Contra Costa County Bar Association

2022 MCLE SPECTACULAR

Building Our Future

CCCBA's Alternative Dispute Resolution Section proudly presents…

#6 THE MAGIC OF MEDIATION - A Look Behind the Curtain at the 'Tricks' Neutrals Pull Out of Their Hat

Commissioner Palvir Shoker, Contra Costa County Superior Court
Mark LeHocky, ADR Services , Inc
Nathan Scheg, Ironhorse Law Group
Dr. Stephen H. Sulmeyer, JAMS
Claudia Viera, Viera Mediation

OUTLINE:

- **Panelist Introductions**
  - Short Personal Introductions for each Panelists about experience with ADR
  -
- **Audience Poll #1: What Kind of cases do you mediate?**
  -
- **Moderator Questions for Panelist**
  - Agreements to Mediate
    - *Commissioner Shoker – Courts Perspective*
  - Prepping for Mediation
  - Challenges and obstacles (ex. What do you do when people get emotional/reactive?)
  - Looking at dynamics depending on type of case
  - Memorializing Agreements
    - *Commissioner Shoker – Courts Perspective*
  - Mediators as Negotiators/Coaches

Contra Costa County
Bar Association

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PROGRAM MATERIALS

The Magic of Mediation
Contra Costa County Bar Association MCLE Spectacular
November, 18, 2022

Program Description: This program will provide a look behind the curtain at the 'rabbits' that neutrals pull out of their hats to overcome pre-mediation reticence, in-session roadblocks, and ethical dilemmas to achieve resolutions that provide value to participants and lawyers. ADR practitioners, those practitioners who utilize them, and all with a curious mind will benefit from a look behind the curtain to see how various techniques can turn an impasse into a handshake making the seemingly impossible come to pass. The program will involve a moderated format with Q&A. Come one, come all and be amazed!

Moderator:

- Nathan Scheg, Ironhorse Law Group, PC

Panelists:

- Mark LeHocky, ADR Services, Inc.
- Comissioner Palvir K. Shoker, Contra Costa County Superior Court
- Dr. Stephen H. Sulmeyer, JAMS
- Claudia M. Viera, Viera Mediation & Law

OUTLINE:

- **Panelist Introductions**
  - Short Personal Introductions for each Panelists about experience with ADR
- **Audience Poll #1: What Kind of cases do you mediate?**
- **Moderator Questions for Panelist**
  - Pre-Mediation Reticence
    -Agreements To Mediate
    -Prepping For Mediation
    -Other Issues
  - In-Session Roadblocks
    -Challenges/Obstacles
    -Emotions
    -Type Of Case Dynamics
    -Other Issues
  - Ethical Dilemmas
    -Memorializing Agreements
    -Mediators As Negotiators/Coaches
    -Other Issues

POLICY IN ACTION

Mark LeHocky Mediation/ADR Services, Inc.
marklehocky.com

Road to Somewhere

HOW CAN ATTORNEYS TAKE STEPS TO IMPROVE SETTLEMENT EFFORTS AND AVOID UNPLEASANT SURPRISES AS THEY MAP OUT A DISPUTE RESOLUTION? ONE LITIGATOR-TURNED-GENERAL COUNSEL-TURNED MEDIATOR (WITH SOME HELP FROM A DISTINGUISHED ROCK STAR) POINTS THE WAY FORWARD.

MARK LEHOCKY

IN HIS BROADWAY SHOW *American Utopia*—a joyous mix of music, dance and social commentary—David Byrne reprises his classic Talking Heads song "Once in a Lifetime." Along with the lyrics "How do I work this?", "Where is my large automobile?" and "This is not my beautiful house!" are the stirring refrains:

Well, how did I get here?
My God, what have I done?

These questions reverberate as I read mediation briefs in many cases in which the disputants close in on a trial or arbitration date with strong convictions that, sadly, don't mirror reality. "Reality" here means the probability of winning juxtaposed against the cost of disputing fully—litigation costs, diversion of time and resources and other effects on organizations and people.

Mediators who do their job well carefully posit how things may play out—the good, the bad and the ugly—along with their associated costs. But even delivered delicately, that analysis can trigger awkward conversations among clients and counsel as to how an early case diagnosis has changed markedly, and why it took so long. This is often not pretty.

Based on my decades as a litigator, general counsel, client and neutral, let me share some tested steps to reduce one's need to answer David Byrne's famous questions and suffer the resulting harm to client and counsel relationships.

Conduct a *pre*mortem. In *Beyond Right and Wrong*, his groundbreaking work analyzing handicapping errors by counsel and their causes, Randall Kiser explores various ways to contain unwarranted overconfidence. One strategy is to conduct a "premortem" early in the life of a dispute: *If we look back 12 to 24 months from now and things have gone sideways, how might that have happened? What can we do now to minimize that risk, or at least better measure it?*

A disciplined review of where things might go wrong requires a hard look at all material assumptions and means to test them: *What are we missing?* It's always better to kick the tires hard at the outset—and to keep kicking them. Which leads us to Step Two.

Talk early and often about the merits. The ease and efficiency of email and other forms of electronic communication is undeniable, yet they come with a cost. Emails and letters between adversaries rarely prompt frank exchanges. Instead, as essentially permanent records of communication, they typically resemble advocacy missives devoid of candor.

Yet the earlier that opponents meaningfully discuss the substance of a case—via phone or in person—the earlier the parties can come to an unvarnished view of the pluses, minuses and alternatives: repaired relationships, reinstated employees, reworked contracts and more. Saving those deeper dives until a later mediation can lead to troublesome days of reckoning, especially as many alternatives evaporate over time. Which leads to Step Three.

ISTOCK/JANIECBROS

Don't immediately default to mediation. The growing use of mediation to speed dispute resolution has been a godsend for clients, saving them time and resources, and preserving future opportunities. But mediation shouldn't come first or supplant direct discussions. Indeed, direct dialogue often exposes the source of the misunderstanding of facts, positions and objectives. As such, it produces a closer approximation of reality and reveals productive paths to explore.

Of course, sometimes direct efforts don't do the trick, and a facilitated negotiation (a fancy way to say "mediation") is needed. But the preceding direct dialogue should significantly pare down the number of misunderstandings before mediation takes place.

Testing this approach at my prior companies, we adopted a "three-conversation" rule: Before any mediation took place, our inside or outside counsel were asked to have three substantive conversations with adversary counsel. Why three? Typically, the first call caught the other side off-guard. But by the second or third chat, a meaningful exchange would usually take place. We learned. They learned. Everyone could better assess, recalibrate and avoid unpleasant surprises down the road.

For direct exchanges to really be effective, by the way, they must be *real* exchanges. Playing hide-the-ball while asking for candid input from the other side doesn't work. Nor should it. When conducted with candor, though, these exchanges often clear a path to resolution—sometimes with the aid of a mediator, sometimes not. But if mediation is inevitable, let's move to Step Four.

Share your mediation briefs, and do so early. While some attorneys avoid sharing these briefs, think about the consequences of not doing so. Without the benefit of the other side's best elucidation of their position, your side sees only the most positive spin on your story. Rose-colored glasses become rosier, positions harden and resetting expectations becomes more difficult. Conversely, sharing briefs allows everyone to assess realistic potential outcomes in advance, adding needed perspective to the mediation dialogue to follow.

Adjusting to adverse information also requires time, particularly when multiple constituents—business partners, insurers, family members—are involved. More than one "leveling" conversation is often needed. Sharing briefs early allows for this needed recalibration, thereby enabling the parties to avoid Byrne's second question: *My God, what have I done?*

Implementing these recommended steps and doing so early in the life of all disputes regularly pays dividends, saving time and resources—and sometimes people and relationships, too. With all due respect to the great former Talking Heads front man, there's no reason for a dispute assessment and settlement effort to be *same as it ever was, same as it ever was.* ●

"Direct dialogue often exposes the source of the misunderstanding of facts, positions and objectives."

INSIGHT

JAMS ADR Insights

Legal Case, Emotional Case: The Ethical Obligation to Attend to Both

STEPHEN H. SULMEYER, J.D., PH.D.

JAMS Mediator, Arbitrator, Referee/Special Master, Hearing Officer
Published October 3, 2022

The definition of practicing law competently is changing. I maintain that to practice law competently, as that term is defined in Rule 1.1 of the California Rules of Professional Conduct, and to “keep abreast of changes in the law and its practice,” we must recognize that every transaction and every litigated matter has both a legal component and an emotional component, and that we must develop the skills to handle both components with sensitivity. As competent lawyers, we can no longer focus on the legal facet and neglect the emotional facet.

