THE MAYHEW-HITE REPORT

ON DISPUTE RESOLUTION AND THE COURTS

Created by the Ohio State Journal on Dispute Resolution at the Moritz College of Law at The Ohio State University for the Alternative Dispute Resolution Community and made possible by a deferred gift from Harold E. and Betty W. Hite in honor of Kimberly Hite Mayhew.

VOLUME 7, ISSUE 1

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WELCOME

The *Ohio State Journal on Dispute Resolution* is pleased to bring you Volume 7, Issue 1 of the Mayhew-Hite Report on Dispute Resolution and the Courts.

LEAD ARTICLE

For the lead article in this issue, the editor of the Mayhew-Hite Report interviewed Richard C. Daley, a Moritz College of Law faculty member who teaches Real Estate Development and Commercial Leasing. After 12 years of law firm private practice, Mr. Daley joined the Pizzuti Companies, a real estate development firm headquartered in Columbus, Ohio, as Executive Vice President and General Counsel. In this interview, Mr. Daley discusses his perspectives on dispute resolution as both attorney and developer. The full-text of this article can be accessed here.

ARTICLE SUMMARY

In *Arbitration's E-Discovery Conundrum: Dealing with Complex Evidence Problems in a Streamlined Process*, Thomas L. Aldrich addresses the negative impact of massive discovery demands on arbitration proceedings and discusses what various arbitral institutions are doing to address this issue. A detailed summary of this law review article can be accessed here.

CASE SUMMARY

In early 2008, the New Hampshire Superior Court ordered Nancy J. Lamarche and Stephanie A. McCarthy to mediate a personal injury claim that had arisen from a motor vehicle accident. Prior to beginning mediation, both parties were obligated to pay a $50.00 fee to the New Hampshire Office of Mediation and Arbitration ("OMA"). Both parties objected to the mandatory fee (and the possible sanctions for failure to pay) as unconstitutional and the trial court agreed. OMA subsequently appealed the decision. The case, *Nancy J. Lamarche v. Stephanie A. McCarthy*, was ultimately heard by New Hampshire Supreme Court, which determined that requiring a mandatory fee for alternative dispute resolution was not unconstitutional. A detailed summary of this case can be accessed here.

STUDENT SPOTLIGHT

In *Mediating Culture: Is Mediation an Appropriate Forum for Employment Discrimination Claims Despite Cultural Differences?* Tiffany Smith argues that employers, employees, and mediators can overcome the challenges posed by cultural differences in mediations of employment discrimination claims. Tiffany identifies the issues associated with intercultural mediations, and then highlights two dispute resolution systems designed by specific cultural groups that account for their group's cultural norms, values, and interests. She then draws from those examples to identify the issues that should be addressed in mediating intercultural employment discrimination claims and argues that cultural differences do not eliminate the option of using mediation to resolve employment discrimination claims. Tiffany will receive her J.D., along with her Certificate in Alternative Dispute Resolution, in May of 2009 from the Ohio State University Moritz College

of Law. After she takes the bar this summer, she will be joining the law firm of Akin Gump Strauss Hauer & Feld, LLP in Washington, D.C The full-text of this paper can be accessed here.

EDITORIAL INFORMATION

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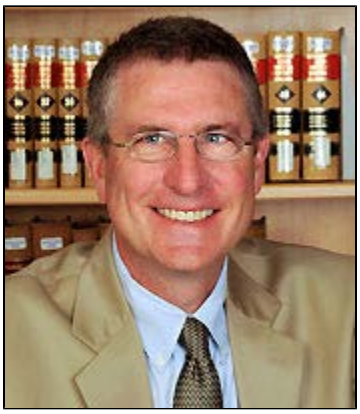
An Interview with Richard C. Daley



RICHARD C. DALEY is a Senior Lecturer in Law at the Moritz College of Law at The Ohio State University. Prior to joining the Moritz faculty, Mr. Daley spent twelve years in the private practice of law, specializing in the representation of real estate developers, followed by 13 years as Executive Vice President and General Counsel of The Pizzuti Companies, a real estate development firm headquartered in Columbus, Ohio. As both an executive and attorney for Pizzuti, Mr. Daley was involved in the development of over 20 million square feet of office and industrial space throughout the Midwest and Southeast regions of the United States. After retiring from Pizzuti in 2003, Mr. Daley spent the next three years providing legal and business consulting services to private developers and corporate real estate departments throughout the country.

In an interview with a *Mayhew-Hite Report* editor, Mr. Daley shares his thoughts on dispute resolution as both a developer and an attorney.

Generally speaking, how important was the art of negotiation to you while working in real estate development?

First of all, I really don't think there is much of an "art" to negotiation. A business lawyer's goal in any negotiation is quite simple – achieving a result which works for the client. Preparation and knowledge of the client's business are the keys to completing a successful negotiation. Polemics, psychology, body language and all of the other negotiating "arts" are really quite tangential to the process.

Real estate development is well known to have many different "phases." Which would you characterize as the most contentious?

The only parts of the process where a developer can afford to be a little contentious are in the buy and sell phases. When you are buying or selling real estate, there is no continuing relationship with the other party to the transaction and, hence, there is no compelling reason to "play nice." Being overly contentious during a negotiation with a party with whom the developer is going to have a long-term relationship (for instance, a tenant or a debt or equity provider) is a prescription for failure.

Do you have an example in mind that best exemplifies this contentiousness?

There are obvious "deal killers" in any negotiation involving the purchase and sale of real estate – price, contingencies, etc… A good negotiator makes it clear at the outset what those deal killers are and why his or her client can't budge on those points. I have found over the years that being upfront and thoughtful in discussing points of possible contention usually shifts the flavor of the negotiation from "fist banging" to a reasoned discussion of how the legitimate interests of both clients can be served in the deal. I have also found that, almost without exception, the most contentious negotiators are those who are the least prepared for the task at hand.

Given that the industry can be prone to conflict, what steps did you take to protect your company? How important were alternative dispute resolution principles to the equation?

When I went in-house with a developer back in 1990, one of the first things that I noticed was that the company had a

pervasive attitude that it needed to do whatever it took to punish folks that had "done it wrong." The best advice I gave my colleagues at the company was to grow up and focus not on punishing the bad guy, but rather on doing whatever made the most sense for the company in the long-run. Embracing conflict is a short-term strategy, which seldom has any long-term benefit.

As for ADR procedures, I liked them only when I was on the wrong side of both the facts and the law. My primary experience in the ADR world was in court-mandated, voluntary, mediation sessions in Florida and Indiana. In every instance, the sessions were conducted in a fashion which, in my mind, was solely focused on producing a compromise of some type – even if the facts and the law did not merit a compromise or the level of compromise being bandied about by the mediator. To say the least, I do not look back fondly upon the countless hours I spent being forced to mediate "disputes" with folks whose only leverage was their perception that I didn't have the patience to continue to say "no" throughout the day to a well-meaning mediator. My perception of the mediation process is certainly colored by the fact that the party I represented almost always had the deeper pocket in the dispute – and, hence, was typically both willing and able to spend the money necessary to resolve the dispute in the courts.

