CARDOZO JOURNAL OF CONFLICT RESOLUTION

VOLUME 19
NUMBER 1
2017

Mediation Ethics: A CAMP Courthouse Colloquy, United States Court of Appeals for the Second Circuit

Conversation between Kathleen Scanlon and John Feerick with Introduction by Chief Judge Robert Katzmann of the United States Court of Appeals for the Second Circuit

MEDIATION ETHICS
A CAMP COURTHOUSE COLLOQUY
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

On January 18, 2017, the United States Court of Appeals for the Second Circuit held its first Court Appeals Mediation Program "Courthouse Colloquy." The subject of the colloquy was mediation and ethics. What follows is a transcript of the discussions.

CHIEF JUDGE KATZMANN: Good afternoon everyone, my name is Robert Katzmann and I am Chief Judge[1] of the United States Court of Appeals for the Second Circuit.[2] Today is a very special afternoon as we inaugurate a CAMP courthouse colloquy on mediation and ethics.[3] This program owes much to Sally Pritchard and Kathleen Scanlon, who had this idea of bringing together all of the key players involved in the work of mediation in the New York community.[4] This really is a wonderful group and we are so grateful to those mediators in the group who volunteer their time to our

---

[1] Chief Judge Katzmann was appointed to the U.S. Court of Appeals for the Second Circuit in 1999, and became the Chief Judge on September 1, 2013. Prior to his appointment, he was Walsh Professor of Government, Professor of Law and Professor of Public Policy at Georgetown University, a Fellow of the Governmental Studies Program of the Brookings Institution; and president of the Governance Institute.

[2] The United States Court of Appeals for the Second Circuit is one of thirteen United States Courts of Appeals. Congress established the present-day Second Circuit Court of Appeals by the Judiciary Act of 1891. Its territory comprises the states of Connecticut, New York, and Vermont, and the court has appellate jurisdiction over the federal district courts in those states.

[3] Civil Appeals Mediation Program (CAMP).

[4] Sally Pritchard is the Director of Legal Affairs for the Second Circuit. She oversees the Staff Attorney's Office and the court's mediation program. She began her career as a law clerk to Judge Barbara S. Jones of the Southern District of New York. After practicing litigation at Debevoise & Plimpton, LLP, she clerked for Second Circuit Judge Dennis Jacobs. She was then a prosecutor in the Major Economic Crimes Bureau of the Manhattan District Attorney's Office before returning to the Second Circuit. She is a graduate of Yale University and Columbia Law School.

Kathleen M. Scanlon is the Chief Circuit Mediator for the Second Circuit. She is a graduate of Brown University and Fordham Law School. She began her career as a law clerk to Judge Louis L. Stanton of the Southern District of New York, and she practiced as a litigator at Simpson Thacher & Bartlett and Heller Ehrman. She was Senior Vice President at the CPR International Institute for Conflict Prevention and Resolution and is a long-standing adjunct professor at Fordham Law School.

Special thanks to Michael Kar, a law student intern at CAMP, for annotating the transcript. Mr. Kar is a J.D. Candidate, 2017, at the Benjamin N. Cardozo School of Law, where he is the Managing Editor of the ADR Competition Honor Society, and an Associate Editor for the *Cardozo Arts & Entertainment Law Journal*, Vol. 35.

court-appointed panel. This is a very special gathering because of who we have here with us.

I also thank Lou Lopez and his crew at the library for making the space available to us. Those of you who are members of the Bar may remember that this area used to be inaccessible to use as conference space because there were bookshelves. We've now converted it into a conference area; a very special gathering place it is.

Mediation is very important to the life of the Second Circuit and so we want to showcase its work. We have the chair of our legal affairs committee, Judge Denny Chin, who'll be speaking later. My role is simply to introduce the extraordinary John Feerick and then there will be a conversation with our wonderful mediator Kathleen Scanlon.

John Feerick elevates any place that he is a part of; there are very few individuals we can look at and say that it is certainly a special privilege to know that person. I think that all of us in this room who've had any association with John Feerick feel that way. I know that I certainly do.

It's not simply his numerous accomplishments as a dean, as a leader of legal education, as somebody who has been so fundamentally a part of our legal world—not just in New York, but in the nation—it's the values that he brings to everything that he does that makes all of us want to follow him, that makes us all feel that the world is a better place because of who he is and what he does.

As you know, he was for many years dean of Fordham Law School,[5] and he's now the founder and senior counsel of Fordham Law School's Feerick Center for Social Justice.[6] He also has served in a number of public positions: as a member of the New York State Law Revision Commission; as one of two representatives of New York City to the New York City Office of Collective Bargaining; as chair of the New York State Commission on Government Integrity;[7] as a special New York State Attorney General; and as president of the Association of the Bar of the City of New York.[8] He's been a mediator and arbitrator in many disputes, including

---

[5] John Feerick served as the school's eighth Dean from 1982–2002. From 2002–2004, he was the Leonard F. Manning Professor of Law at Fordham, and in 2004 was named to the Sidney C. Norris Chair of Law in Public Service.

[6] Fordham Law's Feerick Center for Social Justice works with students, alumni, lawyers, and community volunteers to connect low-income New Yorkers to the legal resources they need and cannot afford. *Feerick Center for Social Justice*, FORDHAM U., https://www.fordham.edu/info/20693/feerick_center_for_social_justice (last visited June 27, 2017).

[7] 1987–1990.