I refer to the legal and financial aspects of any negotiation or dispute as the “legal case”; i.e., the evidence available, the case law, the statutes and regulations that might apply, the causes of action that might be cognizable by a court and the norms of usage that the negotiators are familiar with. The legal case also includes the economic advantages and terms that negotiators vie for, damages that might be recoverable in a lawsuit and the cost of bringing the matter to trial (and possibly appealing a verdict) or failing to reach an agreement. I refer to the emotional and psychological facets of any negotiation or dispute as the “emotional case”; i.e., the things that might not be cognizable in a court of law but are nevertheless of great importance to the parties, such as a desire for fairness, to save face, to receive justice, to prevent injustice, to be heard, to be vindicated and to obtain peace of mind. It includes people’s feelings, needs, thoughts and beliefs about themselves, the person(s) or entities they are in dispute or negotiation with and the dispute or negotiation itself. The emotional case is typically what the parties care most about in a given dispute; it’s what tends to drive the matter as a whole. And it is frequently unrecognized, unacknowledged or simply ignored.

Most people who find themselves in the midst of conflict do not experience their dispute as primarily a legal event or a business transaction, but rather as something profoundly emotional and personal. Conflict can push people’s survival, identity and insecurity buttons, and can arouse intense feelings such as anger, distrust, resentment and fear. Rather than dismiss such feelings as irrational, unimportant or counterproductive, we need to welcome and be curious about the internal logic behind them and recognize that they are an indication of how much the conflict matters to them. To call people’s expression of emotion “venting,” and to take the attitude of “let the parties vent so that *then* we can negotiate,” is insulting as well as self-defeating because it disrespects the depth and importance of our clients’ feelings and ignores the fact that the parties’ feelings often hold the key to resolution of the dispute. We need, in other words, to see that *human beings* are in front of us, not a problem to be solved. Failure to honor and respect the people we’re working with as human beings inevitably undermines the entire negotiation endeavor.

The refusal to acknowledge, let alone grapple with, the emotional case tends to cause the legal and emotional cases to become conflated—and it is the conflation of the two cases that I believe is one of the primary causes of both conflict and impasse. The main reason for this is that when the legal and emotional cases are conflated, people are inclined to use legal means to accomplish emotional ends, which never works. A good example of this is a divorce case I mediated in which the husband shouted angrily at his wife, “I’m not paying her a penny in spousal support! *She* had the affair!” This tendency to use legal positions to correct past or present emotional injustices obscures the fact that *there is no legal solution to an emotional problem*. An emotional problem can only be resolved on its own terms; i.e., by an emotional solution, such as, in the above example of the cuckolded husband, an honest acknowledgment of the pain the affair caused and perhaps an apology.

Just as the repression of painful emotions pushes them out of mind but does not eliminate them, attempts to exile the emotional case from the negotiations are doomed to failure because people hold on to their feelings and grievances. Attempts to suppress or ignore people's need to share their emotional truth and instead focus on rational analysis actually tend to inhibit rational discussion because what the participants care most about isn't getting heard or addressed. As long as people's emotional truth goes unrecognized, they will naturally resist, if not unconsciously sabotage, attempts to resolve only the legal case. The unaddressed emotional case will tend to remain in the mix anyway, mucking things up like dirt in a set of gears, preventing a more dispassionate assessment of the parties' future needs, goals and options, if not precluding agreement entirely.

A major part of practicing law competently, then, requires that we differentiate the legal and emotional cases and in so doing recognize that the two cases have very different goals and methodologies. When working with the legal case, the point is to arrive at an agreement. When working with the emotional case, the point is not to arrive at an agreement, but at a *connection*. Resolution of the legal case usually means either vindication by a judge, settlement of a lawsuit or completion of an agreement. Resolution of the emotional case, on the other hand, usually has to do with recognition and acknowledgment of the emotional truth of one or both parties. The legal case, by its nature, requires methods that lawyers are already familiar with: rational analysis, problem-solving, creativity, attention to material interests, and so forth. The emotional case, by its nature, requires methods that have heretofore been relegated to the realm of psychotherapy, and has goals that are relational, such as recognition, connection and mutual understanding. The key is switching from one approach to the other as needed depending on which case is calling for attention at any given moment.

Many professionals use analytical thinking and problem-solving as a defense against letting the genie of powerful and painful emotions out of the bottle and having to navigate unknown emotional waters. Yet, if the parties' pain is what the dispute is about at its core, I believe we have a professional and ethical obligation to explore that dimension with them. As the poet Rumi wrote some 800 years ago, "The cure for the pain is in the pain." Such exploration is not about mere catharsis, but about helping our clients give voice to what matters most to them *and* about opening the door to the path most likely to lead not simply to agreement but to meaningful resolution. This is not something your thinking mind can figure out. But your heart can.

EXPLORE MORE ON THESE TOPICS

Mediation

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Claudia M. Viera, Esq.

The Benefits of Video-Conference Mediation – Available Now

By Claudia M. Viera March 27, 2020

Attorneys (and mediators) are grappling with the best way to mediate cases, given the current Covid-19 shelter-in-place order. For attorneys concerned with supporting their clients during this difficult time, it is worth considering video-conferencing instead of re-scheduling mediation dates. While some mediations may require in-person mediations at a later date, many do not. Clients may benefit from the security of resolution sooner rather than later, and they can achieve this through the use of video-conferencing.

As a mediator with over 15 years of experience conducting in-person sessions, I have been pleased to find that the mediations I have conducted by Zoom video conference (as well as Facetime video conference) have been remarkably effective. I have found that Zoom, in particular, allows the mediator to create a reasonable simulation of the in-person joint session and confidential private caucus meetings.

Using Zoom, I have held private and fully confidential caucus meetings with different parties and their attorneys in breakout rooms (just as would occur in ordinary in-person mediations.) Zoom breakout rooms do not allow participants outside the breakout room to hear or see anything that is happening inside the room, so it effectively protects conversations from the other side and from the mediator, when desired.

With Zoom, it is also possible to share documents privately with the mediator in the breakout room. In addition, it is possible to share a whiteboard which the mediator can use to demonstrate a decision tree risk analysis for each side separately.

Protecting the Attorney-Client Privilege – Breakout Room Alternative

As a mediator, I understand that virtual private conference rooms may seem risky to some attorneys. Therefore, some attorneys might prefer using separate connection points for phone calls/video conferences with their clients to ensure total and complete privacy (even from the mediator). These options work well, as long as mediators ensure that all participants can be reconvened with no more than five or ten minutes' notice. Having all parties available at all times helps streamline the mediation process considerably.

Advance Preparation for Zoom Video-Conference Mediations

Here are some key steps to take in advance to ensure an effective use of Zoom video conference in mediation:

1) Hold a joint, pre-mediation telephone call with the mediator and all counsel to ensure that the logistics are clear to everyone. Ensure you discuss how the day will be structured, that the mediator

will send the appropriate video link, whether there will be a joint session or if it will take place in caucus (breakout rooms), how the mediation documents will be signed, and so forth;

2) On the call, discuss whether attorneys would be more comfortable having a separate contact line with their clients which they organize themselves (and can utilize when the mediator is not in their breakout room);

3) Ensure that all cellphone numbers and email addresses are exchanged prior to the mediation (including those of the parties) as each participant will generally sign in separately during this shelter-in-place period;

4) Ensure that everyone sets aside the entire day for mediation and understands that scheduling other work calls will diminish and delay the process for all (although, of course, other work can be done and calls can be made while the mediator is with the other party);

5) Stress the importance of signing in to the mediation from a private, quiet room from a computer (rather than a cell phone) to ensure maximum connectivity and enhanced communication. While cell phones are adequate, the screen is generally too small to allow for effective sharing of documents, photos or other image-intensive data;

6) Encourage all parties to download and practice with Zoom prior to the date of the mediation. Using the free version of Zoom to communicate with family members is an ideal way to practice in advance;

7) Be flexible! These are unusual times and may call for unusual modes of negotiation while we work to ensure your clients' needs for resolution, certainty and fairness are met effectively.

I look forward to serving you at your next mediation – whether online or eventually in person. For now, stay safe, and let's all do our part to protect each other by meeting virtually.