What about arbitration?

I have never participated in an arbitration proceeding. It is fairly common for general contractors to include an arbitration provision in their standard construction contracts. I resisted including an arbitration clause in our construction contracts for a couple of reasons -- (1) I thought that withholding payment from a contractor gave me the ultimate leverage in any dispute that I might have with a contractor and (2) arbitrators in construction-related disputes are commonly thought to be unduly sympathetic to the contractor (in large part because so many arbitrators used to work with or for large construction and engineering companies). As an overall matter, I believe that developers are best served by staying away from arbitration and other ADR proceedings.

How effective were the safeguards you implemented? Was litigation over disputes an exception or the rule?

During my 13 years as EVP/General Counsel for The Pizzuti Companies, we were only involved in one lawsuit of any magnitude – and that involved a National Hockey League franchise and not anything having to do with the real estate business. Except for some minor collection actions against delinquent tenants, the Company never filed a lawsuit as a plaintiff in any of the ten or so states in which it conducted business. The Company was named as a defendant in a few construction cases, all of which were settled when my patience ran out during the voluntary mediation sessions mentioned above. That was the extent of my litigation experience during my stint at Pizzuti – a decent testament to the "grow up" conflict resolution policies that I put in place when I first joined the Company back in 1990.

Do you think being both a Principal in and General Counsel for your company affected the way you approached a negotiation? How?

No doubt. As a business person, the only successful negotiation is one that results in a deal getting done. When I put my "businessman hat" on, I quickly figured out that the successful negotiator is the person who focuses on what matters and avoids wasting time and money negotiating issues which, while interesting from a purely legal perspective, have no real bearing on the achievement of a company's business objectives. Having to pay (rather than collect) legal fees to outside counsel also gave me some needed perspective on the negotiation process.

If you could impart one piece of advice about the right way to approach a negotiation, what would it be?

Mick Jagger and Keith Richards said it best – "You can't always get what you want, but if you try sometimes, you just might find that you get what you need."

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ARBITRATION'S E-DISCOVERY CONUNDRUM: Dealing with Complex Evidence Problems in a Streamlined Process

Article by Thomas L. Aldrich

In the opinion of Thomas Aldrich, the arbitration process has become mired in a legal morass of runaway document discovery and e-discovery, which has largely nullified the long-recognized benefits of speed, efficiency and cost savings that originally made arbitration an attractive alternative to litigation. [1] He also argues that because the process has become more cumbersome, time-consuming and expensive, arbitration is developing into a less desirable alternative to other ADR processes such as mediation. [2]

Given these concerns, Aldrich's article focuses mainly on the efforts of arbitral institutions to restore the benefits of arbitration without compromising fundamental fairness. To this end, Aldrich starts with a look at the development of e-discovery rules and their interplay with the rules of these various institutions.

Aldrich begins with a discussion of the 1925 Federal Arbitration Act ("FAA"), which created a body of federal law that recognized contracting parties' obligations to honor a private agreement to submit a dispute to arbitration. Though the FAA allowed arbiters to subpoena witnesses and documents for testimony, it made no specific pronouncements about prehearing discovery. Aldrich suggests that under this law one could infer that no right to discovery exists unless the parties contract otherwise. Aldrich also makes mention of the 1955 Uniform Arbitration Act which was also silent with regard to discovery. [3]

Next he discusses the 2000 Revised Uniform Arbitration Act ("RUAA") that has several clearly delineated provisions addressing discovery. Though the RUAA it allows the arbitrator to define the scope and breadth of the discovery, Aldrich is quick to point out that arbitrators often accede to a party or parties' requests for expansion of discovery right up to the point that it closely resembles those in court.

With these issues at the forefront of the dialogue, Aldrich reviews the approaches being used by certain arbitral institutions to resolve this expanding problem and ultimately renders his opinion on the future viability of arbitration:

The Draft Conflict Prevention and Resolution Protocol:

Aldrich first addresses the protocol promulgated by the International Institute for Conflict Prevention and Resolution (CPR). Its arbitration committee has proposed new guidelines that attempt to temper the ability of parties to conduct massive discovery – electronic or otherwise – by not only requiring a narrow focus in the discovery requests but also through demanding a balance between the burdens, costs and accessibility of the requested information.

The CPR protocol can be further broken down into four "modes:" Mode A, Mode B and Mode C. Mode A is the narrowest in scope and only requires parties in an arbitration hearing to disclose the documents it intends to present in support of its case.

Mode B provides that each side must produce e-documents maintained by an agreed limited number of designated custodians, that the disclosure be limited to e-documents created from the date of signing the arbitration agreement to the

date of filing the request for arbitration.

Similar to Mode B, Mode C also allows for discovery of documents from certain custodians but increases both the number allowed and the applicable time period. It also allows for documents obtained through other forensic methods to be admitted for consideration.

Finally, Mode D allows for a broad discovery and only has limitations similar to those of the Federal Rules of Civil Procedure under Rule 26. [4]

Chartered Institute Protocol:

According to Aldrich, the Chartered Institute Protocol (CIP) for E-Disclosure in Arbitration has much in common with its CPR counterpart. This includes early consideration of the conduct the discovery; agreements by the parties to limit the scope and extent of production; reduction of the cost and burden of production; and placement of the ultimate burden of persuasion on the requesting party. [5]

Unlike the CPR, however, the CIP's fails to provide detailed choices regarding potential methods of document production by the parties. Aldrich suggests this could be a serious shortcoming.

International Centre for Dispute Resolution Guidelines:

Aldrich next examines the International Centre for Dispute Resolution's (ICDR) guidelines for arbitration. Though the stated principles align with those of the protocols already discussed, the guidelines offer very limited suggestions for dealing with runaway discovery.

Instead, the guidelines state succinctly that "[t]he tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy ... [by] avoid[ing] unnecessary delay and expense, while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly." [6]

In fact, the guidelines only require three things: (i) that document requests be narrowly focused and structured to avoid unnecessary expense; (ii) that documents upon which the parties intend to rely must be produced; and (iii) that any documents disclosed must be produced in the form they are maintained (absent, of course, a clear need for a different form).

International Bar Association Rules:

Similar to the IDCR guidelines, the International Bar Association's (IBA) Rules on the Taking of Evidence do little in concrete terms to ameliorate the discovery issues in arbitration.

In Article 3, Section 2 of the Rules, however, is language that states that any requests for documentation may be excluded on grounds of relevance or materiality, legal impediment or privilege, unreasonable burden to produce, or considerations of fairness or equality that the tribunal determines compelling. Aldrich argues that a savvy arbitrator could use this language to avoid costly and time-consuming fishing expeditions by the parties. [7]

Conclusion:

Ultimately, Aldrich's examination yields a conclusion that the only way to restore the virtues of efficiency, cost-effectiveness, and speediness to arbitration without compromising its fairness is for the parties to arbitration agreements to make effective use of the protocols and guidelines available to them. Moreover, Aldrich argues that arbitrators themselves must be willing to exercise the discretion granted to them by arbitration agreements. [8]

Thomas L. Aldrich, *Arbitration's E-Discovery Conundrum: Dealing with Complex Evidence Problems in a Streamlined Process*, 31 Nat'l L.J. S1 (2008).