[8] 1992–1994.

labor disputes at the Jacob Javits Convention Center, the 1994 transit negotiations in New York, the NFL salary cap disputes, and NBA grievances. He's served in court-appointed positions to resolve disputes as a mediator and arbitrator. He's chaired the Ethics Committee of the Dispute Resolution Section of the American Bar Association; and the joint committee of the American Bar Association, the American Arbitration Association and Association for Conflict Resolution that developed model ethical standards for mediators.[9] He served as chair of the Professionalism Committee of the American Bar Association Section on Legal Education and Admissions to the Bar and the New York State Committee to Promote Public Confidence in Judicial Elections.[10]

He also chaired the New York State Committee to Review Audiovisual Coverage of Court Proceedings;[11] the Standards Review Committee of the Legal Education Section of the American Bar Association;[12] the Fund for Modern Courts;[13] and served as president of the Citizens Union Foundation.[14] He's been the chair of the board of directors of the American Arbitration Association,[15] and a founding member of the New York State Mandatory Continuing Legal Education Board. That's just the tip of some of the things that he has done. What I think is extraordinary is that he's not just a member of a committee. There are many big names who agree to have their prestige and name associated with what they are doing. But they don't really do much in terms of being involved in the life of what they are doing. But when John Feerick says he's going to do something, it's really a moral commitment to do it fully and to do it in a way that gives everyone a sense of confidence about what is to be done.

When Kathleen told me that John Feerick was going to be our first special guest for the inaugural CAMP colloquy, I thought this is great for us as a court because it elevates what it is that we are trying to do. And this event also fits well within our newly announced civics education project, "Justice for All: Courts and the

---

9 MODEL STANDARDS OF CONDUCT FOR MEDIATORS (AM. BAR ASS'N, 1994).

10 2002–2006.

11 1996–1997.

12 1996–1998.

13 1995–1999.

14 1987–1998.

15 1997–2000.

Community."[16] One purpose of the project is to bring together members of the bar and law students at the courthouse to talk about issues that are central to the administration of justice. I turn it over to Kathleen and Dean Feerick.

CHIEF CIRCUIT MEDIATOR KATHLEEN SCANLON: Thank you, Chief Judge. Welcome, Dean, and members of the audience. As a preliminary remark, this is the first CAMP colloquy in what we hope will become an annual event. We have gathered the many facets of the ADR Bar for this conversation—we have mediators, advocates, in-house counsel, leaders from the ADR provider organizations, including the CPR Institute, the AAA and JAMS, committee chairs of the Bar Associations, law students and academics. It's a nice mix of our ADR Bar and we are looking forward to exploring and opening up a dialogue about certain ethical issues that may arise in the course of mediations.

I couldn't agree more with Chief Judge Katzmann when he highlighted the values that you represent and I am sure those values permeate your role as a mediator. How did you become involved in mediation?

DEAN JOHN FEERICK: I cannot start by just answering that question. I first need to say that I don't feel worthy of what you said, Chief Judge, and I just thank you so much for your generosity of spirit and friendship. It is an honor for me to be present here.

How did I get involved in mediation? When I left law school, I joined a then very small firm of ten or eleven lawyers called Skadden Arps. They represented employers in the airline industry and a printing union. I got involved working with the partners in connection with collective bargaining negotiations and began participating in those negotiations. I saw the actual function of mediators under the Railway Labor Act, under the Federal Mediation Service, and under the New York State Mediation Service. To my surprise, Robert Kheel is here today and I consider his father, Ted Kheel, the finest private mediator I met in the collective bargaining

---

[16] This project seeks to bring courts closer to the communities the judiciary serves and to increase public understanding of the federal judiciary. *Mission*, JUSTICE FOR ALL, http://justiceforall.ca2.uscourts.gov/index.html (last visited June 30, 2017).

context.[17] At the time, I was an advocate representing our clients; I was not a mediator. I watched the mediators and how they functioned: how they used their humor; constantly moving back and forth from one party to the other; all while holding us together to try to reach an agreement. That's really how I got involved in the mediation process, initially, as an advocate.

In all my years at Skadden Arps, I was involved in building their labor and employment practice. I was also involved in other forms of problem-solving. When I became Dean of Fordham Law School[18]—and I've just covered twenty-one years while at Skadden Arps—I started to get calls asking me if I would serve as a mediator or arbitrator. I never expected to do any of that. I expected to be a full-time law dean, following a great predecessor, Joe McLaughlin,[19] who in turn followed another great predecessor, Dean Mulligan.[20] Both were dear friends of mine.

People saw in me as an academic who had experience in mediation and arbitration and thought that someone in the academic setting could be a good neutral. So, for the past thirty-four years while at Fordham Law School, as both Dean and as a professor, I've been engaged as a neutral in all kinds of matters. Both public and private matters come to me from parties and lawyers and sometimes courts. A lot of the matters are pro bono.

KS: You were telling me when you were Dean, you often ended up mediating on a Saturday.

JF: I tried as much as possible to get parties to agree to work on a Saturday and a Sunday. There is somebody here in the audience who remembered me as a mediator and holding the mediation on a Saturday. I just asked her, "How did the matter end?" And she said, "Well, we didn't successfully mediate the matter, but you said to the other side if I got a TRO [Temporary Restraining Order], they would have no leverage." And I said, "What happened?" She

---

17 Theodore W. Kheel, 1914–2010, was a mediator who was instrumental in resolving multiple high-stakes labor disputes throughout his lifetime, such as the New York City teacher's strike of 1968. Robert Kheel, his son, is a member of CAMP's court-appointed mediator panel.

18 John Feerick was dean from 1982–2002.

19 Joseph M. McLaughlin, 1933–2013, served as Dean of Fordham Law School from 1971 to 1981. He left this position as Dean to become a U.S. District Court Judge for the Eastern District of New York and later was appointed to the Second Circuit in 1990 by President George H.W. Bush.