About the Author:
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At what cost? Rethinking cost-benefit analysis to accelerate dispute resolution: *A litigator turned general counsel turned mediator borrows from the behavioral science.*

-**Mark LeHocky, ADR Services, Inc.**

Many civil mediations follow a similar pattern, starting with debates over liability and then segueing to debates over dollars. Money is usually the primary if not the sole focus, leading to some lively but many tired exchanges over how many dollars a dispute is worth.

What usually gets short shrift in those exchanges are the indirect costs of most disputes — people time and resources, distraction, and lost opportunities. Yet those indirect costs often eclipse the direct costs when considering everything impacting most clients.

This reality isn't obvious to outside counsel, nor to clients who haven't yet suffered through a fully litigated matter. The solution offered here is a series of conversations designed to prompt earlier and more rigorous assessments of all such costs, tradeoffs, and alternative ways to end most disputes.

First, a confession: Yours truly didn't fully appreciate this phenomena until many years into an active litigation practice involving large cases that often lasted several years. During those days, the full impact of litigation on my clients seemed clear because we spent so much time together. However, it was only after becoming a general counsel working for one company that all the valuable time, focus and opportunities most disputes usurp became apparent.

Obvious categories of time lost include conversations with witnesses and decision-makers, preparing for key events (depositions, hearings, trials) and time spent collecting and interpreting documents and data. Less obvious is the time spent in internal meetings and one on one conversations assessing what happened and why, often precipitating further conversations and concerns about accountability. Concurrently, individuals and groups lose time and focus considering their role leading to the dispute. None of this helps anyone sell more widgets.

The other less obvious cost of most disputes — especially for clients new to a full-blown litigation — are all the opportunities that wither and die as disputes drags on. Such opportunities may involve a repaired business relationship — which becomes far less likely as lawsuits languish. Other lost opportunities include remedial steps to improve compliance and reduce damage exposure — something many defendants resist while a lawsuit remains alive precisely because those fixes will be cited as proof that prior practices were deficient.

So what to do?

Marshall all anticipated direct and indirect costs ASAP: Partnering together, in-house and outside counsel are best suited to raise all of these direct and indirect cost issues and are best served doing so right away. Outside counsel should craft realistic budgets for how well *and* how badly a litigation matter may evolve. Concurrently, in-house counsel can start counting the number of internal people to be involved and the hundreds or thousands of hours likely to be consumed if the dispute lingers on.

Anticipate resistance: All this information is needed to begin tempering the early enthusiasm or anger that many disputes precipitate: *How dare they sue us? How dare they fail to do what they should, forcing us to sue them?* These projections lay the ground work to counter the knee jerk rationalizations for launching forward forcefully: *It doesn't matter how much it costs; we have a principle to protect! If we don't take a firm stand here, others will consider us an easy target!* Let's first make sure we understand all those costs.

Play *for time to reassess:* Raising these tradeoffs does not mean they will immediately overcome the early enthusiasm and umbrage of many disputes. Indeed, it will often take a few rounds to refine these projections and prompt reasoned decision-making.

In her seminal work studying the impact upon people confronted with catastrophic news — typically dealing with their impending death — the Swiss psychiatrist Dr. Elisabeth Kübler-Ross (*On Death and Dying (Scribner 1969)* posited that most people go through a series of grieving stages, beginning with denial, then anger, and eventually (if all goes well) reaching a point of acceptance. While civil lawsuits and disputes are not life and death matters, much can be borrowed from her work — particularly the concept that adjusting to bad news often takes time. Indeed, the worse or more unexpected the news, the more time often needed to recalibrate.

That does not mean that counsel — inside or outside — should delay the conversation about all indirect and direct costs. The opposite is true. But as you approach those conversations, plan for multiple rounds to refine and reinforce the calculation of all costs and alternatives: *Given the likely costs ahead, let's kick the tires hard before we fully commit here.*

As well, by the second or third such conversation, the more direct expenditures on lawyer, expert and discovery costs often begin to hit home. At that point, clients can best measure and balance all the costs of litigating fully against the benefits of settling early on. As that happens, thank Elisabeth.

Mark LeHocky is a mediator and arbitrator with ADR Services, Inc. A former complex litigation attorney and public company general counsel, Mark was named 2022 Mediator of the Year for the San Francisco area through BestLawyers©'s voting system. He also teaches at

UC Berkeley's School of Law on the intersection of law, risk assessment and effective decision-making. See www.marklehocky.com.

JAMS ADR Insights

[PODCAST] Reflecting on the Emotional and Psychological Dimensions of Alternative Dispute Resolution

A podcast from JAMS featuring Stephen H. Sulmeyer, J.D., Ph.D., and Hon. Lynn Duryee (Ret.) on the emotional and psychological dimensions of ADR and the impact on mediators, lawyers and all parties involved

STEPHEN H. SULMEYER, J.D., PH.D.

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HON. LYNN DURYEE (RET.)

JAMS Mediator, Arbitrator and Referee/Special Master
Published March 15, 2022

In this podcast, JAMS neutrals Stephen Sulmeyer, J.D., Ph.D., and Hon. Lynn Duryee (Ret.) weigh in on how to differentiate between the emotional and legal aspects of a dispute, including walking through poignant examples. Mr. Sulmeyer and Judge Duryee discuss the role of tools, such as developing negative capacity, in successfully navigating the emotional elements of a case, as well as their thoughts on recognizing and addressing defense mechanisms exhibited by parties during proceedings. They conclude with reflecting on how the dynamic of proceedings has shifted amidst the transition to mostly virtual proceedings, and what to keep in mind to support better case outcomes.

JAMS · [PODCAST] Reflecting on the Emotional and Psychological Dimensions of Alternative Dispute Resolution

Moderator: [00:00:00] Welcome to this podcast from JAMS. In this episode, we're going to be talking about the emotional and psychological dimensions of dispute resolution, including virtual mediations and the wrinkles they've added to that landscape. With us are Stephen Sulmeyer, a lawyer, clinical psychologist and mediator, and Judge Lynn Duryee, also a mediator, who spent 21 years as a superior court judge in California.

So, thank you both for joining us. Judge Duryee, you and Stephen have been speaking and writing on the emotional and psychological dimensions of ADR for a while. How did your partnership first begin?

Judge Lynn Duryee: [00:00:44] Our partnership began about 15 years ago when I was the family law judge on the Marin County Superior Court and I realized I needed to do something to help settle the cases. I knew about settling cases, but I didn't know about settling family law cases. I don't know how it happened, but Steve showed up in my life and volunteered with me week after week, sitting down with stressed-out parents and helping them settle their family law disputes. We became good friends, and he has taught me so much about psychology and settling cases.

Moderator: [00:01:23] Stephen, in previous talks and articles, you and Judge Duryee both have discussed the differences between the legal and emotional case. Can you help us understand the difference?

Stephen Sulmeyer: [00:01:36] Sure. Well, the position that we've arrived at, really from experience, is that every dispute, and even every negotiation, has quote, unquote a legal case and an emotional case, and what we mean by that is that you can look at, let's say, a mediation that's currently in court from a legal lens. If you do it that way, you are seeing the way a judge would see it, the way a lawyer would see it, in terms of causes of action and kinds of evidence that you need to establish your case and so forth. All of that's what we call the legal case.

The emotional cases: What does the case actually mean emotionally and psychologically to the participants? We see that often these two have nothing in common. So, for example, on the surface, if you just look at the legal case, let's say a copyright infringement case, it looks like it's about a question of whether or not somebody copied somebody's copyrighted work, but from the emotional case point of view, it may be that, in fact, they hate each other.

This actually happened in my first copyright case. This was Saul Zaentz v. John Fogerty of [the band] Creedence Clearwater Revival. John was sued for copyright infringement. It wasn't about that. It was about that Zaentz hated him and Fogerty hated Zaentz. That's really what it was about.

So we found it to be useful to make these distinctions, to differentiate the legal case from the emotional case, because they require different tools, different languages, different skills to work with and resolve each one.

Moderator: [00:03:11] Judge Duryee, how about you? How do you see this? How have you seen this difference sort of manifest itself in the real world?

Judge Lynn Duryee: [00:03:19] I had a case last week that is a perfect example of this. There was a plaintiff who was suing someone for a highly charged sexual assault. It was really clear that the evidence did not back up her allegation. So, as a judge, if I were hearing the case, I'd be thinking about evidence and what the various witnesses might be testifying about and what [the] likelihood of success might be,

but that wasn't the thing that was going to settle the case. The thing that was going to settle the case was listening to what she had to say and how this event, as she perceived it, had affected her life. That was an easy thing for me to talk about: her emotions, her reactions, how she was doing now, what she was doing to recover. In that way, we were able to settle the case, whereas if I just focused on, as Steve said, the causes of action, the legal case, she would have hated me, and we would never have settled it.