Id.

Id.

Id. at S4-5.

*Id.*at S5.

Id.

Id.

Id.

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Case Summary: Nancy J. Lamarche v. Stephanie A. McCarthy, 2008 N.H. LEXIS 150

Issue: The New Hampshire Supreme Court considered whether a rule requiring payment of a fee by parties subject to court-ordered alternative dispute resolution is constitutional.

Rule: The Court determined that the $50 mandatory fee is constitutional because it is a reasonable method for raising revenue and it does not deprive litigants of access to the court. The Court also ruled that the presence of sanctions for failure to pay the fee (up to and including dismissal of the case) does not affect the constitutionality of the rule. [1]

Facts: Nancy Lamarche and Stephanie McCarthy were plaintiff and defendant respectively in a personal injury matter. The case was referred to mandatory alternative dispute resolution by the trial court. Both plaintiff and defendant objected to the mandatory $50 fee for such a proceeding and the trial court agreed, stating that the required fee was unconstitutional. The New Hampshire Office of Mediation and Arbitration ("OMA"), a legislatively-created body charged with making alternative dispute resolution programs within the state's judicial branch an efficient, effective and useful part of the court process, intervened, arguing for the fee's constitutionality. [2]

Discussion: After determining OMA did, in fact, have standing to intervene in the case, the Supreme Court addressed the constitutionality of a mandatory fee for ADR. Plaintiff in this case advanced several theories to the Court supporting the contention that a mandatory fee was unconstitutional.

Her first argument, in the words of the Court, was that imposing a fee for ADR was "tantamount to requiring one to purchase justice." [3] The Court was unreceptive to this line of reasoning, instead favoring an argument advanced by the State of New Hampshire, as amicus, that the $50 fee for alternative dispute resolution was "akin to a filing or such administrative fee…" and that "[s]uch fees have been found constitutional in this state and others, and should be upheld" (internal citations omitted). [4] Ultimately, the Court ruled that the fee was "a reasonable fixed fee, prescribed for the purpose of revenue." [5]

Plaintiff also alleges that the fee (or the associated sanctions for failure to pay it) could result in the deprivation of the constitutional right to a jury trial. [6] The Court dismisses this contention on two grounds: First, the third-party neutral to which their case was assigned was not a judge and had no power to make judicial decisions or bind the parties to a course of action. Also, the Court analogizes the case to that of *Follansbee v. Plymouth Dist. Ct.*, 151 N.H. 365, 367 (2004), wherein the Court held that a "thirty dollar fee for a bail assessment did not violate our constitution because an arrestee would receive a hearing regardless of his or her ability to pay immediately…Because imposing a fee to be paid at a future time did not deprive arrestees of their right to bail, it was subject to rational basis review. The same is true in this case." [7] Since plaintiff was never actually deprived of her right to trial, the Court used a rational basis test and – as noted above – it found the fee being charged appropriate.

Plaintiff's final argument against the fee's constitutionality stemmed directly from the possible sanctions for nonpayment. [8] Reiterating its reasoning that the fee was similar to any other court imposed fee, the Court held that "Available sanctions…for a plaintiff's refusal to pay are broad. Indeed, such sanctions could include dismissal of the case if the trial judge found it appropriate. Dismissal for a plaintiff's failure to pay a filing or administrative fee, such as the fee in this case, is both reasonable and constitutional." [9]

Though $50 is a relatively low figure even in small claims court, with this decision the New Hampshire Supreme Court has opened the door to a host of questions involving obligatory fees for court-mandated ADR. Perhaps most pressing among these are at what point the fee becomes unreasonable and the method a court will use to determine whether that threshold has been breached. Given that many litigants are often resistant to court ordered ADR let alone being forced to pay for it, answers to these questions will surely be forthcoming.

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[1] *Nancy J. Lamarche v. Stephanie A. McCarthy*, 2008 N.H. LEXIS 150, at *1.

[2] *Id*. at *1-*3.

[3] *Id*. at *12.

[4] *Id*. at *15.

[5] *Id*. at *14.

[6] *Id*. at *13.

[7] *Id*.

[8] *Id*. at *12.

[9] *Id*. at *15.

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Mediating Culture: Is Mediation an Appropriate Forum for Employment Discrimination Claims Despite Cultural Differences?

Tiffany T. Smith

Introduction

Consider this scenario. A supervisor in the IT department of a large technological services company fires an employee due to unexcused absences. The employee, an older man of Latino descent, claims that the employment action was not a result of absences, but rather, a discriminatory decision made because of both his age and ethnic background. The supervisor, a young, African-American college graduate, vehemently denies the accusation that racial or ageist bias motivated her decision. The judge orders mandatory mediation of the claim before proceeding to trial. The mediator, a middle-aged Caucasian woman, is Jewish and the daughter of immigrants who spoke another language in the home.

Although this hypothetical scenario was created for the purposes of this paper, it is fairly representative of what a typical employment discrimination mediation could look like. Age, gender, ethnicity, color, race, education, socioeconomic status, religion, language, and national origin all contribute to each individual's unique cultural identity. The one definitive thing that each actor in this scenario has in common is their diversity. Given these cultural differences, will a mediation of this dispute result in a process that is fair, just, and mutually satisfactory to each party?

Alternative dispute resolution ("ADR") program developers have frequently overlooked cultural issues as ADR has become a popular alternative to traditional adversarial litigation. At least one critic suggests that American dispute resolution systems "are often founded on assumptions that do not fit the cultural influences and behaviors of persons" for which they are intended. [1] Because mediation is unquestionably a major dispute resolution process, the concern that cultural differences among disputants and mediators impact the mediation process is significant. Further, the question is whether such differences can adequately be accounted for in shaping and participating in dispute resolution processes.

Many people equate "culture" with "ethnicity" or "race." Although these terms are related, the incorrect belief that they are one and the same ignores the many other "sources of diversity which contribute to cultural identity, and perpetuates false dichotomies." [2] Moreover, traditional categories of racial identification are increasingly inapplicable in metropolitan areas given the increase in interracial and first generation immigrant families. [3] To have any meaningful discussion about culture, it is helpful to think of it as "a dynamic, evolving, interrelated set of processes comprising shared mental perceptions that help group members determine how to behave." [4] Consistent with this construction of culture is the proposition that culture plays a very prominent role in each individual's thoughts and actions; therefore, it inevitably plays a significant role in any dispute resolution process.

Addressing cultural differences in the context of employment discrimination mediations is particularly important given that such claims are made precisely because of age, race, color, ethnicity, religion, gender, or national origin – all characteristics that contribute to one's cultural identity. This paper will seek to examine the specific effects that cultural differences have on the process, the parties, and the mediator, and then argue that such differences do not eliminate the option of using mediation to resolve employment discrimination claims. Part I provides an overview of mediation. In Part II, the author discusses the critiques of intercultural mediation and the challenges it presents for mediators. In Part III, the author gives a brief overview of two cultural groups who have developed their own forms of dispute resolution that respect

their cultural norms and ideals. In Part IV, the author concludes by discussing what implications there are for mediating employment discrimination disputes as a result of cultural differences amongst the parties and the mediator.