20 William Hughes Mulligan, 1918–1996, served as Dean of Fordham Law School from 1956 to 1971, at which time he was appointed to the Second Circuit by President Richard Nixon.

said, "I got a TRO and I had leverage; they should have settled it." [Laughter]

KS: Recognizing that confidentiality obligations still bind you, could you give us a sample of some of the cases that you've been called upon to mediate?

JF: I was a mediator for family homelessness in New York City for almost three years. The City and the Legal Aid Society couldn't talk to each other about the many issues that had to do with family homelessness. I was asked by the Legal Aid Society if I would serve as a mediator. I said yes, but only on the condition that as part of my mediation team I had assigned to me people who knew something about the family homelessness situation, which I felt unqualified to deal with. I worked with two social workers who assisted me over the three years. That was certainly the most challenging of experiences I've had.

I have been involved in, as the Judge said, transit negotiations, like my mentor and role model Ted Kheel used to do. I had the opportunity to settle what could have been a subway and bus strike. I was involved as a mediator in a shutdown of the courthouse in Westchester where OCA [Office of Court Administration] and the Dormitory Authority had all kinds of issues about cost overruns. That was a very interesting mediation.

Other types of mediations that I've had: I was involved in a NCAA [National College Athletic Association] and NIT [National Invitational Tournament] mediation involving post-season tournaments. While their case was being tried here in the Southern District before Judge Cedarbaum,[21] I held nighttime mediations and communications to see whether the parties could reach an agreement before the jury reached a verdict. That mediation involved sports, and dealt with the future of the NIT, which was a very interesting matter. I was involved in a very difficult mediation involving Enron, which was a commercial mediation that involved so many parties. There were claims by limited partners, the general partners, and by the bankruptcy trustee. I was brought in by two major law firms to serve as a mediator. I guess there were about fifty or sixty law firms, plus inside counsel. I thought it was an impossible mediation, but we got it done.

---

[21] Judge Miriam Goldman Cedarbaum, 1929–2016, was appointed a U.S. District Judge for the Southern District of New York by President Ronald Reagan in 1986.

KS: Do you mediate smaller cases or is your specialty the big case?

JF: I had many matters involving individuals where I had to mediate between whoever was representing the employer and whoever was representing the employee's interest. I have mediated a lot of cases having to do with sexual harassment, age discrimination, and other forms of discrimination. I would try to mediate on a holiday or in the summer because, people forgot, I was a full-time law dean. That made it very difficult for me, but I felt purpose and meaning in what I was doing.

KS: You have been a leader in this area and I continually hear stories about your leadership. Today I just heard for the first time that when you were the President of the New York City Bar Association,[22] you put together a group to see whether a committee on ADR [Alternative Dispute Resolution] would be of value to the legal community. Can you tell us about that project?

JF: You certainly overheard a conversation that was supposed to be private. [Laughter] When I became president of the City Bar in '92, we had an arbitration committee. By that time, I was familiar with what was going on in employment law and mediation. I said we should have a broader agenda than just what was covered in the arbitration committee. But there were a lot of feelings about changing that history. You just can't walk into an organization and think you are some kind of emperor. You have to buy support. So I created a special committee chaired by Gerry Aksen.[23] I said, your mission is to take a look at the field of ADR and decide whether or not there should be an ADR committee. My presidency lasted for two years and when I walked out of the door we had an ADR committee established for the first time.[24]

KS: So now in addition to the arbitration committee, there is an ADR committee and they co-exist. Also there are ADR commit-

---

22 1992–1994.

23 Full-time arbitrator, mediator, and ADR neutral, 2003 to present; Partner, Thelen Reid & Priest LLP (and predecessor firm Reid & Priest LLP), 1981–2002; General Counsel, American Arbitration Association & attorney and assistant to the President, American Arbitration Association, 1961–1980; Private Practice, 1958–1960.

24 The Alternate Dispute Resolution Committee encompasses the ADR processes of mediation, negotiation, and emerging mixed processes such as med-arb.

tees in the New York State Bar Association[25] and in the ABA as well.[26]

JF: Right.

KS: Of all these cases that you have mediated—from the large to the more personal—are there a few that standout as very rewarding to you?

JF: Yes, there is one case, where I think I was a court-appointee serving as a special master for one of the federal judges, involving an age discrimination case. There were two senior people in their sixties that lost their jobs and they felt they were victims of age discrimination. I spent a chunk of a weekend with the attorneys and the individuals seeing whether we could effectuate a settlement. At the end of the day we did, and when I walked out onto Park Avenue at the end of the day to go home, the two individuals had walked out at the same time. They both came over to me and they said, "Thank you for giving us our lives back." It's the only time anybody said that to me. That was very satisfying and still stands out.

Another one is the family homelessness matter in New York City. Two social workers and I helped the Legal Aid Society and the City talk to each other for over two and a half years. One area that everyone ultimately agreed upon was the need to fix the processing of homeless families. At the time, it was a facility located at about 150th Street, in the area of Yankee Stadium, the old Yankee Stadium. Every homeless family had to be processed there. The parties had their views and as the mediator working with the two social workers, we had views. The parties asked us to express our views, which we did. We said that we thought the facility should be taken down, abolished, and instead there should be a place for the processing of families in a way that was compatible with the dignity of people.

Not too many years ago, I was invited by Mayor Bloomberg, along with the social workers, and the parties, to go to the Bronx

---

25 N.Y. ST. B. ASS'N: DISP. RESOL. SEC., http://www.nysba.org/DRS/ (last visited June 30, 2017).

26 A.B.A.: SEC. DISP. RESOL., http://www.americanbar.org/groups/dispute_resolution.html (last visited Feb. 17, 2017).

and see the new facility.[27] That was a real bonus to see the mediation result. That also was a pro bono mediation.