Moderator: [00:04:22] Well, lawyers are not trained psychologists, but what can lawyers do to prepare their clients for these two kinds of cases, Stephen?

Stephen Sulmeyer: [00:04:32] Well, I don't think you need to be a trained psychologist in order to work with these concepts, but I do think you need to be cognizant of them. I think you need to do a little introspection to assess your own comfort level with dealing with these issues. In my experience, most lawyers are sort of overtrained with their rational minds but undertrained with their emotional minds, and tend to like to be in a position of control, in a position of being in familiar terrain, familiar territory, and don't want to tread where they feel less than fully confident.

So, to overcome that barrier, to the extent it exists, I think it's important to become familiar with some of these concepts, with the language that is necessary, the sort of logic that's necessary to deal with the emotional and psychological issues, to develop one's comfort zone so that one can work in an area with confidence.

Moderator: [00:05:33] Judge Duryee, obviously this is super important for mediators. Can you talk a little bit about that?

Judge Lynn Duryee: [00:05:38] Yes. It's important for everyone who's in the room; right? It's important for the mediator. It's important for the lawyer. And it’s important for the parties.

Just like Steve said, it's true about lawyers and judges who are acting as mediators, and it's true of lawyers who are acting as lawyers in a mediation. We're not trained as psychologists, and it makes us feel that we're not qualified. But you know what? We're all human beings who have had our experiences, and we care about the people who are coming to us in a mediation.

So, if you're a mediator, you want to welcome that emotional expression because that's probably going to be the key to settling the case. If you're the lawyer in a mediation, [it’s the] same. You're going to be with your client all day long. It's going to be a super-hard day for your clients. So be willing to be with your client through that hard day. A lot of times, participants in mediation are shocked that it's such an emotional experience for them. But of course, it's an emotional experience because something bad happened to them. It was so bad that it caused them to be involved in a lawsuit, and here, finally, is a day of resolution.

It's going to be a hard day, but hopefully the mediation process is going to help them get through to the other end and find some healing.

Moderator: [00:07:03] You both have discussed ego defenses in the past. Stephen, can you explain what they are and how they can impede a successful mediation?

Stephen Sulmeyer: [00:07:13] Sure, I can, but I think it's important to recognize that the ego defenses show up in different ways, depending on whether we're talking about the legal case or the emotional case. So let me lay a little bit of a foundation before I answer your question directly. One of the things that Lynn and I have found, again through experience, is that there is no legal solution to an emotional problem, and what we see is that people come to us in mediation with the legal case and the emotional case conflated. That in itself is an example of an ego defense, and I'll unpack that in a moment, but the way it can show up, for example, let's say, is a divorce mediation.

I'll just give you a line that somebody actually said to me in a divorce mediation. The husband was really angry with his wife because she'd had an affair, and he said, "I'm not paying her a dime of spousal support because she had the affair."

That is an example of the conflation of the legal and the emotional cases. He's talking about a legal issue, spousal support, but he's coming from his emotions. She doesn't deserve anything.

So I asked him a question, which was "Well, let's say, hypothetically, your wife was willing to agree to take zero in spousal support. Would you feel less betrayed?"

"Well, no, but at least then she'd know how I feel and how hurt I am."

"Well, maybe there's a more direct way to let her know that if that's important to you. Why don't you tell her?"

So that then opens up the emotional case, and so you can see that there's some resistance there to going into that pain and that humiliation of having discovered that his wife was cheating on him. So the defense was "I'm not going to feel my feelings. I'm going to focus on the legal case." Right?

This is sometimes referred to as an intellectual defense, which is one of the classic ego defenses. So, in order to answer your question, you have to ask yourself, "Which lens am I looking through?" Because, if people are addressing the legal case, sometimes they're employing ego defenses and sometimes they're not. Sometimes they're just analyzing the legal case in the way it needs to be [analyzed].

So I think we tend to see these ego defenses showing up when these two cases are conflated. They can show up in the following ways: One is the intellectual defense, and another one is what's called "projection." Projection is when there's something we hate about ourselves, something we dislike about ourselves so intensive that we have cut it off. We've split it off. We've repressed it into the unconscious. The problem is that things that are repressed don't like to stay repressed. Freud called this "the return of the repressed." So we end up seeing in others, projecting onto others, these split off parts of ourselves. So we may take a great dislike to our next-door neighbor and see them as being bullying or being insensitive when they secretly may be things we believe about ourselves. Next thing we know, we end up

in a boundary dispute, and we're in court or we're in mediation. We believe these things about them, not seeing that actually we're trying to defend ourselves from what it feels like to believe this to be true about ourselves.

Judge Lynn Duryee: [00:10:42] Can I just underscore what a profound point that is that Steve is making?

That's the kind of thing that is so useful for mediators and participants in mediation to appreciate—is that it's painful and it's hard, but it's often that thing that we're seeing in others, we're critical of it, or we're noticing it because it's something that is true within ourselves that we're not really saying.

Moderator: [00:11:10] I was going to ask you, Judge Duryee, if there are strategies available to mitigate against these defenses. I mean, what I hear both of you saying is at minimum sort of recognizing, again, the difference between the actual legal case and the emotional case.

Judge Lynn Duryee: [00:11:26] I'm going to answer this, but Steve, when I'm done, I want you to answer it because you know so much more about this than I do. But one of the things that I've noticed in myself is if I'm in a mediation and someone's upset and they say something to me like "you're not being fair" or "you've made up your mind already" or "you're being judgmental" or "you're believing what the other..."—something that challenges my neutrality and would cause me to maybe react—I have now learned that I don't need to react, that [it's] just my ego that's getting involved.

The thing that's important for me is just to practice awareness in that moment and to remember to keep my heart and my mind on the person who's speaking and find out why that seems important to them or how they feel like they've been wronged, rather than just reacting because my ego has been hurt and I feel I need to defend myself.

Steve, what about you? How do you answer this question?

Stephen Sulmeyer: [00:12:24] Well, I am following right on what you're saying, Lynn. There's a lot of sort of technical ego defenses that would take some unpacking, like projective identification and transference. I don't want to take the time to get into those, but I think Lynn hit it on the head when she was saying that the defenses are to protect ourselves from feeling bad about ourselves feeling painful emotions, basically feeling anything that we believe we can't tolerate.

That's really the common denominator, I think, with these various ego defenses. So, framed that way, I think it makes it a lot easier to see that what's going on is people are scared. They're afraid that they're going to feel something they can't handle. Typically, there's two sort of broad categories of these kinds of defenses, and one is "I'm not going to feel, so I'm just going to just be in my head, just live from my neck up."

The other way is what I sort of call the “hysterical defense,” which is “I'm not going to feel my feelings by pretending to feel them. So I might seem to be very feeling, very emotional and loud and expressive, and in fact, I'm not feeling my feelings at all.” It can look like it to the untrained eye, but bottom line is, people don't want to be vulnerable.

They don't want to feel things they can't tolerate, and, in a sense, if they do, they kind of collapse in a sort of a regressed way to how they were when they were two or three years old and were overwhelmed by feelings they didn't have the capacity to tolerate. That's really what they're trying to do, shore themselves up, strengthen their ego so that they can sort of hold it together and not disintegrate into their worst nightmare of who they secretly believe they are.

Moderator: [00:14:17] You both have stressed the need for lawyers and their clients to develop their negative capacity. So, first of all, let's define that. What is negative capacity, Stephen?

Stephen Sulmeyer: [00:14:30] Broadly defined, it's the ability to tolerate the intolerable. So I was just talking about how, when we're very little, we are exposed to feelings that we cannot tolerate. Babies don't have that capacity. Toddlers don't have that capacity. So we develop various kinds of defenses and filters so that we don't have to fully feel those feelings.

Negative capacity is something we have to develop so that when we are exposed to these feelings—because, as Lynn was pointing out, like the sexual assault case, people actually are feeling some intense feelings, fully or partially. We're going to resonate with that. We're in the same interpersonal field, and we want to resonate. We want to connect empathically, but if it triggers our own defenses, our own fears about what we can tolerate, we're not going to really be able to attune with that person. We're not going to really be able to be in empathic contact with that person. So it really behooves us to develop the internal capacity to stay present and to stay open to whatever's arising in us. So what we call “negative capacity” really comes from John Keats’ "Ode on a Grecian Urn." He called it “negative capability,” and really there are several components to it.