Discussion

I. Overview of Mediation

According to the Uniform Mediation Act (the "UMA"), mediation is a "process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." [5] In short, mediation is an alternative method of dispute resolution that consists of a discussion between two or more parties, facilitated by a neutral third-party mediator. The mediator, who has no power to impose or enforce any particular agreement between the parties, may employ a variety of mediation techniques in order to help the parties reach an agreement.

Traditionally, a mediator may play one of two major roles during a mediation. In a facilitative role, the mediator may encourage exchanges of information, provide new information, help parties understand each other's views, let them know that their concerns are heard and understood, promote a productive level of emotional expression, encourage flexibility, shift the focus to the present, and stimulate the parties to suggest creative settlement options. [6] In this role, the mediator typically refrains from giving his or her own opinion, thereby allowing the parties themselves to share such opinions. If these techniques are not successful, the mediator may choose to take a more evaluative role. In this role, a mediator would give his or her opinion, help the parties realistically assess their alternatives, and invent solutions that meet all the parties' interests. [7]

Mediation, although typically a result of two or more parties' inability to settle some type of dispute, can be used in multiple contexts. There are court-mandated mediation programs, small-claims mediations, prosecutor-assisted pre-filing programs, and many others. The ever-increasing rise in mediations – of all types – has led the legal community and national and state legislatures to consider what regulations should be imposed on the process. [8] Issues of privilege, confidentiality, enforcement, fairness, costs, and quality control [9] have all been raised.

There are numerous benefits to be reaped from the mediation process. In particular, mediation can be useful when the parties have an ongoing relationship that they want to preserve. This is due to mediation's focus on the present and future, rather than past conflicts. Mediation can also be beneficial to parties who want to avoid a clear win/lose decision that would be rendered in traditional litigation, and instead prefer to keep control of the process and craft their own unique settlement. Mediation is also typically much less expensive than litigation, both with regard to financial and time expenses.

II. Intercultural Mediation Poses a Number of Challenges to the Process, the Parties, and the Mediator.

A. Concerns About Intercultural Mediation Revolve Around Fairness, Achieving Rights, and Miscommunication.

Despite the numerous potential benefits that mediation creates, critics express concern that mediation may not provide cultural minorities with a fair or consistent process. Scholars have argued that employment mediation discrimination in particular is a "second-class system of justice" aimed at "suppressing [the cultural minority employee's] conflicts rather than offering a just result." [10] Three major criticisms of intercultural mediation will be discussed in turn.

i. Prejudicial or Biased Opinions May Prevent Mediation from Serving as a Fair Forum for Culturally Diverse Parties.

The first criticism suggests that mediation disserves parties who are members of powerless or disadvantaged groups based on psychological theories of prejudice. [11] After reviewing the psychological literature on the origins of prejudice, one group of prominent scholars concluded that social-psychological theories of prejudice may support the notion that racism resides so deeply within the American culture and psyche that it can survive unconsciously. [1]2 Although that critique was concerned primarily with racial differences, the general point can be applied to many – if not all – cultural traits. If unconscious bias exists among individuals, concerns arise over whether mediation can provide a fair process to culturally diverse parties.

The informal structure of mediation – where parties are encouraged to speak freely about their concerns and interests – creates a unique environment for the resolution of disputes. This setting is starkly different from traditional litigation, which takes place in a courtroom, is presided over by a judge, and is subject to strict rules concerning formality and procedure. [13] Scholars are concerned that mediation's informal setting effectively creates an environment where parties will "feel safe" letting prejudicial feelings influence their actions and behavior. [14] Within the structure of traditional litigation, such notions would otherwise be kept removed from the process, or at least concealed, through procedural protections such as the Federal Rules of Civil Procedure.

Even if individuals do not knowingly allow prejudicial feelings to influence their behavior in mediation, [15] individuals will have differing thoughts, feelings, and expectations of the process as an inherent result of their unique cultural identity. Scholars seem to agree on three points concerning culture. [16] First, culture affects people's values, beliefs, perceptions, and behaviors. Second, both individual and cultural differences contribute to differences in values, beliefs, perceptions and behaviors. Third, the degree of interculturalness is a continuum rather than a dichotomy. Additionally, most people belong to numerous "subcultures" that further contribute to their identity. [17] Given these findings, along with the fact that each individual has a unique cultural makeup, it is likely that any mediation will be a medley of diverse thoughts. Because those existing ideas will inevitably affect an individual's conduct in mediation, it is critical that both the parties and mediator exercise a heightened level of awareness and respect for other individuals' cultural identities.

ii. Cultural Minorities May Not Be Able to Assert and Achieve Their Rights Through Mediation.

The second major criticism of intercultural mediation is that, from a "pro rights" perspective, mediation also disserves cultural minorities. [18] This argument derives from the idea that mediation and other forms of ADR did not become popular until the time when disadvantaged groups, specifically women and racial minorities, began extensively using the adversarial system to fight for their rights. Critical Legal Studies scholars argue that ADR effectively controls and undermines this "rights explosion," [19] by lessening the ability of cultural minorities to assert their rights through the formal, procedural safeguards afforded by the litigation system. Claimants cannot achieve an equally satisfactory resolution to their claims through ADR, because according to critics, the emphasis on informality and compromise in mediation does not encourage disadvantaged parties to focus on their own rights and values. [20]

Proponents of mediation would assert the exact opposite, arguing that the informality of mediation allows cultural minorities an ideal forum in which to express their interests, values, views, and experiences in an authentic way. [21] Because they would have the opportunity to fully express themselves without the constraints of litigation, there would likely be an increased possibility that the opposing party would understand their position. Understanding the other parties' interests is critical to achieving any resolution that will encompass both parties' goals and succeed long term. Proponents of mediation would also argue that mediation provides diverse parties with the opportunity to achieve reconciliation with the other party. There is no reason why cultural minorities would not have the same psychological need as the majority to experience connection and reconciliation when resolving some disputes. [22] Under this view, mediation does allow cultural minorities to assert and achieve their rights, as well as other interests shared by many disputants.

Nevertheless, the benefit that mediation provides to diverse parties by allowing them to tell their own stories might in fact disadvantage those same individuals. While in mediation, the narratives of each party must compete in order to gain legitimacy. But cultural minorities may have more negative "cultural myths" attached to them, many of which are based on derogatory stereotypes and assumptions. [23] These negative cultural myths will undermine the ability of those parties to legitimate their narratives, and therefore to compete effectively." [24] Furthermore, the parties to the mediation will not be the only individuals receptive to negative cultural myths. Rather, despite a mediator's attempts at remaining neutral and unbiased, he or she will also inevitably come to the mediation with preexisting cultural myths, both positive and negative. [25]

iii. Intercultural Mediations May Increase the Chance of Miscommunication Among the Parties or the Mediator.