KS: The homeless dispute, as I recall, had been in litigation for a very long time.

JF: It was the longest case of its kind.[28] We could not get the parties to reach an agreement, to resolve the entire litigation. But three years later, the parties, without our involvement, achieved that result. They then communicated to us in different ways that a lot of the ideas that were discussed during the earlier mediations were very helpful to the resolution. So, often an unsuccessful mediation is not really a failure; you've gotten people to talk to each other, generate ideas that resurface later on in the relationship between the parties.

KS: I think I've laid a very good foundation that you are an expert in this area. To conclude this section, what do you think are the attributes of a good mediator?

JF: To be patient, to listen, and to engage with the parties. Let them know that you've heard what they said, that you understand what they are talking about, and that you are interested in helping each party communicate with each other. Becoming engaged is very important. Those attributes are what I saw in Ted Kheel and the other mediators from the government services. Also, how they really stayed at it and didn't give up.

KS: The Winston Churchill "never, never give up" model for a mediator often is a good one.[29]

---

27 The new permanent intake center was officially opened on May 11, 2011, and is known as the Prevention Assistance and Temporary Housing Center (PATH). *See Mayor Bloomberg, Deputy Mayor Gibbs and Homeless Services Commissioner Diamond Open the City's New Prevention Assistance and Temporary Housing Center in the Bronx After Eight Years of Development*, CITY OF NEW YORK (May 11, 2011), http://www1.nyc.gov/office-of-the-mayor/news/149-11/mayor-bloomberg-deputy-mayor-gibbs-homeless-services-commissioner-diamond-open-city-s-new#/3.

28 This particular lawsuit spanned twenty years. *See* Leslie Kaufman, *New York Reaches Deal to End 20-Year Legal Fight on Homeless*, N.Y. TIMES (Jan. 18, 2003), http://www.nytimes.com/2003/01/18/nyregion/new-york-reaches-deal-to-end-20-year-legal-fight-on-homeless.html.

29 The full quote, delivered in a 1941 speech, reads as follows: "Never give in, never, never, never, never—in nothing, great or small, large or petty—never give in except to convictions of honor and good sense." *See, e.g.*, *Quotes*, INT'L CHURCHILL SOC'Y, http://www.winstonchurchill.org/resources/quotations (last visited Feb. 17, 2017).

We are now going to move on to a simple Title VII hypothetical to highlight three issues for discussion. As everyone can see, you could talk about many, many issues, but we selected only three.

The hypo is a Title VII discrimination case.[30] The district court granted summary judgment to the employer. The record included the employee's testimony about statements attributable to the employer that the employee believes constitutes a Title VII violation. Shortly after those statements were made, the employee was fired. The employee, now the appellant, is appealing the summary judgment decision. The appeal is ordered into mediation under the Second Circuit CAMP program before any briefs are filed. The client is requested to participate and you are the mediator. As an aside, there are now fifteen court-appointed mediators as part of CAMP. You receive an email from the employer's counsel, who writes, "I have been litigating for thirty-five years, this case will never settle, it's a waste of time, it's a waste of resources, I don't think it's worth us attending a mediation." How would you handle that type of assessment?

JF: Okay, this is a case that has been assigned to CAMP. The local rule requires that there is an obligation by counsel to participate, and the client, in good faith.[31] I would say to counsel, "Can we get together and just talk about your views?" It's the kind of conversation that I would probably not want to do over the telephone. I believe in electronic communications, but I believe more powerfully in in-person communications. I would want to talk to that counsel and make a number of points. I might say, "I certainly understand where you're coming from, but in my experience clients and lawyers find that when they have the opportunity to talk to the other party, or use a mediator, avenues might open up that could interest them and lead to exploring resolution of the matter. There is no end to the possibilities and I would like to ask you to come to know me a little bit and to allow me to engage with you, engage with the other attorney, and with your clients and see whether in the course of doing so we can reach an agreement."

KS: I think because of your experience, such a statement would carry much weight. There are also empirical studies that back up exactly what you're saying in terms of the benefits of giving time to mediation to explore possibilities. For the benefit of the audience,

---

30 42 U.S.C.A. § 2000e-2 (1964).

31 2D CIR. R. 33.1(g).

I want to summarize an article in the materials very quickly and then Dean, get your reactions to it.

An extensive study was done in 2008. The article reporting on it is titled *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*."[32] It's a study based on 2,054 contested litigation cases in the California court system in which the plaintiffs and defendants had conducted settlement negotiations, decided to reject the adverse party's settlement proposal, and then proceeded to trial or arbitration.[33] The study compared the party's settlement position with the ultimate verdict in the cases. What the finding revealed was that there was a very high rate of what the authors called "decision making error." That is, whether the settlement proposal would have been better to accept than going to trial. And what it found was that for plaintiff's counsel in 61.2% of the cases, they made a decision error in that they went to trial and the trial result was the same or lower than the rejected settlement proposal.[34] The article, which is very scholarly, called that outcome the "oops factor."[35] [Laughter] And for the defendants as well; there the study found that counsel made a decision error in 24.3% of the cases, which is lower than it is for the plaintiffs, but the magnitude was much greater in terms of the error.[36] Interestingly, when counsel was someone who had training or experience as a mediator, the decision making error was lower in both categories. The study supports the value of mediation techniques to assess settlement possibilities.[37] How would you use information about these types of empirical studies—if at all—when you're dealing with counsel who may be reluctant to engage in mediation?