One is mindfulness. You have to be able to be aware of what's arising in you, and you have to be aware of how that's impacting you. Secondly, you have to develop what Eric Voegelin called “therapeutic distance,” which is the ability to maintain a certain amount of reflective distance—I think was the term he used, reflective distance—which is the ability to reflect on what is arising in you. So there's a certain almost subject-object distance, and that provides a little sense of a buffer.

Judge Lynn Duryee: [00:16:25] So sometimes in mediation, people are upset. Sometimes people will start yelling, and it can be very emotional. If you're a lawyer or a mediator in that room, you might think “I have to get out of here. This is awful. I want to leave” or “I want to yell back.” It kind of triggers that fight or flight thing.

Steve is the one who taught me about expanding your negative capacity. I, often in a mediation, will have a Post-it in front of me that says “expand your negative capacity.” For me, what it means is

reminding myself that I can handle this, that I'm big enough to be able to handle someone else's terrible, emotional expression, that I do not need to react to it.

Steve, I remember the exact moment when you taught this to me, and it was during a family law mediation with a know-it-all mediator. Do you remember that? And what you said to me then?

Stephen Sulmeyer: [00:17:26] Vaguely, but go on.

Judge Lynn Duryee: [00:17:28] We had a very confusing case, and there were two sides, and they were diametrically opposed, and we took a recess, and the other mediator says, "I think I've got it all figured out."

Do you remember what you said?

Stephen Sulmeyer: [00:17:42] I remember what he said. He said, "She's lying," and then you turned to me and said, "Well, Steve, what do you think? And I said, "I'm confused."

Judge Lynn Duryee: [00:17:51] That's negative capacity; right? [It's] being able to not feel like you need to know all the answers, that you can be confused, and that makes you open and curious to hear more instead of frustrated that you're trying to get a difference, trying to get a certain solution based on what you think the facts are.

Moderator: [00:18:10] I was about to ask, as a mediator, can you help set the stage for more negative capacity in the room? Do you feel like you can have an impact on other people's negative capacity?

Judge Lynn Duryee: [00:18:22] Totally. Because one of the things that you're doing as a mediator is repackaging something you're hearing in one room so that it can be received in a better light when you explain in the other room. For example, in this room, you think that you're acting in good faith and the other side is being unreasonable because your offer is good and you think the demand is too high, but you know what's crazy is in the other room they think exactly the same thing. So we're two sides of the same coin.

Moderator: [00:18:59] I want to touch on virtual mediations and their impact on the emotional and psychological challenges of ADR. Stephen, what have you noticed over the last couple of years, when virtual mediations have really become the norm?

Stephen Sulmeyer: [00:19:18] I haven't seen that much of a difference. I certainly prefer in-person mediations. I'm a big fan of bringing people together in joint session. It's certainly a lot easier in person to read body language and really just to feel into the interpersonal field with what's happening, but we managed to do fairly well in the virtual realm, and we still are faced with the same kinds of challenges.

We've just been speaking about like why does it matter—whether you're [meeting] virtually or not—why does it matter if you make this distinction between the legal case and emotional case? Really the bottom-line reason I think is because that's what people really care about. They care about the emotions

first. They care about the emotional case first. Can I give you an example of that?

Moderator: [00:20:06] Absolutely.

Stephen Sulmeyer: [00:20:07] So this was a family law case—another one—and the husband was living in the family residence. The wife had moved out, and when we pointed out "Hey, you cannot afford"—we had a financial neutral—"you can't afford to stay in this house. You couldn't afford it before when you were one family. Now that you're split into two, you certainly can't afford it." And the husband's reaction was "I am not moving out of the house. Don't mention it again."

"But, well, take a look at this spreadsheet."

"I'm not talking about the house. Don't mention it again."

And, actually, it was the financial neutral who said, "Help me understand what's important to you about staying in the house."

He said, "Well, that's where she's going to come back to me."

So you could hear a pin drop in that room.

So the wife was very compassionate and kind and acknowledged that and said, "You know, with all the compassion in my heart, that's not what's happening. I'm not coming back."

So he was finally able to overcome emotional ego defense and allow himself to grieve, and he shed tears, but that's what he was defending against. Then, once they'd had that missing conversation and he could actually allow himself to grieve, that was it. That was the resolution of the emotional case.

Then he took a look at the spreadsheet and said, "Oh my god. I can't afford to stay in this house. We've got to sell it."

Moderator: [00:21:34] He had to first settle the emotional case. Judge Duryee, how about you? Have you noticed any changes to the emotional and psychological dimensions of cases in the virtual sessions?

Judge Lynn Duryee: [00:21:50] I have. In addition to what Steve has talked about, as we all know, Zoom—or virtual mediations have pluses and minuses. The pluses are sometimes people in their own homes—you know, when their cats are there and they are doing the laundry at the break and kids are running around in the background—feel more comfortable, and you can sometimes settle into the mediation faster, but sometimes as a mediator, you have to work harder because you're not in the same room. They can't feel the love that you're trying to convey to them. Sometimes their video is off or Wi-Fi is terrible. So a lot of times I can't see them, but I know that they can see me. So I am working harder to make sure that I'm looking into the camera, and I'm making sure that I'm projecting myself, even though I can't—I'm not getting the feeling back from them. I'm trying harder to show that I'm there for them and that I care about them.

Then [there are] other things too, [like] that we're so used to sitting in front of the computer all day, but that's not the same as living your life. So just being mindful, like let's all take 10 minutes and go outside and get some fresh air because we're not in a room together and we need to see some natural light. Little things like that have made a difference.

Moderator: [00:23:14] I suppose it's harder to make a connection with certain parties, and I take it that strategies for building sort of the emotional resilience that we've been talking about would apply to any kind of mediation, whether it's virtual or in person.

Judge Lynn Duryee: [00:23:28] Yes, but like, for example, there's such a thing as a "Zoom room," where everyone's in a room and it looks like you're looking at them from the end of a conference room table, quite different from looking at them just from the shoulders up. So you have to find a way to be able to connect in that room when I feel like you're sort of shouting at them.

Moderator: [00:23:49] For sure, a major challenge indeed. I know there is a lot more to discuss, but let's leave it there. I want to thank our guests, Stephen Sulmeyer and Judge Lynn Duryee, for a fascinating conversation. You've been listening to a podcast from JAMS, the world's largest private alternative dispute resolution provider.

Our guests have been Stephen Sulmeyer and Judge Lynn Duryee. For more information about JAMS, please visit www.jamsadr.com. Thank you for listening to this podcast from JAMS.

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Claudia M. Viera, Esq.

Key Security Features for Zoom Mediations - Prevent 'Zoom Bombing'

By Claudia M. Viera April 6, 2020

Confidential and secure conversations are a hallmark of the mediation process. Mediators who use Zoom video conference for their mediations must ensure these conversations are protected and private to the greatest extent possible.

While the risk is likely low that an unwanted attendee would appear in a private mediation, or that the mediator would fail to notice, this article summarizes key security features that mediators should use to ensure their mediations are confidential and secure. Zoom (zoom.com) continues to update its security features, so new options may soon be added.

I. Use a Mediation Waiting Room

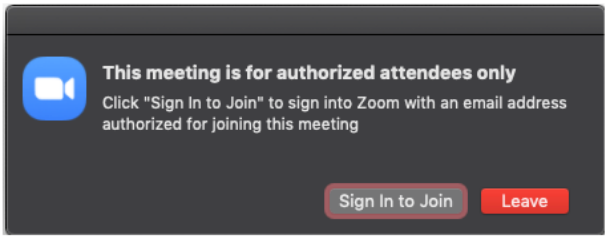
One of the best ways to use Zoom for private mediations is to enable the **Waiting Room (link)** feature. The Waiting Room is a virtual home page that stops your parties from joining the mediation until you admit them. You should admit only those you have invited to the mediation at the appointed time.

The mediator (host) can customize Waiting Room settings for additional control, and can even **personalize the message** attendees see when they arrive in the Waiting Room.

II. Manage Mediation Participants

Other features to help secure your Zoom mediation include:

• **Allow only invited attendees to join:** If someone tries to join your mediation and is not logged into Zoom with the email through which they were invited, they will receive this message:



The above is useful if you want to control your mediation guest list by invite only.