The diversity present in intercultural mediations poses significant challenges both to the mediator and to the mediation process itself because there is an increased possibility of miscommunication or misunderstandings. At a basic level is the age old argument that men and women communicate in very different ways. More importantly, diverse racial, religious, and ethnic groups often have distinct phrases and terms with underlying meanings that would not necessarily be fully understood by people from a different cultural background. [26] An even greater challenge is raised in intercultural mediations where the participants speak different languages or where English is not their first language. Indeed, at a conference planned in order to design and implement mediation in Costa Rica with dispute resolution professionals from Florida and Costa Rica, cultural and language differences prevented the participants from agreeing whether the systems they were discussing were "mediation" or "conciliation." [27]

On a more nuanced level, participants from different cultures may interpret certain body movements, hand gestures, or facial expressions in diverse ways. [28] Therefore, a participant could unknowingly communicate something to the other party that he did not intend. This is obviously detrimental to a system specifically designed to provide parties with an open forum for discussion. If inaccurate information is communicated to the other party, a mutually agreeable resolution to the dispute will prove much harder to achieve. This brings us to the next section, which discusses the unique role that mediators play in intercultural mediation.

B. The Mediator's Role is Critical to Overcoming the Challenges Posed by Intercultural Mediation.

Some scholars posit that the goals of the mediation process differ according to the culture of each participant. [29] As discussed above, it is also argued that the underlying prejudices people have are more likely to be exposed in the kind of informal setting provided for in mediation. If either of these two theses is correct, the mediator's role is critical to overcoming those challenges.

If the goals of the mediation process differ according to the culture of each participant, it is incumbent on the mediator to make "every effort to learn about the cultural and social expectations" of the participants. [30] The mediators must understand the parties' diverse "goals or 'conceptions' of the process, and [ ] forge a process which satisfies the participants' different conceptions." [31] Some scholars have argued that mediators should be able to take an "activist" or "interventionist" approach to mediation in order to positively focus the parties' perceptions and interaction. [32] But this approach raises its own set of problems. The argument that mediators should be able to prevent or stop any negative cultural biases between the parties makes the assumption that the mediator does not possess biases of his own; a false assumption because every person has inherent biases. Moreover, if mediators were to insert their own personal beliefs and values into a mediation session – even in the noble attempt of defeating any existing prejudice between the parties – the mediator would be taking on the kind of activist role that is considered inappropriate within the mediation structure. Even those mediators who take an evaluative approach are expected to refrain from imposing their personal feelings into a mediation. Failing to do so would jeopardize the process' neutrality and thwart the goal of having a process and resolution shaped by the parties.

The above criticisms call into question the effectiveness of mediation where, as a result of cultural differences, the mediator and disputants hold different expectations for the process. But even if mediation can still be effective despite cultural differences, what kinds of implications are there for mediator selection and training? Should mediators be required to undergo specific cross-cultural training? And if such training should be required given our diverse society, what effect will this have on the number of people who choose to become mediators? Will mediation become a more expensive process, thereby losing one of its most attractive features?

In one court-connected mediation program, the mediators received significant cross-cultural training. In that program, the mediators were asked to recognize that their own learning can be limited by "culture and family-induced…preconceived notions of how things are." [33] Moreover, the mediators were warned that prejudices can seriously impede or prevent communication with someone who recognizes different signs, mores, and folkways derived from distinct social classes. [34] The program found that misleading, loaded, or unfair questioning exhibiting bias could be found oppressive and disadvantageous to one of the participating parties. [35]

In addressing the second challenge – for prejudice to be reduced when members of "majority" and "minority" groups meet – the contact must be intimate, on equal terms, and perceived as rewarding. [36] However, these requirements will likely be hard to achieve in a mediation atmosphere. Although the contact will be intimate due to the informal setting, equal status is not likely to be perceived. Culturally diverse parties may have disparate socioeconomic statuses, thereby creating inequality. [37] Alternatively, the parties may come to the mediation with pre-conceived negative perceptions, based on the fact that the mediation has arisen out of a disagreement. This will effectively make them anticipate the process to be antagonistic, threatening, or negative. [38] If the parties interpret the process as either unequal or with negative pre-conceptions, it will eliminate the ability of the mediator to transform the process into a positive and beneficial interaction.

Some studies have attempted to see what impact the race or ethnic background of the mediator plays in the outcome of mediations. In one such study conducted at the University of Oklahoma City School of Law, one third of the mediators were non-white. Of the 125 cases in which the mediator was of mixed ethnic heritage, it was reported by the mediator that race, ethnicity, or national origin played no discernable role. [39] Moreover, in cross-cultural mediations involving both ethnicity and gender, female mediators reported that their gender played a larger role than their race, while male mediators reported that their gender was a neutral factor. [40] Interestingly, the most consistent factor that played a role in the outcome of the 125 cases involving minorities was general literacy and formal education, both of which are proxies for socioeconomic class. [41] Although socioeconomic status is distinct from race, because the two are – unfortunately – often related, these results invariably raise the question of whether race does, even indirectly, play a role in mediations.

One scholar has posed three possible theories for why race was reported as such an unimportant factor. First, the scholar suggests that the self-reporting could be a result of America's transformation into a color-blind society. On the other hand, and more likely, either the mediators, participants, or both noted color at some point, but made a conscious decision to make it a "secondary consideration." Another possibility for the report results could be that the mediator used mediation protocols learned in training to direct the parties in a "neutral direction." Finally, a judge's positive referral of the mediator could have caused the parties to disregard race and enter into the process with an understanding of neutrality and respect. [42]

Although race was reported as having little effect on the mediations, mediators who were members of a minority group across the board reported a "heightened intuitive awareness of cross-cultural issues." [43] This finding could have significant implications for ensuring that all parties involved in cross-cultural mediations are treated fairly. For example, does this finding suggest that minority mediators may be better equipped to ensure that the parties' cultural backgrounds are taken into account and respected? If such is the case, what can be done to ensure that mediators who are not cultural minorities provide a fair process for all parties? Possible solutions are discussed in Section IV.

Another study analyzed the direct effect of race on small claims court mediations. That study found several surprising results. First, the testers found that minority status in terms of ethnicity, race, or national origin may not in fact matter as much as gender. [44] Second, neither gender, ethnicity, race, or national origin may matter as much as socioeconomic status. [45] Although these results may be surprising, they still indicate that one's cultural identity, no matter which particular facet of it, does in fact effect mediations. The report also indicated that well-constructed, monitored methodology for mediator training and supervision may assure fairness in small claims court mediations. [46] Moreover, the study's author posits that mediation may in fact be more advantageous to cultural minorities than litigation would be. [47] This is because mediation often focuses on culturally framed issues of relationships, such as respect and morality, whereas such ideas are not usually addressed in a typical adversarial setting. This is distinct from the view taken by some scholars, that any mediation straying from strict legal issues may actually invite victimization of the minority party. [48]

III. Many Cultural Groups Design Dispute Resolution Systems that Respect Their Group's Norms, Beliefs and Ideals.

Many cultural groups form their own methods of dispute resolution. This section will provide brief examples of two such systems: one used in Filipino villages, and the other among Canadian aboriginal tribes. [49] Interestingly, both of these processes have proven very successful in resolving disputes within their respective cultural groups. The author will describe how implementing unique systems designed specifically to respect their culture's norms and values extinguishes the negative aspects of ADR, and mediation in particular, for their particular group.

