

# The Mediation Group

N E W S L E T T E R

MEDIATION • ARBITRATION • CONSENSUS BUILDING  
TRAINING • SYSTEMS DESIGN

## Dear Clients, Colleagues and Friends,

In this issue, we hope we accomplish two goals simultaneously. First, we give some more play to our new colleagues – we get to trumpet some of the rich experience they bring to our practice. Second, we explore some of the ways that these new associations have already enhanced our work. In part, this comes from the expanded services we can offer our clients; in part, it comes from the insights into our practice that experienced professionals from diverse areas bring to the table; and in part, it comes from creative new forms of ADR that their talents have allowed us to begin to develop. As an example of insights into the practice of mediation, David, after a conversation with Judge Kass, writes an article on the relationship of judging to mediating. David discusses why some clients may be looking to respected jurists for their experience and wisdom; and then explores how a skillful judge turned mediator may find the appropriate place and technique for offering that wisdom.

Developments in the field, as well as demand for the talents of our panelists, has led us to some creative models for resolving cases. For example, one of our arbitration panelists, Natasha Lisman, was instrumental in devising an innovative process in which the parties employed one of the judges to issue what was essentially an advisory opinion in connection with a pending civil case. Plaintiff's counsel had won an interlocutory ruling on a key aspect of the dispute and both parties wanted a sense of the likelihood of it being upheld on appeal without first engaging in the trial on the remaining issues. A well considered opinion could result in an early and economical resolution. This process exemplifies the innovation and flexibility that our new panel allows.

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Also intriguing is the idea of appellate arbitration. We continue to be struck by the extraordinary regard many of our clients have for the earlier legal practice and then the appellate jurisprudence of Judges Gillerman, Jacobs and Kass. Several clients have mentioned that even though they sometimes are hesitant to arbitrate — because arbitrating means the loss of appellate rights — these are precisely the neutrals that might persuade them to do so. But another use of these excellent jurists seems eminently appropriate, namely, appellate arbitration. For the case that is sitting in an appeals docket somewhere, our judges provide an immediate alternative. Parties may agree to submit their appeal to a single arbitrator, or as some obviously see our new colleagues, to a dream team panel. For those wary of taking cases to arbitration in the first instance, one might set up arbitrations for the trial level with carefully defined appellate rights, those appeals to be heard by some combination of arbitrators from TMG's panel (or TMG and others at the option of the parties.)

Our expanded family panel has also provided a new richness for our practice. Jane writes of the insights derived from our introduction of peer group supervision and the roundtable discussion of cases. We hope this effort at quality in our practice is also a modest contribution to the field of mediation. There is much discussion in the mediation field generally about the lack of training past introductory courses, the lack of supervision, and the absence of forums to develop good practice models. Jane describes our effort, in the family panel context, which builds on TMG's commitment to cross-disciplinary skills. The peer group supervision allows all of the practitioners to benefit from perspectives from other disciplines and to improve their own practice. Our clients should then benefit from the insights of legal specialists and mental health professionals.

Finally, we should note a similar development in our health care practice, i.e., new opportunities have grown out of our new associations. We have continued to work on a project in Pennsylvania, in association with Carol Liebman from Columbia Law School, which applies mediation concepts to assist hospitals in conversations with patients about medical errors that the hospitals are mandated to disclose. Jane is presenting at a conference funded by the project, in which she brings a psychodynamic perspective of the effect of apologies on the patient and the provider. Susan Morash, a senior nurse supervisor at MGH, has been working as a TMG intern on a related project, researching local practices for disclosing medical errors. Our protocol on managed care dispute resolution will be presented again this fall at the ACR conference in Sacramento, California, most probably by Mary Jeanne Tufano and Eben Weitzman. At the same time, we are seeing an interesting growth in our mediation caseload of health care related cases. In particular, we are seeing an increasing number of cases arising out of allegations of inappropriate or negligent care at nursing homes and an interesting spate of cases related to disability insurance. We hope to write more on these areas in upcoming issues. — *Brad*

## Role Definition

by Jane Honoroff



Now that our family panel has been up and running for a few months we thought it might be interesting to share with our readers some of the topics which have emerged for discussion in our rich and enjoyable supervision group meetings.

Perhaps all the specific questions we have focused on to date can be encompassed under the one larger conceptual category of role definition, i.e. moving beyond the training biases of our original professional identities as therapists and attorneys, and incorporating our experience into the role of mediator.

For a therapist/mediator the most challenging moments seem to occur when the clients raise complicated emotional struggles which as a therapist we would quickly engage. For example, a client with a long history of depression and dissatisfaction with the quality of interaction between herself and her children asks for help from us on improving the parent/child relationships.

For the attorney/mediators, who are used to advising and trying to persuade an individual client or an opponent of the value of a particular stance, just how much the mediator needs to put out with regard to the law is a challenge, especially when the sharing of that information may be experienced by one party as “taking the other party’s side”. (This is also a moment when a family mediation differs significantly from a civil mediation in which the attorneys for the parties are present; their presence at once lessens the obligation of a mediator to inform parties of the law and provides a check if they do.) An example of this dilemma oc-

curred when one of the parties was insistent that he had no intention of sharing with his wife the assets of a closely held business which was started during the marriage and which he insisted had no real value. Our attorney/mediator knew that the business is considered a joint asset and must be included in the negotiation. To disclose this piece of law felt much like being an advocate or practicing law especially when it was clear that the husband would experience this intervention as being put at a distinct disadvantage. Yet to not disclose this fact would render any future agreement useless and insupportable at a subsequent court hearing.