JF: I guess I approach that conservatively—I'm not sure if I would use it at all. It may have an important place in a court program where general information is provided to all those who participate. It's hard work trying to mediate and I wouldn't want to spend my time trying to explain studies and results of studies to the parties

---

32 Martin A. Asher, Randall L. Kiser & Blakeley B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. EMPIRICAL LEGAL STUD. 551 (2008).

33 *Id.* at 551.

34 *Id.* at 566.

35 *Id.* at 563.

36 *Id.* at 566.

37 *Id.* at 586–89.

and the attorneys. Maybe in a caucus with a lawyer; lawyers might make reference to such studies at times, but I would find that somewhat competitive with what I need to do as a mediator in this matter. Their matter is not in that study. For their matter, they will have strong feelings about it. I wouldn't want to overly pressure them by somehow saying there is some kind of science here; that you have got to do a settlement. I really want to respect the parties, respect the process, and work at it.

KS: Understood. Was there any part of the study that surprised you?

JF: I think what happens to you when you're my age [laughter]; there are so many studies, there was so many polls, so many different points of views, that you try not to get pushed down a certain path. I found it interesting.

KS: In terms of court-ordered mediation, as you pointed out, such studies might be valuable to share generally on a court's website about the program. Returning to the reluctant counsel, what benefits—if any—do you see coming out of a court program where you can be ordered into the mediation in the first instance?

JF: I think it's a terrific concept. I was reminded, and thinking about this earlier. The first time I argued in the Second Circuit was early 1974 when Judge Kaufman was the Chief Judge and there might have been a CAMP program at that point, but I don't recall anybody reaching out and saying, "You need to mediate." I was working with a senior partner from Skadden Arps on the matter and he wanted me to argue the matter in both the district court—where we lost the summary judgment motion trying to prevent an issue going to arbitration—and before the Second Circuit. We also lost before the Second Circuit and off to arbitration we went. It was a long arbitration and the other party that wanted the arbitration was not happy with the outcome nor was our side. Both parties spent an enormous amount of money in the arbitration.

I believe that had there been a CAMP program, it might have settled. But neither of us would make a move to the other to raise settlement because neither side wanted to show an interest in talking. There were strong feelings at that point, particularly between counsel, and no one wanted to indicate a sign of weakness by suggesting mediation. Had there been a CAMP program I think would have been a good chance that a mediator could have helped

us reach a settlement that would have spared the client and the parties the grief of a long arbitration.

KS: Indeed. The CAMP program was a pioneer program in the Circuits and it was started as a pilot program in 1974.[38] So you just missed it, or maybe you were ships passing in the night. Since then, settlement type conferences have been incorporated into the appellate process under Rule 33 of the Federal Rules of Appellate Procedure,[39] and specifically the CAMP program under Local Rule 33.1.[40] CAMP is a part of the court process in the service of justice to the public.

JK: You're going to have your own study, a year from now, two years from now, tracking cases that have been resolved as general information for the bar. I know one of my colleagues, Professor Paul Radvany, who is a court-appointed mediator on the CAMP panel, has had several successful mediations.[41] I think he's had more successful mediations than not. So there is evidence the program is working.

KS: Indeed it is, and has been working for a few decades now. If possible, I can come out with my own study, which will be quite exciting. Before we close this part, where we are focusing on lawyer participation, what would you say are the attributes of a good advocate in mediation?

JF: Well, I think an important responsibility of an advocate in mediation is to make a commitment to compromise, as a generalization. Yet, I recognize in a court-mandated program, attorneys as a matter of principle really may not be able to compromise a relevant principle in some circumstances. I accept that. I respect that, and that is very, very important. The world of mediation, in general, is a compromise process. The mediator is not a judge; the mediator doesn't issue any decrees, can't hold the parties in contempt. We don't have that many powers. There is an expectation that counsel will make a commitment to the process and the mediator has a responsibility to be a leader in the process.

---

38 Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 54 FORDHAM L. REV. 1 (1990).

39 FED. R. APP. P. 33.

40 2D CIR. R. 33.1.

41 Paul Radvany, Professor of Law at Fordham Law School, is a member of CAMP's court-appointed mediator panel.

KS: If you're in a mediation and you have a particularly positional counsel, what are some of the techniques you use to see whether they are posturing or whether they could move towards a compromised position?

JF: I generally spend a fair amount of time with each attorney. First of all, in a typical mediation, I'd like to get together with the parties ahead of time and perhaps meet them, perhaps talk about getting mediation submissions, and then having more dialogue concerning what I learned about the positions even before the mediation. By doing so, you get some information about whether counsel is explaining a party's position or making dramatic statements at the very beginning.

Patience is very, very important. So you try to explore; yes, the parties have positions, but the parties may have a relationship and it may be a continuing relationship. That tells you right away; there may be more possibly, in terms of the relationship, that could be helpful.

A mediator is always trying to figure out where the interests are. Even in the transit negotiations of whatever year that was, I think it was 1995, both parties were at an impasse. One side wanted *A*, the other side needed *B*, and could you find a way to help them have an agreement that had components of *A* and *B*? Because it was possible to find that, that matter got resolved.

KS: Good. Let's keep moving on in our hypothetical. We're now in a caucus session, and it's just you, counsel, and the client.

JF: Counsel, which counsel?