A. Filipino Dispute Resolution

In 1978, the Philippines promulgated the Katarungang Pambarangay, a law that calls for a system of nationwide mediation to be performed at the local and village level. [50] The Katarungang system is "forward looking" in that it is designed to restore the "harmonious relationship between the parties." [51] This system of informal justice is conducted by either a "barangay captain" or a "conciliation panel." [52] A barangay captain is typically the principal village official, and the conciliation panel is normally comprised of neighborhood residents. Unlike American mediation, the process is open to all of the villagers and they are welcome to participate in it should they so choose. However, parties and their families or friends are the typical participants.

The procedural design of the Katarungang Pambarangay system has both similarities and differences from traditional American mediation. In contrast to American mediation, Katarungang usually begins with an investigation by the barangay captain into the facts of the dispute. However, his investigation is not limited to the scope of the dispute. Rather, because there is a focus on restoring the future relationship of the parties, the barangay captain may choose to explore the full extent of their relationship. After the investigation, both parties are brought together and invited to share their respective accounts of the dispute, similar to party narratives in American mediation. The barangay captain may then question both of the parties and their witnesses. After that, the barangay captain encourages the parties to propose possible terms for an agreement.

Barangay captains take an exclusively facilitative role, and similar to American mediators, are not substantially confined to any particular style in which to do so. Although the barangay captains may suggest potential settlement terms, they are not allowed to dismiss a complaint or impose an agreement; each party must consent to the conclusion of the process. [53] The barangay captains' role is distinct from American mediators in that they are rarely neutral. In addition to conducting an independent investigation, they are typically well-known leaders of the village, and therefore will likely know the parties to the dispute. The loss of mediator neutrality is an inevitable, though seemingly successful, side-effect of conducting mediation systems in close-knit cultural groups.

Although mediation is the least formal of the government-sanctioned dispute systems in the Philippines, it has been very effective in helping parties resolve disputes. At least one commentator believes that Katarungang mediation is considered the most desirable form of dispute resolution because the "key values and beliefs of the folk legal culture" support it. [54] This is largely due to the fact that villagers perceive the system to be one based on fairness. In Filipino culture, fairness is considered an integral aspect of any just dispute resolution system, particularly with respect to the equal treatment that those of different financial means are afforded.

This mediation system also respects the culture of its participants because, in contrast with the Filipino judicial system where proceedings are conducted in English, Katarungang hearings are held in the local language. [55] It is also maintained that the Katarungang system is particularly successful because the village official's authority is rooted in the values held by the participants. [56] Lastly, participants tend to be receptive and supportive of the Katarungang system because their culture believes that disputes should be settled within the village, both to maintain their reputation to other villages and so that good relations between the disputants can be restored. [57] Based on all of these factors, it seems clear that one of the primary reasons the Katarungang system achieves such success is because of its respect for the participants' cultural beliefs.

B. Aboriginal Canadian Dispute Resolution

The aboriginal population in Canada has long been treated much like racial minorities in the United States. With higher incarceration rates and longer sentences than their fair-skinned counterparts, they have not typically fared well in the traditional Canadian legal system. [58] Moreover, certain aspects of Canada's trial procedures are in direct conflict with the Aboriginal people's norms of appropriate behavior. [59] For these reasons, among others, in the 1990's the aboriginal First Nation community in the Yukon and Northwest Territories developed "Circle Sentencing" and "elder panels," two forms of alternative dispute resolution comparable in some ways to American mediation. Because elder panels are used almost exclusively in combination with the Canadian court system, the discussion here will focus on Sentencing Circles, which have gained in popularity and spread to several other communities throughout the country.

Circle Sentencing is a process that is used primarily for juvenile issues and criminal offenses, though it can also be applied in civil disputes. [60] Although the basic idea of Circle Sentencing remains constant, different Aboriginal tribes may vary in the way they implement it. The participants include offenders, victims, and their respective families, though community supporters are also welcome to participate. [61] Because community members frequently want to participate, there will often be two circles: the inner circle comprised of parties directly involved in the case and the outer circle comprised of community members. [62] In Circle Sentencing, an elder of the community serves as a facilitative third party. Many elders begin the process by first performing a sunrise pipe ceremony, and then conducting a cleansing ceremony for all participants. [63] This aspect of the Sentencing Circle is meant to ground the participants in their traditional beliefs and spirituality. [64] He then directs an open discussion between the parties about the causes and consequences of the offender's crime by passing an eagle feather or "talking stick" around the circle. [65] Each person is allowed to share their thoughts on the dispute when they are holding the object. This approach represents equal respect for each speaker. In a restorative fashion, Circle Sentencing seeks to repair the harms that resulted to the victim, family members, and community from the wrongdoing. [66] In that regard, the resolution arrived at is often put into a "healing contract." [67] However, Circle Sentencing also has a forward looking approach, signified by the elder discussing the consequences that the offense will have on the parties' future relationship. [68]

The First Nation community developed this system because there was a need for a dispute resolution system that understood Aboriginal norms. In contrast with the Canadian court system, participants in Circle Sentencing perceived it as a beneficial process that respects their norms and values. Importantly, Sentencing Circles are conducted in the Aboriginals' native language, instead of French or English like the court system. Another distinctive feature about this form of dispute resolution is the importance that traditional Aboriginal norms and spiritual beliefs play both in making judgments about the wrongful conduct and in determining what the appropriate course of action is to rectify it. [69] As one Yukon Territory judge put it:

> "The circle has the potential to accord greater recognition to Aboriginal values, and to create a less confrontational, less adversarial means of processing conflict. Yet the circle retains the primary principles and protections inherent to the justice system. The circle contributes the basis for developing a genuine partnership between Aboriginal communities and the justice system by according the flexibility for both sets of values to influence the decision making process in sentencing." [70]

Sentencing Circles have achieved high levels of success, both in terms of tangible results and party satisfaction. In fact, ninety-three percent of the nearly two thousand cases that were mediated in programs in Calgary, Langley, Ottawa, and Winnepeg reached a settlement. [71] More than three-quarters of the participants perceived the process as fair and reported high levels of satisfaction. [72]

IV. Mediation Can Serve as a Fair Forum for Resolving Employment Discrimination Claims So Long as the Process Accounts for Cultural Differences Among the Disputants and the Mediator.