So what is a mediator to do? Are there indeed ways to engage these issues, to incorporate relevant professional training, without subverting the mediator role?

For the therapist’s dilemma we began to think about ways in which the party with the problematic relationship with her children might, in fact, be trying to address a negotiable conflict. What about the divorce was making this problem worse in the eyes of the mother? Perhaps she was aware that within the context of the marriage the husband played a central role in the parent/child connectedness that she counted on for a minimal level of interaction, especially during her worst bouts of severe depression. Perhaps the husband was the carrier of important information about the children’s lives, perhaps even interceded on the mother’s behalf. Perhaps this was one of the many roles he was no longer willing to play. But within the context of a divorce agreement it is possible

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*Is there a difference between relaying basic, indisputable legally relevant boundaries for divorcing couples ...and advising individuals on the best tactic for resolution?*

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to set up a new and different structure in which some of these past roles can continue to be provided. For example there can be regularly scheduled phone or email contact between the parents in which particular kinds of communication take place. As **Susan Jampel** said, “This is a very different approach than a therapist might use where we spend time exploring the origins of a conflict in parent/child communication. Here we are setting up a structure or strategy for coping with the problem of poor communication. It is not about understanding where the child/parent communication has gone awry and what are the underlying causes of this failure. But it does address the expressed concern of the mother’s about being further cut out of the communication and information loop.”

The discussion about the role definition for the attorney also raises important distinctions about practice interventions. Is there a difference between relaying basic, indisputable legally relevant boundaries for divorcing couples (even when there is a lot of emotion surrounding that information) and advising individuals on the best tactic for resolution? What if, by relaying relevant information, one of the parties feels unheard, or worse, put at a disadvantage? For **Shippen Page** the role dilemma emerged when the parties came up with a solution which did not seem practical and he feared it would not stand up to the test of time. The challenge became how to test their resolution without putting them on the defensive, losing neutrality, or sounding argumentative. **Jeff Fraser** suggested that

a method for maintaining a neutral stance in the face of potentially loaded information might be to refer to an external reality such as the court’s financial forms in which the parties are required to list all their assets, including the value of a closely held business. How the parties decide to come up with a value is then left to the negotiation. Unlike an advocate who might push for a formula for evaluating the business which is favorable to his/her client, the mediator’s job is to inform the parties about all the relevant issues which need to be negotiated, including those set by law and the courts, and then try to help them complete the negotiation.

In both examples, our colleagues’ training in their disciplines allows them to bring important substantive knowledge to the mediation, but in each case their role is different than their original training presumed. The challenge becomes putting their discipline’s knowledge and insights in service to the role of mediator and the goals of mediation.

I hope this brief article does justice to the rich, thoughtful, complex and respectful dialogue that has been our supervision meetings. It is an honor for me to be leading this group of talented and seasoned professionals in this cross-disciplinary perspective as we all enrich our practice as family mediators in our continuing effort to better serve our clients. ■



Susan Jampel



Shippen Page



Jeff Fraser

## Judging and Mediating: A Conversation With Rudy Kass



by David Matz



In the mediation field, there is an ongoing debate about whether it is good practice for a mediator to offer parties an opinion about the settlement value of a case, or about the likely decision of a court on any aspect of a case. Those who oppose a mediator offering such an opinion argue that (a) once such an opinion is put forth the party who doesn't like it will lose confidence in the mediator, and end the process; and (b) that making such a judgment requires knowing, or not knowing, things that are different from those that a mediator has to know.

The case for permitting, or even at times encouraging mediators to offer such judgments is that if it will help the parties move toward settlement, such judgments constitute a useful tool and should not dogmatically be ignored.

In the mediation literature, the debate has not moved much beyond statements of positions. When three retired judges joined the TMG roster, it seemed a good moment to explore in more depth the relationship of offering opinions to settling cases. This note is the report of a conversation between me and **Rudolph Kass**, who had recently retired from 24 years of service as a justice of the Massachusetts Appeals Court. Judge Kass has joined the TMG panel of neutrals.

In thinking about this question, the most significant fact is what the parties want and expect when they decide to seek mediation. When the clients call and say "We want Judge X to be our mediator," it is a clue that the judicial background is a factor in their choice. What more precisely

might such a choice mean?

It might mean that they want someone whom they know to be fair-minded. And it might mean that they want someone with a history of mastering complex facts and law quickly. And of course, it might mean that over the years they have come to have respect for the judge's decisions and think that such a judgment in this case might be useful.

