.[10]")

D. What Mediation Offers

Values, as ideals, are too large and general to be limited to any particular model, system or process. Similarly, mediation, like life, is far too open a process to be defined by any two values, even ones as great as justice and harmony. Drawing on the *Tao te Ching*, which uses the word "*Tao*" often translated as Way, with overtones of ultimate truth or ultimate reality: "the Tao (Way) that can be "*taoed*" (*i.e.*, "wayed", laid out, expressed, defined) is not the eternal *Tao*."[37] It is important to keep in mind the indeterminate, and open, nature of mediation as a process as we enter the next discussion.

Consistent with the inclusive model of *yin* and *yang*, mediation offers an open forum in which not only the value of harmony but also the value of justice (and other values)[38] may play themselves out in the parties' negotiations. We see the justice norm at work when parties and counsel begin opening statements with projections of legal outcome, when offers are coupled with messages of case strengths, and when parties and counsel engage with the mediator in risk and transaction cost analysis. We see harmony operating as parties consider their relationship with one another. We see it in accommodations that take into consideration not only legal outcomes but also the ability to pay, the value of ongoing business relationships, industry realities and challenges, the feasibility of particular deal terms or proposals, and even another party's need for recognition, appreciation, or acknowledgment in the form of an apology.

We further see harmony or, even more broadly, the applicability of teachings from the *Tao te Ching*, in the conduct of the mediator him (or her) self. Mediators are at their finest when they can be deeply receptive; when they listen profoundly; when they demonstrate flexibility; when, like water, they benefit all; when they build trust by showing trust; when they do not coerce, but instead act with *wu wei*. They are at their best when they do not compete and when they take the needs and interests of all parties, without discrimination, as their own. They come to the forefront by being background players, understanding that their role is to facilitate the parties' negotiation, not to run or steer it to the mediator's preconceptions of what is good, right, true, just

[37] Chan, *Tao te Ching*, Chapter 1 ("The Tao that can be told of is not the eternal Tao; The name that can be named is not the eternal name.").

[38] There is a wide range of values that can be considered and influence decision making in mediation, including: efficiency, economy, closure, appropriateness, feasibility, consideration, compassion, diligence, duty, loyalty, practicality, etc. All of these can be made transparent and treated with sensitivity, clarity, impartiality, and respect in this process.

or even harmonious. Indeed, while harmony is a beautiful thing, the mediation process includes the openness to present discordant feelings, views, goals and expressions. In this way, the discordant, when expressed, accepted and explored, can transform into resolution. This is a way of harmony.

The interplay of justice and harmony in mediation is doubly beautiful. Justice seeks to change and harmony adjusts—it is like watching the interplay of active and passive, *yang* and *yin*. Beyond this justice within a mediation forum is not limited to predicting the court outcome. As discussed above, each of the parties might have views of fairness based on principles and expectations that could differ from the way a legal analysis might run. Working flexibly with the parties to meet their needs and provide a process that they find satisfying (itself an adjustment by the mediator consistent with the fluid quality of harmony), includes fostering clarifying and constructive discussion that identifies, develops, and explores principles and values the parties might choose as most applicable in providing guidance for the resolution of their issues. For example, in a family estate matter, all siblings might choose the principle of equal distribution as a governing family value. Alternatively, they might conclude that the *kibbutznik* norm of "from each according to his abilities, to each according to his needs" represents their family value and cultures, and should be adopted in this matter.

Whether considering possible legal outcomes or independent principles and values, one characteristic of this mediation process is that the parties act out of freedom. They are not coerced by the mediator. No outcome is imposed upon them. The process itself can be adjusted to reflect their identities, values, goals, inclinations, concerns and leanings. Choosing one's brand of justice, rather than fighting and have it imposed by a third party, raises the quality of the interaction in mediation to a higher, more humane, more mature phase in the development of civilization. Consistent with this advance is the parties willingness to explore values and recognize that each merits respectful, sensitive attention. Bringing in the postmodern perspective, mediation permits exploration and adoption of many values that result in freely adopted individualized justice tailored to the parties.

The discussion of harmony in Section IV.B. notes the coupling of justice with mercy in the Judaeo-Christian traditions. Along with the freedom to choose what seems most just for all parties comes the freedom to forgive. Much has been written on forgiveness[39] and the value of

[39] *See, e.g.*, Sandlin, J.W., *Forgiving in Mediation: What Role?* (Advanced Solutions Mediation & Conflict Management Services, Charleston, South Carolina 29402) http://www.apmec.unisa.edu.au/apmf/2003/papers/sandlin.pdf; Braskov, S. & Neumann, A., *On Guilt, Reconciliation And Forgiveness—A Case Story About*

apologies[40] in mediation. This too is a way of restoring harmony between parties.

In sum, mediation is a wonderful process, full of rich potential, and based in party freedom and creativity. It permits parties to work out their disputes in a manner that balances property, rights, principle and obligation based norms of justice with relational norms of harmony, developing a life affirming mutual adjustment of the ideal and the actual, and of the individual and the collective. These qualities commend its use at home and abroad.

Mediation, Dilemmas And Interventions In A Conflict Among Colleagues (Lipscomb University Institute for Conflict Management), http://www.mediate.com/articles/BraskovNeumann1.cfm; Schmidt, J.P., *Mediation and the Healing Journey Toward Forgiveness*, Conciliation Quarterly, 14:3 (Summer 1995), pp. 2-4; Della Noce, D.J., *Communication Insight*, ConflictInzicht, Issue 1, February 2009; Luskin, F, Forgive for Good: A Proven Prescription for Health and Happiness (HarperCollins 2002), used in trainings on forgiveness in mediation, *see, e.g., http://danacurtismediation.com/dcm/forgivenessyrslater.html*; and Waldman, E. & Luskin, F., *Unforgiven: Anger and Forgiveness*, The Negotiator's Fieldbook: The Desk Reference for the Experienced Negotiator (Kupfer Schneider, A., and Honeyman, C. editors, ABA Section of Dispute Resolution 2006)(hereinafter "Negotiator's Fieldbook") pp. 435-443.

[40] *See, e.g.*, Gerarda Brown, J. & Robbennolt, J.K., *Apology in Negotiation*, Negotiator's Fieldbook, pp. 425-434; Schneider, C.D., *"I'm Sorry": The Power of Apology in Mediation*, (Association for Conflict Resolution Oct. 1999), http://www.mediate.com/articles/apology.cfm; Kichaven, J., *Apology in Mediation: Sorry To Say, It's Much Overrated*, (International Risk Management Institute Sept. 2005), http://www.mediate.com/articles/kichavenJ2.cfm; *and also see*, Garzilli, J.B., Bibliography of articles on apology in mediation, http://www.garzillimediation.com/pg247.cfm.