Mediation has been utilized as an alternative process for resolving employment discrimination claims in order to help reduce the backlog of court dockets and the Equal Employment Opportunity Commission ("EEOC"). [73] Proponents cite a wide variety of benefits to mediating employment discrimination claims, including EEOC and court cost savings, quicker

resolution of disputes, preservation of relationships, greater control over the process by parties, thereby leading to higher self-esteem and self-confidence, and amicable dealings between the disputants. [74]

As discussed *supra*, diverse cultural traits, values, and interests raise unique issues in mediation. However, such challenges do not have to nullify mediation as a viable dispute resolution system for employment discrimination claims. Admittedly, the Filipino and Aboriginal Canadian dispute systems described above were designed for disputes amongst individuals belonging to the same cultural group. Nevertheless, those examples demonstrate that success can be achieved in intercultural mediations when the system is designed to account for and respect the cultural norms and ideals of the disputants and the mediator. In order to attain a fair and mutually beneficial forum for dispute resolution, employers, employees, and mediators must be cognizant of several issues when participating in cross-cultural mediation of employment discrimination disputes. This is particularly important considering that the very claim being mediated in such cases is that an employer made an allegedly discriminatory employment action against an employee on account of a trait which contributes to that employee's cultural identity. [75]

First, the mediation system has to be one that ensures fairness to both parties. In order to do this, the mediation system must recognize the importance of power differentials between the employer and employee, as well as differing cultural dynamics. [76] Power differentials between the employer and employee can have a significant effect on the process. For example, the employee may not understand the importance of having representation. Even if the employee desires an attorney, he may have difficulty finding one. Although the employee may find an attorney, his socioeconomic position may prevent him from being able to pay for the attorney. Therefore, the employee may decide to represent himself. This scenario is not satisfactory; such an outcome will not only perpetuate the advantages gained by "repeat player" employers, but actually exacerbate those disparities.

The mediation system should remove some of the "repeat player" advantages of employers by providing the employee disputants with a realistic opportunity for legal representation, preferably by counsel who is him/herself a repeat player in mediation. [77] Employee claimants should also be provided "a fair selection of mediators from a core and critical mass of qualified people of color and women, and an opportunity…to have a role in [the mediation system's] design of reasonable and balanced procedures." [78] These allowances will go a long way in leveling out the playing field between employer and employee. Not only will they ensure that the employee walks into a mediation properly advised, but will also make the process more inclusive by allowing the employee to assist in shaping the mediation he will participate in.

The role of the mediator is also important in ensuring that cultural differences of the parties do not negatively affect the process. It is incumbent on employers to ensure that the mediator selected to serve as the third-party neutral in any workplace discrimination dispute is both trained and competent in handling intercultural disputes. The training developed by the ADR System in Oklahoma would provide very beneficial guidance to mediators and should be incorporated into all mediation programs, rather than being kept as part of a separate, non-mandatory "cross-cultural" training option. If the mediator knows what the participant's cultural background is, he should seek to learn about that culture in order to avoid missing cues, misinterpreting data, misreading meanings, and confusing issues. [79] This is probably not a realistic goal for American mediation, as it both opposes the system's basic tenet of neutrality and because mediations do not take place in insular communities where significant time can be spent on researching the parties' backgrounds. However, it could possibly be implemented in employment discrimination disputes where both the employer and employee consent to the release of the parties' biographical information prior to the mediation.

Some scholars argue that the mediator has a duty to rectify any power imbalances that exist between the parties by taking a more active approach to the mediation. [80] However, I believe that mediators should conduct the process in a way that is both procedurally fair and accounts for the disputant's cultural background, without losing the mediator's neutrality. This includes ensuring that communication is thoroughly understood, that each party has an equal opportunity to share their thoughts, and that each party's goals for the process are respected. Anything beyond that would begin to transform a facilitative third-party neutral into an interested intervener.

If the employer does not take seriously its responsibility to provide a fair mediation process for participants who are members of a cultural minority, it falls to the employee to ensure that he participates in a fair mediation in which his cultural background will be respected. If both the employer and employee fail to take measures that ensure a fair process, the legitimacy of the entire process – and agreement – could be called into question, based on claims of bias or prejudice. Not only would this undermine the process's validity, but it could ultimately prove to be extremely costly for the parties – both in terms of their financial and time investments.

Conclusion

Because employment discrimination claims often fare poorly in the court system, many ADR proponents have argued that informal alternatives may provide employment discrimination claimants "a more realistic chance for a fair resolution of

their disputes." [81] This makes it imperative that the alternatives used, specifically mediation, account for the cultural differences of the participants. Culture plays a significant role in one's thoughts, interpretations, decision-making, and actions, and is an especially important factor to be considered where an employee claims that a dispute between the employee and his employer is because of that employee's cultural identity. Hence, the complex issues raised by cultural differences must be addressed when shaping mediations of employment discrimination disputes. The success that cultural groups have had in creating their own forms of mediation serves as encouraging evidence that a fair and just process can be achieved in employment discrimination mediations – so long as the process, mediator, and disputants themselves recognize and respect a participant's cultural background.

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[1] Don Peters, *To Sue is Human; To Settle Divine: Intercultural Collaborations to Expand the Use of Mediation in Costa Rica*, 17 Fla. J. Int'l L. 9, 26 (2005).

[2] Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 Am. U. J. Gender & Law 269, 273 (1996).

[3] Phyllis E. Bernard, *Minorities, Mediation and Method: The View From One Court-Connected Mediation Program*, 35 Fordham Urb. L. J. 1, 16–17 (2008) (hereinafter "*Minorities, Mediation and Method*"). Although this paper will focus on cultural differences, the reader should keep in mind the underlying racial, religious and gender differences that can contribute to one's cultural identity.

[4] Peters, *supra* note 1, at 29.

[5] Uniform Mediation Act, § 2(1), 2002.

[6] Stephen B. Goldberg, Frank E.A. Sander, Nancy H. Rogers & Sarah Rudolph Cole, Dispute Resolution: Negotiation, Mediation & Other Processes 107 (5th ed. 2007).

[7] *Id.*

[8] There are currently over 250 state statutes regarding mediation. Due to this lack of uniformity, in 2002 a committee representing the American Bar Association Section on Dispute Resolution created the Uniform Mediation Act ("UMA"), which has yet to be adopted in every state.

[9] Currently, there is not a uniform set of qualifications for mediators. *See* Sarah Rudolph Cole, *Mediator Certification: Has The Time Come?*, 11 Disp. Resol. Mag. 7–12 (2005). However, including diversity training as a mediator requirement could be an important step in ensuring that intercultural mediations are fair to all parties. This is an important topic that will be discussed in more depth *infra*.

[10] Michael Z Green, Symposium, Second National People of Color Legal Scholarship Conference: *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 Berkeley J. Emp. & Lab. L. 321, 323 (2005) (hereinafter "*Tackling Employment Discrimination*").

[11] Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. Disp. Resol. 55, 58 (1995). Although "disadvantaged" does not equate to "cultural minority," there is significant evidence that on average, individuals who are members of minority groups in American tend to be less educated, lower paid, and more likely to have a decreased quality of life, be that concerning healthcare, housing, education, or employment. These disturbing realities are a result of numerous societal factors, a discussion of which would far exceed the scope of this paper. However, for purposes of this paper, references to "disadvantaged" individuals will be synonymous with any person who is a member of an underrepresented cultural group.

[12] *Id.* at 58–59 (discussing Richard Delgado, et. al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wisc. L. Rev. 1359, 1380). Professor Delgado also analyzes two other theories of prejudice: psychodynamic and economic. *See* Delgado, at 1375–82. *See* Kang, *infra* note 15 for a discussion of the related implicit bias theory.