• **Set up two-factor authentication:** Create a password for your mediation. Generate a random Meeting ID when scheduling your mediation and require a password to join. For greater security, share the Meeting ID separately from the password by email or text message to the parties.

• **Lock the mediation**: When you lock a Zoom mediation after it has started, no new participants can join, even if they have the meeting ID and password (if you required one.) To lock the mediation after it has begun, click Participants at the bottom of your Zoom window. In the Participants pop-up, click the button that says Lock Meeting.

• **Mute participants:** Mediators can mute/unmute individual participants or all of them at once. Mediators can block unwanted, distracting, or inappropriate noise from other participants. You can also enable 'Mute Upon Entry' in your settings to keep background noise down in large mediations.

Each party can temporarily unmute themselves by pressing and holding the space bar.

• **Turn off file transfer:** File transfer allows people to share files through the in-meeting chat. Turn this off to keep the chat from receiving unwanted content.

• **Turn off annotation:** You and your attendees can highlight and mark up content together using annotations during screen share. You can disable the annotation feature.

• **Disable private chat:** Zoom has in-meeting chat for everyone, and it allows parties to message each other privately. You may restrict parties' ability to chat with each another during the mediation (which has some downsides also.) Disabling chat prevents anyone from getting messages during the mediation. One downside of disabling chat is that parties/attorneys cannot use the Help feature to contact you when they are in the breakout room and you are not. They may instead use private cell phone calls or text messages to reach you.

III. Control Screen Sharing

The mediator should not give up control of her screen, especially when hosting a large mediation. You can control this either before or during the meeting in the host control bar settings.

To **prevent parties from screen sharing** during a video-conference, use the host controls at the bottom, click the arrow next to Share Screen and then Advanced Sharing Options. Under "Who can share?" choose "Only Host" and close the window. You can also lock the Screen Share by default for all your meetings in your web settings.

At times when you would like an attorney to share the screen, you can enable this feature again during the mediation.

IV. Other Features to Control the Mediation

The following features should not be necessary if you have taken the precautions described above. However, in the case that an uninvited attendee appears:

• **Remove unwanted or disruptive participants:** From the Participants menu, you can hover over a party's name, and several options will appear, including Remove.

• **Allow removed participants to re-join:** When you remove someone, they can't rejoin the meeting, unless you alter your settings to allow removed participants to rejoin. This is useful in the case where you accidently remove the wrong person.

• **Put party on hold:** You can put each participant on a temporary hold, including the party's video and audio connections. Click on the party's video thumbnail and select Start Attendee On Hold to activate this feature. Click Take Off Hold in the Participants list if/when you are ready to invite them back.

• **Disable video:** Mediators can turn a party's video off. This will allow mediators to block unwanted, distracting or inappropriate attendees.

V. Mediator Best Practices

1. Do not use your personal meeting ID to set up mediations. Use an automatically-generated ID.

2. Do not record mediations or allow others to record. Specifically state at the beginning of your mediation that you do not consent to being recorded. Include a similar statement in your Agreement to Mediate and/or Confidentiality Agreement.

3. Consider potential risks before sharing documents via screen share. It may be wise, at this time, to indicate no sharing of attorney-client privilege materials via Zoom screen share.

4. Use chat only for logistics. Do not discuss attorney-client privilege materials in the chat feature.

5. Recommend that attorneys practice using Zoom with their clients prior to the day of mediation to work through technical challenges. Cellphones function, but are not ideal, and should be used as a last resort if a computer is unavailable.

VI. Other Thoughts

New flaws and fixes for those flaws are being discovered regularly. It may be that you prefer to utilize other software platforms, such as Webex,

among others. Zoom continues to update its security features weekly. In addition, Zoom's ease of use for calendaring mediations, and for hosting breakout rooms (caucuses) during mediations continues to be quite useful.

No matter what your choice of virtual platforms for your mediations, ensure you follow all security protocols and encourage your parties to be patient and flexible as we all navigate these unusual times.

I look forward to serving you at your next mediation – whether online or eventually in person. For now, stay safe, and let's all do our part to protect each other by meeting virtually.

**Ideas above are based on tips from Zoom (March 20, 2020) in How to Keep the Party Crashers from Crashing Your Zoom Event*

About the Author: *Claudia Viera, Esq., is a San Francisco Bay Area mediator focusing primarily on employment, business and contract disputes. For more information, please contact info@vieramediation.com or 510.393.7117. www.vieramediation.com*

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Mark LeHocky is a mediator, arbitrator and special master with ADR Services, Inc. Mark previously served as general counsel and a senior executive to Dreyer's Grand Ice Cream, Inc. and Ross Stores, Inc., where he managed all legal affairs and litigation including intellectual property (IP), product claims, contract, insurance coverage, employment and consumer class actions and other disputes.

As general counsel, Mark crafted and tested innovative dispute resolution programs. He also helped design and execute Dreyer's multi-stage merger transaction with Nestlé, S.A., the world's largest food company, and then developed ADR and litigation management training for Nestlé attorneys worldwide. Prior to his GC work, Mark spent two decades litigating IP, antitrust, commercial, class actions and other complex disputes for clients ranging from small businesses to Fortune 100 companies.

Mark began mediating in 1999. His nationwide ADR practice today includes class actions, IP, insurance, contract, employment, mass and individual torts and malpractice disputes. Mark also teaches at U.C. Berkeley's Law School on the intersection of law, risk assessment and business decision-marking. A collection of his articles are available on his website: www.marklehocky.com.

Mark earned his BA from UCLA and his JD from U.C. Berkeley. For his work, he has repeatedly been voted a Best Lawyer in America for Mediation by *Best Lawyers*© and was voted 2002 Mediator of the Year for the San Francisco area.

COMMISSIONER PALVIR K. SHOKER

BACKGROUND:

Commissioner Palvir Shoker was sworn as the Court Commissioner for Contra Costa Superior Court in November 2021. Commissioner Shoker presides over Department 50 and handles Traffic matters, Small Claims, Unlawful Detainer, Civil Harassment, and Misdemeanor Arraignment calendars.

Before becoming a Commissioner, Ms. Shoker served as a Pro Tem Judge and was the Court Mediation Program Director for The Congress of Neutrals, a non-profit organization providing free Mediation services in Contra Costa Superior Court. She served as a volunteer Mediator in hundreds of cases involving Personal Injury, Neighbor Disputes, Civil Harassment, Unlawful Detainers, Landlord-Tenant Disputes and Small Claims. Shoker was an Adjunct Professor at Chabot College and taught Contracts to Paralegal students.

Ms. Shoker served as President of ADR Section of Contra Costa Bar Association from 2020-2021. She practiced Personal Injury and Employment Law from 2001-2014 before starting her mediation practice in 2014. Ms. Shoker earned her Juris Doctorate from Santa Clara University Law School and her Bachelors of Science in Accounting from California State University, Sacramento. Ms. Shoker is fluent in Punjabi, Hindi, and Urdu.

PANELS:

1. Mediating with Self-Represented Litigants; Mediation Boot Camp, September 27, 2019
2. A Mediation Skills Workshop: Who Wins-The Commercial Landlord or Tenant November 22, 2019
3. You can call me Al: An Exploration of Gender Identity and Civility, with Just a Touch of Current Events, October 17th, 2019
4. Pathways to Mediation: Focusing on Increasing Diversity in ADR Field January 19th, 2021
5. Pathways to Mediation II, June 3rd, 2021
6. Housing Mediation Training, June 29th, 2021
7. Mediation Training for Unlawful Detainer Mediators, August 11th, 2021
8. Watch What You Declare, June 21st, 2022

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Nathan Scheg

Co-Founder at Ironhorse Mediation Services
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Summary

Experienced attorney with a demonstrated history of working in the real estate and construction law fields. Adjunct Professor in one of the nation's top Moot Court and Legal Writing programs. Juris Doctor degree from the University of California, Hastings College of the Law.

Experience

IRONHORSE MEDIATION SERVICES

Co-Founder / Mediator / Arbitrator

July 2015 - Present

Ironhorse Mediation Services provides mediation, arbitration, special master, and discovery referee services throughout the San Francisco Bay Area. Our mediators have extensive experience resolving a wide range of disputes, focusing primarily on real estate, construction defect, and business-related matters. Ironhorse Mediation Services successfully resolves cases ranging in size and complexity, with the goal of achieving results more efficiently and cost effectively than through the litigation process. Our clients benefit from having a neutral third party help them find a way to resolve their case without turning the result over to a judge or jury.