KS: The employer's counsel and his clients are meeting with you in a caucus session. Both are getting a little excited about the possibility that maybe a settlement is possible. There have been debates in the field about the level of candor that a mediator should expect when they are in a caucus with the party and counsel. Some mediators think that they should be able to expect a high level of candor, something comparable to what counsel owes a court under Rule 3.3 of the ABA Model Rules of Professional Conduct.[42] Other mediators are more comfortable with parties and counsel treating them as another person in a negotiation, which allows for puffery and things like that under Rule 4.1 of the model rules.[43]

---

[42] MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2016).

[43] MODEL RULES OF PROF'L CONDUCT r. 4.1 (AM. BAR ASS'N 2016).

Here, you're acting as a mediator in a court program. What do you expect from counsel and the client when you're in a caucus? Do you expect them to be very candid with you or to treat you as another participant in the negotiation process?

JF: First of all, I certainly expect any attorney to be truthful and to understand the model rules that talk about truthfulness. That said, I would be a third party in a negotiation. I wouldn't be a tribunal. The caucus wouldn't involve the Rule 3.3 provision. I would deal with some of the posturing positions, and some of the extreme positions that might be taken, by working through those positions in a conversation with them.

For example, I remember a mediation where somebody was seeking something like $75 million in lost profit and I kept talking about whether they had studied the law of lost profit in New York. Before the end of the session they had reduced the $75 million to $5 million. You have to have a lot of conversation. Maybe say, "Am I right in believing that there is some law out there that's relevant to your matter?" Counsel will give you some response to that question.

KS: Indeed, your assessment is consistent with the analysis set forth in an ABA Formal Opinion.[44] Although, some may say there still may be a wrinkle vis-à-vis court-annexed mediation.[45]

Flipping the coin on candor, how candid should a mediator be in a caucus? This question touches on whether it's a facilitative type mediation or evaluative type mediation. Where do mediators look in terms of rules and standards to govern themselves? The question is a setup because we know that the answer is the Model Standards of Conduct for Mediators.[46] And you were among the group of individuals to spearhead the creation of this document. Could you explain how that creation came about?

JF: I think the year was 1994. In the early '90's there was a lot going on all over the country in terms of mediation developments: local statutes; state statutes. Professor Baruch [Bush] at Hofstra was developing an ethics code.[47] There was a tremendous amount

---

44 ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 439 (2006).

45 *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 370 (1993).

46 MODEL STANDARDS OF CONDUCT FOR MEDIATORS (AM. BAR ASS'N 2005).

47 Baruch Bush is one of the originators of the transformative method of mediation, which is focused primarily on process and not outcome. *See* ROBERT BARUCH BUSH, THE PROMISE OF MEDIATION (1994).

of thought being given to mediation guidelines and ethics. The American Arbitration Association [AAA], the American Bar Association [ABA], the Society of Professionals in Dispute Resolution [SPIDR], law professors, and dispute resolution practitioners decided to develop a comprehensive document, ultimately which became known as the Model Standards, in order to provide a guide for the conduct of mediators, to educate parties who are going to mediate, and to promote confidence in the mediation area. Those were the purposes.

We took everything that was out there and reviewed them. There was a committee of six—we had two reporters, staff, Professor [Jacqueline] Nolan-Haley from Fordham, myself, and others. Professor Nolan-Haley, who played a very significant role, gathered maybe six or ten Fordham students together. They surveyed everything that was out there. I eventually did an article for Judica in the '90's that summarized everything that was there, as well as the standards themselves.[48]

Having said that, one standard that's very important is confidentiality. Looping back to the question—how candid can a mediator be? If you're going to caucus with parties, and you've discussed how you're going to protect what's shared in the caucus, and how you might use what's said in the caucus, you have to stay with that; you have to protect confidentiality. You have an obligation to work out with the parties the guidelines for confidentiality in each particular mediation. I know your court rules deal with confidentiality.

KS: Right, we have a subsection of Local Rule 33.1 on confidentiality.[49] Also, as part of the standards, the first standard is that mediation is a party process in terms of controlling what occurs.

JF: My recollection is that there were nine standards and the order of the standards does not indicate, and should not be interpreted as indicating, the importance of the standards. The first standard was self-determination, but then you had standards on the quality of the process, on confidentiality, conflicts of interest, fees, advertising, so forth.[50]

---

48 John D. Feerick, *Standards of Conduct for Mediators*, 79 JUDICATURE 314 (1996).

49 2D CIR. R. 33.1(e).

50 The nine standards are: I. Self-Determination; II. Impartiality; III. Conflicts of Interest; IV. Competence; V. Confidentiality; VI. Quality of the Process; VII. Advertising and Solicitation; VIII. Fees and Other Charges; and IX. Advancement of Mediation Practice.

Self-determination is extraordinarily important in terms of the users. What does that mean when parties have to go through a court-mandated program? It means that the parties can be the only ones to decide whether to settle or not. Parties cannot be coerced. The standards respected the idea that this is a party process; this is not adjudication; this is not an arbitration. Self-determination is a very important standard.

Most of what we contemplated when developing the standards is a facilitative role. We recognized that mediators might be evaluators, mediators might provide assessments, but that document promoted facilitative mediation. What is your program here?

KS: It's facilitative, which is very much in keeping with how CAMP fits into the judicial process. As I understand, the standards were updated in 2005,[51] and I believe they are adopted by many leading ADR providers, including AAA,[52] and they are referred to in the court program as well.

JF: There was a different group that did the 2005 updating.