It might be useful because there are cases in which a client is so immersed in anger and resentment that he/she is not thinking clearly about how the case might fare in court. Thus a judge of experience and stature may be able to impress a client with some unpleasant realities in a way that neither the attorney nor the opponent has been able to. On other occasions it may be the attorney who is seeking the perspective of years on the bench in valuing the case. And on some occasions the value of the judge offering an opinion is that it allows a party or an attorney later, in conversations with persons not present at the mediation, to explain the settlement as the result of the judge's point of view; put more simply, they can blame the judge for their own decision to settle.

Of course a mediator would seldom listen to the case and bluntly hand out a decision. Indeed this is often a poor idea. Rather, the mediator can gently raise doubts about the inevitability of one party's expectation in court. He can wonder aloud about the force of a particular case that counsel

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has considered dispositive. He can say about an intellectually agile but equitably malodorous argument: "Courts don't like cute." He can express skepticism about a settlement range being put forward by an attorney. He can use not only his knowledge of the law, but also his knowledge — and stories — of how judges work and think.

The mediator of course is in no position to tell the parties what to do. But integrating reminders of what might happen in court with clarifying communication, generating and exploring options, and all the other mediator techniques enhances the likelihood that the parties can find a satisfactory settlement. The choice of which technique to use, and when, is a subtle business, influenced by the mediator's style of presentation and chemistry with the parties.

Are there dangers in offering opinions? Certainly. If the parties are moving toward an agreement, a mediator's opinion might alter the expectations for at least one of

them and impede that progress. If the mediator's judgment is truly far from that of one of the parties, that party might indeed lose faith in the mediator's competence or neutrality, and depart. And of course a mediator must avoid engaging in a tug-of-war with counsel about the "rightness" of the mediator's judgment.

A mediator's judgment can help settlement by clarifying for parties and counsel what the alternative of court might truly entail. It can give one side a face-saving way of making a settlement decision. And it may bring to bear the weight of the mediator's experience and wisdom about the fairness of a particular outcome.

This analysis can be applied to any mediator, or at least any mediator with some knowledge of the alternative to settlement, which is often court. But the analysis is quite central when the mediator is a former judge whom the parties have explicitly sought. ■

Stu's Views

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"Please, Mr. Wolf, now we're just splitting hares."



## Honorable Mentions

**HON. GERALD GILLERMAN** has been involved in the world of international criminal law since 2002 when he became involved in the affairs of the International Tribunal for Rwanda. The presiding Judge of the Tribunal (whom he had met at a Harvard Law School Human Rights celebration) invited him to visit with the Tribunal in Arusha. That experience prompted him to resign his position as Associate Justice of the Appeals Court which he had held for twelve years in order to focus his attention on the field of international criminal law.



Beginning in 2002 Judge Gillerman taught an international criminal law course at New England School of Law. For the last two years he has taught a course entitled “International Criminals and International Criminal Law: From Nuremberg to Rwanda” at Harvard University Extension School. The goal of the course is to provide an understanding of the main currents of international criminal law from the 19th century to the present. The main event of the course is the Nuremberg experience — the model for the United Nations International Tribunals, as well as the recently-formed International Criminal Court.

Judge Gillerman has lectured on the legal aspects of international criminal law to judges and to various citizens groups, and he has appeared on panels at the Fletcher School, the Kennedy School, and most recently he has lectured on this subject to students at the Harvard Law School.

**HON. GEORGE JACOBS** is currently writing a book on Professional Malpractice. Co-authored with Judge Kenneth Laurence, the book will be part of the Massachusetts Practice series. As with other volumes in that series, the book will focus on the how-to aspects of handling malpractice matters, particularly those pertaining to medical and legal malpractice. The book should be ready for the public in 2005.



Judge Jacobs was an Associate Justice of the Bristol County Probate & Family Court from 1975-1981; an Associate Justice of the Superior Court from 1981-1989; and an Associate Justice of the Appeals Court from 1989 -2003. He currently serves as Scholar in Residence at the Southern New England School of Law.



**BRAD HONOROFF, J.D.** Harvard. Founding Principal of TMG. Serves on the Mass. Superior Courts ADR panel, MODR Environmental panel, National Roster of the US Institute for Environmental Conflict Resolution, and other National panels. Has many years of teaching experience as a tenured professor at the University of Massachusetts, Boston Graduate Program in Dispute Resolution and the Law Center and as an instructor and frequent guest lecturer at Northeastern Law School.



**JANE HONOROFF, LICSW, MSW, Simmons.** Founding Principal of TMG. Conducts private psychotherapy practice. Serves as Adjunct Faculty at Boston University School of Social Work. Has served on Massport's CISD (Critical Incident Stress Debriefing) Team since its inception in 1989. Provides ongoing consultation services to Greater Boston Legal Services and to the Community Dispute Settlement Center. Serves as a regular guest lecturer at Northeastern Law School.



**DAVID E. MATZ, J.D. Harvard.** Founding Principal of TMG. Professor at University of Massachusetts, Boston with the Law Center, and Director of the University's Graduate Program in Dispute Resolution. Serves on the Mass. Superior Courts ADR panel, MODR Environmental panel, and American Arbitration Association employment disputes panel. Fulbright Professor of Law at the University of Tel Aviv Law School 1989-1990. Consultant with Ministry of Justice and the High Court of Israel on mediation and the courts.

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**NEWSLETTER**

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