Ironhorse Mediation Services provides both pre-litigation and course-of-litigation services to our clients. The cost of mediating a case is minimal compared to the costs incurred through the life of a lawsuit. The high cost and long delays associated with the trial of civil matters often make litigation an impractical method of resolving disputes. It is not uncommon for the attorney's fees, expert witness fees, jury fees, court fees and other related costs to exceed the amount in dispute. Mediating a case before a lawsuit is filed enables the parties to present their case to a mutually selected neutral person before any money is spent on litigation. Mediation can be successful not only prior to litigation but also during litigation. During litigation, mediation assists in resolving disputes and succeeds in improving the parties' communication, identifying their underlying interests, narrowing the issues in conflict, and helping them more carefully evaluate their litigation options, moving the dispute towards a quicker, more cost-effective resolution.

Ironhorse Mediation Services mediators also volunteer substantial time in their communities, serving as volunteer mediators for the California Superior Court in Contra Costa County.

IRONHORSE LAW GROUP PC
Founding Shareholder / Attorney
April 2014 - Present

Nathan Scheg represents clients in a broad spectrum of areas focused on and related to real estate and construction law. Nathan has represented some of California's largest developers and general contractors in all facets of litigation, including claims of defective construction, mechanic's liens and contract disputes, from project initiation and preparation of contract documents through dispute resolution, including negotiation, mediation, arbitration and trial. Nathan has represented small businesses in matters ranging from commercial lease negotiations and other business transactions to contract litigation and other disputes. Nathan also represents individual homeowners, landlords and tenants in neighbor disputes, unlawful detainer, wrongful foreclosure and other residential real estate matters.

Nathan is also a trained mediator, offering mediation and other conflict resolution services to small and large businesses, individuals, and their lawyers, both before and during the course of litigation. Nathan utilizes these skills not only in mediation but also to bring an innovative problem-solving ability to all the matters that he handles on behalf of his clients.

UC HASTINGS COLLEGE OF THE LAW
Adjunct Professor
August 2009 - Present

The LW&R course provides students with a comfortable, small-class atmosphere in which they can develop the ability to analyze a problem, research the law, and logically and effectively communicate the results of the research in clear, simple English.

In the Spring semester of the first year, students take Moot Court. They write an appellate brief, deliver an oral argument, learn argumentative and persuasive legal writing, and continue to use computer-assisted legal research.

SCHEG LAW PC
Attorney/Owner
March 2009 - March 2014 (5 years 1 month)

Attorney representing individuals and businesses in a broad spectrum of areas, including real estate and construction law, commercial litigation, business transactions, personal injury and product liability. In the construction arena, represented some of California's largest developers and general contractors in all facets of litigation, including claims of defective construction, mechanic's liens and contract disputes from project initiation and preparation of contract documents through dispute resolution, including negotiation, mediation, arbitration and trial. Bought an innovative problem solving ability to those matters arising during the course of ongoing projects and transactions.

STRUCTUREDRISK™
Chief Operating Officer/Chief Legal Officer
October 2004 - March 2009 (4 years 6 months)

STRUCTUREDRISK™ is a nationwide risk management solution for the building industry specifically designed to reduce construction defect claims and the cost of litigation. The STRUCTUREDRISK™ solution is driven by a user friendly, intuitive web interface that facilitates the implementation of best practices for the insurance carrier and the developer. By using our break-through technology, STRUCTUREDRISK™ captures critical construction data in real time and connects our highly trained, claim-focused risk management auditors to the daily process of construction. STRUCTUREDRISK™ is the first and only program to cost-effectively integrate high level risk management expertise with the actual construction site.

SENN, PALUMBO & MEULEMANS, LLP
Attorney
2001 - 2004 (4 years)

Attorney representing corporations and individuals in real estate and construction law, commercial litigation, and business transactions.

SCAMPINI, MORTARA & HARRIS
Attorney
1998 - 2001 (4 years)

Attorney representing corporations and individuals in a well-respected general law practice, including litigation and transactional matters.

Education

University of California, Hastings College of the Law
JD, Law, 1995 - 1998

State University of New York at Binghamton
BA, Economics, Environmental Studies minor, 1991 - 1995

Volunteer Efforts

Contra Costa County Superior Court Pro-Bono Mediation Services, Trial Lawyers Care, Inc., Lawyers in the Schools, San Francisco Rescue Mission, Teen Challenge USA, Pleasant Hill Baseball Association, Diablo FC Soccer Club

Activities and Interests

Stand-up Comedy, Travel, Theater, Hiking and Outdoor Activities, Sports, Fine Dining

Stephen H. Sulmeyer, J.D., Ph.D.

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Biography

Stephen H. Sulmeyer, J.D., Ph.D., joined JAMS in 2019 as a full-time neutral after 20 years as a mediator in private practice. With a dual background as a commercial and intellectual property litigator as well as a clinical psychologist, Dr. Sulmeyer specializes in the settlement of disputes involving professional and intimate relationships (such as family law, probate and estate planning, elder law, closely-held and family businesses, workplace/employment, sexual harassment and partnership disputes), disputes involving high levels of conflict and emotion (such as professional liability, personal injury, partnership dissolutions, and family law), as well as commercial and business disputes. As a mediator he brings a high level of sensitivity and empathic skills that are particularly useful in cases involving party vulnerability (such as sexual harassment, discrimination and personal injury matters). His skill at working with the human issues that drive disputes has earned him a reputation for resolving the most challenging high-conflict and high-emotion cases.

Dr. Sulmeyer's approach to dispute resolution focuses on understanding as thoroughly as possible the parties' material and non-material interests, as well as their financial and legal positions—hence his commitment to thorough and diligent pre-mediation preparation. His ability to listen empathically, think analytically and communicate clearly allows parties and counsel to feel genuinely heard and understood, and ripens negotiations for creative and pragmatic problem-solving. His combination of tenacity, legal acumen and amiable practicality contributes to his high rate of settlement.

In addition to his mediation and arbitration practices, Dr. Sulmeyer is highly sought after as a speaker and trainer of dispute resolution, nationally and internationally. He is also the founder and former president of Integrative Mediation Bay Area, an organization that brings together psychotherapist, financial industry and attorney co-mediators in family law and other cases. Mr. Sulmeyer is the co-founder (with Judge Verna Adams) of the Marin County Superior Court's Interdisciplinary Settlement Conference program, in which mental health professionals and lawyers trained in dispute resolution team up to assist judges to resolve the most intractable child custody, probate and other civil cases.

ADR Experience and Qualifications

- 12 years of private practice litigation experience covering a wide variety of intellectual property, entertainment and general business matters
- 20 years practicing as a psychotherapist, during which time he honed his skills in empathic listening and understanding human behavior and motivations
- Highly experienced in resolving matters involving current and/or future relationships among the parties (e.g., employment, divorce/separation, partnerships, closely-held businesses, family businesses); high-conflict, difficult personalities; mental health issues; and substance abuse
- Co-founded the Interdisciplinary Settlement Conference program at the Marin County Superior Court; in its 12-year history, the program has maintained a greater than 80% settlement rate while substantially reducing the number of return visits by litigating parents

Representative Matters

Business and Commercial

- Breach of distribution agreement and alleged sale of counterfeit goods
- Disputes involving false advertising, misleading labeling, unfair competition, trade libel, interference with contract or prospective economic advantage and other business torts
- Commercial lease disputes and breach of contract cases,

- Cases involving claims of bad faith denial of insurance coverage, advertising injury disputes, and other insurance related matters
- Disputes involving partnerships, family businesses, and closely-held companies

Employment

- Cases involving claims of wrongful termination, sexual harassment, discrimination, hostile work environment, and breach of employment and independent contractor contracts
- Wage and hour disputes and other Labor Code violations
- Disability, failure to accommodate
- PAGA (Private Attorneys General Act) and class actions
- ERISA matters
- Industries: small and medium-sized business, tech, medical, restaurants, manufacturing, professional services

Entertainment

- Disputes involving right of publicity
- Defamation claims involving celebrities
- Cases involving breach of songwriting contracts and cross-claims for rescission and restitution of copyrights
- Cases of musical copyright infringement raising issues of protectability of style

Estates/Probate/Trusts

- Disputes between trustees and beneficiaries involving allegations of trustee malfeasance and other misconduct
- Extensive experience with cases involving opposed sibling factions, some involving mental illness, childhood rivalries and/or substance abuse
- Cases involving ongoing family businesses and complicated real estate holdings