KS: Yes, but the structures stayed the same and just some modifications were made. Returning to our hypothetical; we're out of our caucus now, and you've done great in this hypo by the way, because we are now at a point where the employer is going to offer the employee back his job and this is incredible. But we also are getting to a point in the mediation where there is a very delicate and tough issue which can arise in Title VII cases, and other cases as well, and that has to do with attorney's fees. We have a situation where the employer is willing to bring back the employee, but only has $10,000 that it could possibly contribute to plaintiff's counsel attorney's fees. However, plaintiff's counsel has said, "Look I've taken this case through summary judgment and, but for this lawsuit, the employer would not have rehired my client back. I spent $150,000 and I can't look to my client for payment because he is of limited financial means, nor am I supposed to look to my client for payment under the statute. So what am I to do?"

There has been a fair amount of thinking, including from the U.S. Supreme Court, about how these fees can be negotiated in an

---

51 The 2005 revisions to the Model Standards were approved by the ABA on August 9, 2005, the Board of the Association for Conflict Resolution on August 22, 2005, and the AAA on September 8, 2005.

52 https://www.adr.org/Mediation.

ethical and practical way.[53] When you have encountered this situation in an employment case, how did you navigate through this challenge?

JF: There is not a simple answer to that. First of all, the claim that's in mediation involves also attorney's fees. So, you may have to recognize that, as it plays out; you will have both the merits and the attorney's fees as part of the negotiation. Maybe you should focus first on whether or not you can get to a resolution of the merits piece, which would then be very encouraging to both parties. Then perhaps everyone would be willing to continue to negotiate try to reach agreement with respect to attorney's fees. Now, what would I do with the employer's counsel that can only contribute $10,000?

KS: That's what the employer is saying.

JF: I would spend a little time with that person to point out that maybe a reason for a lot of the costs that had been incurred by the other side was because of all the activity taken on behalf of the employer, your client. I would say to counsel that it would be important to see whether you can do more. Then, I suppose, I would meet with the plaintiff and plaintiff's counsel. I would indicate that the gulf, with regard to attorney's fees, is quite substantial. And it's going to take a lot of work by both counsel to see whether they can reach an agreement.

So it's more a matter of working with the parties. I would respect the right of the plaintiff to a settlement that works for the plaintiff, but I would also point out to the plaintiff that he or she has to face up to the fact that he or she was represented by an attorney and that's a real issue. I don't know where we would go exactly from there, but I've had a number of mediations which involved this issue. For the most part, parties have concluded that the agreement they reached on the merits is better than the alternative of going forward with the expense of the litigation and the uncertainty of the outcome, only because they cannot resolve the attorney's fees portion. They have been able to work both pieces out.

KS: That takes a lot of skill to guide the parties through this, and . . .

JF: A lot of patience.

---

[53] *Evans v. Jeff D.*, 475 U.S. 717 (1986).

KS: A lot of patience. In the materials, there are ethical opinions and cases that set forth some of the issues present when negotiating attorney's fees and the merits dispute together, and suggestions as to how to navigate through these issues.[54] As a mediator, you don't want to create a conflict between the plaintiff and plaintiff's counsel, and sometimes the retainer agreement deals with some of these issues and sometimes not.[55] So it's choppy waters to navigate through as a mediator.

I have been the one having the best fun up here because I have been able to ask questions. I want to share that experience with the audience. Does anyone have questions on any of the ethical issues we've raised, or anything else for Dean Feerick?

AUDIENCE MEMBER #1: I understand that a number of parties who mediate want to skip the opening joint session. How do you handle that request?

JF: In response, what I would say to counsel is that I would like everybody to be in the room together and I'd like everybody to introduce themselves. I also would ask the participants to think about a statement—it could be one sentence or two sentences—that would indicate that you have a commitment to the process of mediation.

I had one matter where it was not possible ever to bring the parties together. I did the best I could to communicate with them separately, particularly the party (plaintiff) who allegedly had been harassed and then conveyed to the other party everything she had said to me. At the end of the day, I was told by the counsel for the plaintiff that the fact that I spent three hours listening to her made it possible to settle the matter. Even though the plaintiff was not able to meet with the other party, the fact that I spent as much time talking with her and communicating what I learned to the other side made the settlement possible. It's all part of what a mediator can do, even if the parties do not all meet together.

In the Enron matter, I can't say much about the matter, but the parties had a very short opening. They worked out how many minutes to give for the opening so that they could introduce themselves, cover the logistics of where the coffee room was, and things

---

54 *See The Florida Bar v. Patrick*, 67 So.3d 1009 (Fla. 2011); NYS Bar Ethics Op. 1096 (2016); CBA Informal Op. 97–131 (1997); NYC Bar Formal Op. 1987–4 (1987).

55 *See Samms v. Abrams*, 163 F. Supp. 3d 109 (S.D.N.Y. 2016); NYS Bar Ethics Op. 1096 (2016).

of that nature. Then, everyone moved into caucuses. I had four or five caucuses with lawyers in every breakout room. It was hard work.

AUDIENCE MEMBER #2: Can you expand on the difference between puffery and being untruthful?

JF: In a mediation, a party often is posturing. The Model Rule allows for posturing. As the mediator, if one side comes into the process asking for $75 million and by the end the demand is at $5 million, I take that as part of negotiating. Although, there may be circumstances where that would constitute lying.

KS: And that approach is consistent with the position taken in an ABA formal opinion in the materials.[56] The opinion states that a mediator should expect to be part of the negotiation process and not expect the same level of candor that a tribunal would receive. I think that is the right outcome because you are busy working with the parties developing a relationship. Of course, posturing is one thing. Flat out lying is something else.

AUDIENCE MEMBER #2: What's the difference?

KS: The comments in ABA Model Rule 4.1 assist here. For example, anything to do with settlement amounts and things of that nature are considered posturing.[57]

AUDIENCE MEMBER #3: What is your reaction to rules mandating that attorneys speak to their clients about using mediation?