[13] *See* Delgado, *supra* note 12, at 1367–75 for a discussion of the elements of adjudication that function to reduce prejudice in trials.

[14] This is not to say that prejudicial feelings do not have any influence in litigation. Juror and judicial biases inevitably exist, and unfortunately, may influence decision making. However, the parties themselves are restricted to following the Rules of Civil Procedure, which do not allow an opportunity for open discussions in which personal biases could be revealed. At most, the parties' prejudicial feelings may influence how they direct their counsel to act, for example, in rejecting a settlement offer or pursuing a particular line of questioning during testimony.

[15] Although participants and mediators may not knowingly possess prejudicial feelings, there is significant evidence that many, if not most, individuals possess inherent biases towards members of other cultural groups. See Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489, 1494 (2005) for a discussion of the implicit bias theory, which posits that most people, despite sincere self-reporting to the contrary, have biases against racial and ethnic minorities in the form of negative beliefs (stereotypes), and attitudes (prejudice).

[16] *See* Savage, *supra* note 2, at 272–73.

[17] *Id.* at 273.

[18] *See* Gunning, *supra* note 11, at 58.

[19] *See id.* at 61 (citing Richard L. Abel, *Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice*, 9 Int'l. J. Soc. L. 245, 256 (1981)).

[20] *See id.* at 62.

[21] *See* Michelle Herman, Gary Lafree, Christine Rack and Mary Beth West, *Report Summary: An Empirical Study of the Effects of Race and Gender on Small Claims Adjudication an Mediation*, Institute of Public Law, Univ. of New Mexico (Jan. 1993).

[22] *See id*.

[23] *See* Gunning, *supra* note 11, at 72.

[24] *See id.* at 68, 71.

[25] *Id.* at 70.

[26] For example, in Farsi there are no positive corollaries for the words mediate or compromise, as the closest Farsi words "connote notions of meddling for mediating and disadvantaging for compromising." *See* Peters, *supra* note 1, at 27. Similarly, in the Czech Republic, the word collaborate has a negative association of giving information to law enforcement. *Id.* at 28.

[27] *See id.* at 23.

[28] For example, "crossing one's legs or showing the sole of one's foot" may be a serious insult in one culture but "a matter of comfort in another." David W. Augsburger, Conflict Mediation Across Cultures: Pathways and Patterns 23 (1992).

[29] Savage, *supra* note 2, at 271.

[30] Jan Jung-Min Sunoo, *Some Guidelines for Mediators of Intercultural Disputes*, 6 Negot. J. 383, 387 (1990).

[31] Savage, *supra* note 2, at 272.

[32] John Forester & Doug Stitzel, *Beyond Neutrality: The Possibilities of Activist Mediation in Public Sector Conflict*, 5 Negot. J. 251 (1989).

[33] State of Oklahoma Alternative Dispute Resolution System, Mediation Training Manual and Resource Guide, Supreme Court of Oklahoma 37 (1994).

[34] *See id.*

[35] *See id.* at 48.

[36] Gunning, *supra* note 11, at 59.

[37] *See id.* (discussing Delgado's prejudice reduction findings).

[38] *See id.*

[39] *Minorities, Mediation and Method, supra* note 3, at 30.

[40] *Id.* at 28–29. Although not explored by the study's author, one must wonder whether this result may be because men aren't cognizant of their gender in the same, or similar way, that whites are not cognizant of their race.

[41] *Id.* at 34.

[42] *Id.* at 30.

[43] *Id.* at 31.

[44] *Id.* at 1.

[45] *See Minorities, Mediation and Method, supra* note 3.

[46] *Id.*

[47] *Id.* at 8.

[48] *See* Delgado, *supra* note 12, at 1387.

[49] Other cultures that have formed their own dispute resolution systems include the Navajo, Amish, Quaker, Mennonite, and many other religious groups.

[50] *See* G. Sidney Silliman, *A Political Analysis of the Philippines' Katarungang Pambarangay System of Informal Justice Through Mediation*, 19 L. & Soc'y Rev. 279, 280 (1985).

[51] *Id.*

[52] *Id.*

[53] *Id.* at 292.

[54] *Id.* at 291.

[55] Silliman, *supra* note 50, at 291.

[56] *Id.* at 295.

[57] *Id.* at 296.

[58] *See* Melissa S. Williams, *Criminal Justice, Democratic Fairness, and Cultural Pluralism: The Case of Aboriginal Peoples in Canada*, 5 Buff. Crim. L. Rev. 451, 453 (2002).

[59] *See id.*

[60] *See* Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 Utah L. Rev. 413, 419 (2003).

[61] *Id.*

[62] Williams, *supra* note 58, at 480. In one Circle Sentencing conducted by the Hollow River tribe, the outer circle consisted of over two hundred community members.

[63] *Id.* at 480.

[64] *Id.* at 481.

[65] *Id.* at 480–81.

[66] Sun Beale, *supra* note 60, at 419.

[67] Williams, *supra* note 58, at 478.

[68] Sun Beale, *supra* note 60, at 419.

[69] Williams, *supra* note 58, at 475.

[70] *Id.* at 478.

[71] *See* Mark S. Umbreit, *Restorative Justice Through Mediation: The Impact in Four Canadian Provinces*, 373, 379 in International Perspectives (Burt Galaway & Joe Hudson ed., 1996).

[72] *Id.*

[73] Matt A. Mayer, *The Use of Mediation in Employment Discrimination Claims*, 1999 J. Disp. Resol. 153 (1999).

[74] *See id.* at 162. *See also* Cindy Cole Ettingoff & Gregory Powell, *Use of Alternative Dispute Resolution in Employment-Related Disputes*, 26 U. Mem. L. Rev. 1131 (1996). On the other hand, scholars have debated the propriety of using mediation as an alternative dispute process for such claims, noting concerns over the unequal bargaining powers between employers and employees, depriving parties of due process, the possibility of physical or psychological harm to parties due to the volatile nature of the dispute, denying the affirmation of public rights, and preventing the public stigmatization of discriminating employers. *See* Mayer, *supra* note 73, at 164.

[75] Many of these concerns are paralleled when considering cultural differences in the context of employment discrimination arbitration. See Michael Z. Green, *An Essay Challenging the Racially Biased Selection of Arbitrators for Employment Discrimination Suits*, 4 J. Am. Arb. 1 (2005) for a discussion of these issues as they relate to employment discrimination arbitration.

[76] *Tackling Employment Discrimination, supra* note 10, at 336.

[77] *Id.* at 340–41.

[78] *Id.*at 325.

[79] Peters, *supra* note 1, at 29. In contrast with American mediation, the mediator knows the participants well in the cultural dispute resolution systems discussed above. The third party “interveners” in the Costa Rican mediation system also typically know the disputants well. *See id.* at 31. Given this common theme among cultural dispute resolution systems, one has to wonder whether the knowledge and familiarity with the parties increases the parties’ comfort with the system and ultimately heightens the chance of a resolution.

[80] *See Tackling Employment Discrimination, supra* note 10,at 347–48.

[81] *Id.* at 329.