Family Law

- Mediated hundreds of divorce, separation and custody cases of all kinds, many extremely high conflict
- Parenting plans involving challenging issues such as unusual and complex custody schedules, relocation, domestic violence, mental health issues, and drug, alcohol, sexual, and emotional

abuse
- Interviewed children to bring their voices into child-centered mediations
- Very high net worth individuals in cases involving estates valued in the hundreds of millions of dollars, including complex characterization, valuation and division issues involving stock options, RSUs, public and private retirement benefits, small businesses and professional practices
- Post-decree disputes involving adjustments to support and custody arrangements
- International/cross-border, including international custody
- Cross-cultural/multi-ethnic couples
- Same-sex and never-married couples

Intellectual Property

- Trademark, trade dress infringement, and unfair competition/ Lanham Act § 43(a) false advertising cases
- Patent infringement involving high tech and non-high tech products, software, and processes
- Copyright infringement cases involving computer software, musical compositions and recordings, marketing materials, among many others
- Piracy cases involving such things as designer clothing, musical recordings, and music-related artwork via illegal postings on the web and on social media platforms

Personal Injury

- Media and internet defamation cases, including online impersonation and posting of false sexually explicit material online
- Wrongful death
- Automobile-related and non-preempted workplace injuries
- Attorney and physician malpractice

Elder Law

- Cases involving disputes between siblings or sibling factions relating to the care of an elderly parent, sometimes involving dementia
- Access to and exclusion from an elder
- Elder financial abuse
- Conservatorships

Honors, Memberships, and Professional Activities

Completed Virtual ADR training conducted by the JAMS Institute, the training arm of JAMS.

Memberships and Affiliations

- Founder and President, Integrative Mediation Bay Area, 2008–2018
- Chair, ADR Section, Marin County Bar Association, 2005
- Member, Section of Dispute Resolution, American Bar Association, 2013-present
- Member, ADR Section, Mediation Division, Bar Association of San Francisco, 2002-present
- Member, Association for Conflict Resolution, 2005-present
- Member, Mediation Society, 2012-present

ADR Panels

- Mediation Panel, Marin and Alameda County Superior Courts
- Mediation Panel, United States District Court for the Northern District of California
- Mediation Panel, California Court of Appeal, First Appellate District

Selected Speaking Engagement

- Panelist, "Beyond the Barriers: Working With Non-Material Interests," Practica Collaborativa, Italy, June 2022
- Panelist, “Reflecting on the Emotional and Psychological Dimensions of ADR,” Center for Alternative Dispute Resolution, The Hawai'i State Judiciary, August 2022

Selected Publications

- Co-Author (With Hon. Lynn Duryee), “Managing the High-Conflict Litigant,” *California Courts Review*, Fall 2008
- Co-Author (With Hon. Verna Adams and Hon. Beverly Wood), “The Interdisciplinary Settlement Conference: A Grass Roots Alternative for Resolving High-Conflict Parenting Disputes in Lean Times,” *Family Court Review*, October 2015

Other Professional Activities

- Judge Pro Tem, Small Claims Division, Marin County Superior Court, 2004–2005
- Adjunct Professor, Institute of Transpersonal Psychology, 2001–2003
- Founder and Settlement Panelist, Interdisciplinary Settlement Conference Program, Marin County Superior Court, 2008–present

Background and Education

- Mediation Offices of Stephen H. Sulmeyer, J.D., Ph.D., 2001–2019
- Mediator, Northern California Mediation Center, 2002–2018
- Law Offices of Stephen H. Sulmeyer, 1993–1998
- Attorney; Morgan, Lewis & Bockius; 1989–1990
- Attorney, Graham & James, 1983–1984
- Ph.D., Institute of Transpersonal Psychology, 2001
- J.D., Stanford Law School, 1983
- B.A., With Distinction, History, Stanford University, 1980

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Claudia Viera focuses on mediation of employment and other business disputes.

Mediation Areas of Expertise

- Employment Claims
- Harassment
- Discrimination
- Retaliation
- Breach of Contract
- Business Disputes
- Wage/Hour Class Actions
- Landlord/Tenant
- Real Estate/HOA
- Video Conference

Contact

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CLAUDIA M. VIERA, ESQ.
Mediation Law Offices of Claudia Viera

MEDIATION EXPERTISE

Claudia Viera is a highly experienced and tenacious attorney-mediator who primarily focuses on employment, contract and business disputes. Ms. Viera draws on her years of legal experience as an employment attorney with Littler Mendelson, the largest employment and labor law firm in the nation, to promote effective communication and increased understanding between parties in conflict.

Since 2001, Ms. Viera has mediated nearly a thousand tough legal disputes. Her most recent work includes race harassment and discrimination, wage and hour class actions, disability discrimination, wrongful termination, sexual harassment, business dissolutions of partnerships, age discrimination and landlord-tenant disputes. Ms. Viera mediates in Spanish and has extensive experience with pre-litigation disputes in workplaces and among co-owners or business partners.

Ms. Viera works actively with both parties to help them achieve a better resolution than either would achieve in court. Ms. Viera believes that exploration below the surface of the dispute is often necessary to reach resolutions that have lasting value to her clients. To this end, she focuses on eliciting and clarifying each side's positions and then works closely to identify the interests and underlying concerns of each party. She simultaneously encourages true cost benefit analysis of litigation alternatives as she works to orient clients toward settlement.

LEGAL EXPERIENCE

Ms. Viera previously practiced employment law at Littler Mendelson, where she dealt with labor and employment issues, including disputes arising under Title VII, the Family and Medical Leave Act, the Americans with Disabilities Act, wage and hour laws, employment contracts and a variety of California state statutes. Ms. Viera worked with a variety of Fortune 500 companies in both state and federal court and later represented plaintiffs. Ms. Viera currently conducts investigations into complaints of workplace harassment and other claims, in addition to training supervisors on their management responsibilities under the law. Ms. Viera teaches a Mediation course at UC Berkeley Extension. She taught Conflict Resolution at SF State University for 10 years, and Employment Law at Saint Mary's College of California.

PANEL MEMBERSHIPS

- U.S. District Court, N. D. Cal. ADR Panel
- California Court of Appeal, 3rd Appellate Distr. Mediation Panel
- San Francisco Bar Association Mediation Services Panel
- Alameda County Court Mediation Panel
- Equal Employment Opportunity Commission (EEOC) Panel
- Yolo County Court ADR Mediation Panel

Publications

Worsening Economy Brings Increased Discrimination Charges: How Early Mediation Can Assist http://www.mediate.com//articles/vieraC1.cfm

Employment Mediation at the EEOC and DFEH: The Models and the Opportunities

Mediation Statistics at the EEOC and DFEH

Harassment Prevention Training in California: What Employers Should Know About AB1825

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MEDIATION TRAINING

Ms. Viera has participated in over 600 hours of mediation training, including:

- U.S. District Court, N. D. Cal. ADR Program
- California Court of Appeal, Third Appellate District
- Advanced Mediation Training, Center For Mediation in Law
- Northern California Mediation Center
- Harry Sloan Fellow for the Center for Mediation in Law
- Equal Employment Opportunity Commission
- Will Schutz Associates

EDUCATION

- J.D., University of California, Berkeley, Boalt Hall Law School
  - Assoc. Editor, Berkeley Journal of Employment & Labor Law
  - Assoc. Editor, Berkeley Women's Law Journal
  - Advocate in Spanish, Central American Refugee Clinic
  - Director, East Bay Workers' Rights Clinic
- B.A., Psychology, University of California, Berkeley, High Distinction
  - Phi Beta Kappa, 1990

PROFESSIONAL ACTIVITIES

- Lead Trainer/Lecturer, 40-hour Business Mediation Course, U.C. Berkeley Extension (2020-present)
- 2016-2017 President, The Mediation Society of San Francisco, Board of Directors (Board member 2011-2018)
- Five-term Co-Chair, Mediation Committee, Bar Association of San Francisco
- President, Board of Directors at SEEDS Community Resolution Center (2005-2008)
- Lecturer on Conflict Resolution, San Francisco State University
- Guest Lecturer on Mediation Skills, U.C. Berkeley, U.C. Hastings and Berkeley Law School
- Speaking Engagements on various mediation topics (see web site)
- Former Lecturer on Employment Law, St. Mary's College
- Member - California Bar Association, Association for Dispute Resolution of Northern California, Association for Conflict Resolution, The Mediation Society

Video conference mediations are offered during the pandemic.