JF: It certainly would seem to me that counsel should have some conversation about different means of achieving the client's objective. Whether I would choose mandatory in every matter. I'm not sure I would go that far. Although, I think when I was chair of the ABA-ADR committee, we did put out an opinion that encouraged communication between counsel and client on that very subject.[58]

---

56 *See* ABA Comm'n on Ethics and Prof'l Responsibility, Formal Op. 439 (2006).

57 MODEL RULES OF PROF'L CONDUCT, r. 4.1, cmt. [2] (AM. BAR ASS'N 2016) ("Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category.").

58 *See also* Marshall J. Breger, *Should an Attorney be Required to Advise Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427 (2000). Berger argues that the Model Rules "allow[ ] the obligation to exist in an unarticulated form" and that "the ABA . . . must choose between a

But I don't think we were speaking necessarily for the entire ABA at that time. I have been away from litigation for a long time; I would want to know more from the judges and others as to that area.

AUDIENCE MEMBER #4: When a mediation enters a phase where it is uncertain settlement will happen, what have you found to be a useful catalyst? Something that sort of turns the situation around; now all of a sudden you know you can get it done.

JF: I suppose—as a generalization—I try to turn the parties in a direction that allows them to find their interests, to have a broader conversation. A catalyst that I've seen often: find something that is important to each party to build on. Those two people who said, "Thank you for giving us our lives back;" they needed enough severance in a package so that amount, combined with their pension and social security, would be sufficient for their retirement. That dispute ended in a settlement because one side was willing to pay enough of that amount and both sides didn't want to take the matter to a court outcome.

If I could make one final point on my part. As Yogi Berra would say, "It's not over until it's over." On more than one or two matters that I have been involved in as a mediator, parties were ready to call it quits. Maybe taking a short break is a good idea and sometimes by stretching out the day. All of a sudden—maybe because it's getting dark outside—the impossible becomes possible.

KS: That's a perfect line—the impossible becomes possible—to end on. Judge Chin is going to close our program.[59]

JF: Judge Chin is a former student of mine, and he got the highest grade in the class.

JUDGE DENNY CHIN: Sometimes just the highest grade in the class, sometimes you've said the highest grade you ever gave. [Laughter]

---

precatory rule urging client consultation on ADR or a mandatory rule concerning client consultation on ADR." *Id.* at 458.

59 Judge Denny Chin was sworn in as a Circuit Judge for the U.S. Court of Appeals for the Second Circuit on April 26, 2010. Directly prior to his appointment to the Second Circuit, Judge Chin was a U.S. District Judge for the Southern District of New York.

As you heard from Judge Katzmann, I am the Chair of what we call the Legal Affairs Committee here at the Circuit. Our principal jurisdiction is the Staff Attorney's Office [SAO]. We have a group of about thirty lawyers here who are an incredible part of our court; they provide a lot of help to the judges in many different ways.[60]

Within the SAO is the CAMP program. We've had a mediation program here at the court for many years. I think we have come a long way and it's largely thanks to Sally Pritchard's efforts. She's been with us about three years now and has spectacular results in many respects, including the CAMP program. Now, we are in a phase of new beginnings with our recently hired Chief Circuit Mediator, Kathleen Scanlon, and starting on Monday, a second full-time mediator, Dean Leslie, who we are fortunate will be joining us after fourteen years in the state court system. We also now have had for about two years a program of volunteer mediators. We have a roster of fifteen, and if you look at their credentials, you would be really impressed. They are spectacular mediators. We are grateful to them and thankful to them.

And finally, I want to thank John Feerick. I have known John for forty years. Indeed he was my professor when I was a 3L in the late '70's. He said he has been a law professor for thirty-four years, but he was an adjunct before that when he was at Skadden Arps. I had the good fortune of taking him for employment law and it's no coincidence that some years later I became an employment lawyer. At Fordham we refer to John as "John the Good." He's the most decent and caring person you could ever meet.

I have also been fortunate to be a part of the Feerick Center as a member of the advisory board. I remember our first meeting where we talked about the problems of the world and what we could do to fix them. John has been deeply concerned about homelessness and the poor and those are some of the things that we have worked on at the Feerick Center.

John is also a great scholar. As a law student, he wrote an article for the *Fordham Law Review* on the Vice Presidency. It wasn't published until a little bit after he graduated and then President Kennedy died and suddenly the article became incredibly im-

---

60 The SAO provides objective legal advice to the judges of the court, handling a wide range of civil, criminal, and agency cases.

portant and eventually led to the 25th Amendment. John is really the world's leading scholar on the topic.[61]

But we learned tonight what is the key to his success and that's how hardworking he is. He was able to get all those folks to settle by making them come in on the weekends and holidays. Last summer in July—I think it was probably the hottest day of the summer—the *Fordham Law Review* was having a training program for its new members. John's family was actually on vacation somewhere in the Carolinas. Yet he stayed as his family went ahead so he could come talk for fifteen minutes on a Saturday morning on the hottest day of the year to the students about the law review. And I remember walking out with him as he was wheeling his suitcase because he was going to go down to join his family. So, to close, as Judge Katzmann said, I agree that the world is indeed a better place because of John Feerick. Thank you.

JF: Thank you.

61 *See* John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 FORDHAM L. REV. 73 (1963). *See also* JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND EARLIEST APPLICATIONS (1976) (nominated for a Pulitzer Prize); John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 FORDHAM L. REV. 907 (2010); John D. Feerick, *A Response to Akhil Reed Amar's Address on Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 41 (2010); John D. Feerick, *The Twenty-Fifth Amendment: An Explanation and Defense*, 30 WAKE FOREST L. REV. 481 (1995).