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## Creating a 21st Century Oligarchy: Judicial Abdication to Class Action Mediators

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# CREATING A 21<sup>ST</sup> CENTURY OLIGARCHY: JUDICIAL ABDICATION TO CLASS ACTION MEDIATORS

James R. Coben\*

## I. INTRODUCTION

It is becoming a matter of routine for federal and state judges to cite the involvement of a private mediator as evidence that bargaining in a class action case was conducted at arms-length and without collusion between the parties. In many cases, class action mediators offer up testimony about the nature of the bargaining, as well as subjective (and most often summary) opinions on the merits of the settlements they helped to broker. This article argues that this approach to mediator participation (and haphazard delivery and uncritical acceptance of mediator evidence) is an abdication of judicial fiduciary duty to ensure that proposed class action settlements are fair to absent class members.

Repeating the mantra that participation of a private mediator in the negotiating process ensures that the proceedings are free of collusion or undue pressure does not make it so. Moreover, should we really ignore the conflict of interest concerns when a mediator testifies about the quality of the bargaining or the merits of a settlement in the context of seeking court approval of the same? Unfortunately, repetition, not reasoned analysis, has characterized court opinion-writing on this topic. In fact, courts offer no reasoning to explain their practices. The one consistent theme to be inferred from the class action mediation cases is that courts view class action mediators as members of a small, elite club of highly experienced neutrals. “Club membership” alone seems to be the foundation for the now routine presumptions made about the benefits of mediator-brokered class action settlements.

Nearly three decades ago, Yves Dezalay and Bryant Garth described the “very select and elite group of individuals”<sup>1</sup> eligible to serve as international arbitrators:

They are purportedly selected for their “virtue” – judgment, neutrality, expertise – yet rewarded as if they are participants in international deal-making. In more sociological terms, the *symbolic capital* acquired through a career of public service or scholarship is translated into a substantial cash value in international arbitration.<sup>2</sup>

Arguably, this same mantle has been passed to the elite group of class action mediators. And the symbolic power that led to their selection by disputing parties has fostered especially lazy judicial reasoning, and unjustified judicial deference in a context where

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<sup>1</sup> YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 8 (1996).

<sup>2</sup> *Id.*

vulnerable third parties (class members not at the bargaining table) deserve better from our judicial system.

One solution: Insist that class action mediators be appointed as special masters under Federal Rule of Civil Procedure 53 (or state equivalent) and formalize their reporting obligations to the court. Arguably, the formal appointment would extend to the mediator the same fiduciary obligation to protect the interests of absent class members that the court itself holds, a fiduciary duty that private mediators do not have.

## II. CLASS ACTION SETTLEMENT: A UNIQUE MEDIATION CONTEXT

In most mediated general civil cases, the parties' settlement ends the initial litigation without judicial review or approval of the agreement.<sup>3</sup> Except in the minority of jurisdictions mandating court review,<sup>4</sup> or those few extraordinary situations where ongoing court supervision is needed in the form of a consent decree, plaintiffs typically dismiss their cases with prejudice under Federal Rule of Civil Procedure 41(a) (or its state equivalent), and the parties' settlement agreement is a new contract, that if breached is the starting point for an entirely new lawsuit – an enforcement action.<sup>5</sup>

Settlements of class actions require a much different path to finality. Federal Rule of Civil Procedure 23(e) directs that class actions may be settled “only with court approval.”<sup>6</sup> Moreover, the same rule mandates that class members should receive notice of the settlement,<sup>7</sup> and that it will be approved “only after a hearing and on finding that it is fair, reasonable, and adequate.”<sup>8</sup>

Though there are variations by circuit,<sup>9</sup> courts generally evaluate a number of factors to determine whether a settlement is fair, reasonable, and adequate. They include:

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<sup>3</sup> See generally SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY AND PRACTICE* § 7:19 (2012); Peter N. Thompson, *Enforcing Rights Generated in Court-connected Mediation--Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509 (2004).

<sup>4</sup> See, e.g., COLO. REV. STAT. ANN. § 13-22-308 (1991) (providing that a mediated agreement is not enforceable unless “reduced to writing and approved by the parties and their attorneys, if any . . . presented to the court . . . , as a stipulation and, . . . approved by the court”). Legislatively mandated court review is far more likely in the family law context. See, e.g., KAN. STAT. ANN. § 23-603(c) (1985) (providing that in domestic mediations, a mediated agreement is not admissible unless it is in writing, signed by the parties and their attorneys, and approved by the court); MINN. STAT. ANN. § 518.619, subd. 7 (2001) (providing that mediated child custody agreements “may not be presented to the court nor made enforceable unless the parties and their counsel, if any, consent to its presentation to the court, and the court adopts the agreement.”).

<sup>5</sup> See generally COLE ET AL., *supra* note 3, at § 7:1.

<sup>6</sup> FED. R. CIV. P. 23(e) (providing that “[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.”).

<sup>7</sup> FED. R. CIV. P. 23(e)(1).

<sup>8</sup> FED. R. CIV. P. 23(e)(2).

<sup>9</sup> See, e.g., *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 639 n.11 (5th Cir. 2012), *cert. denied*, 133 S.Ct. 317 (2012) (listing six factors as “(1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members,” (citing *Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983))); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 117 (2d Cir. 2005) *cert. denied*, 544 U.S. 1044 (2005)

- 1) likelihood of recovery, or likelihood of success;
- 2) amount and nature of discovery or evidence;
- 3) settlement terms and conditions;
- 4) recommendation and experience of counsel;
- 5) future expense and likely duration of litigation;
- 6) recommendation of neutral parties, if any;
- 7) number of objectors and nature of objections; and
- 8) the presence of good faith and the absence of collusion.<sup>10</sup>

The primary goal is to protect those class members “whose rights may not have been given due regard by the negotiating parties.”<sup>11</sup> According to the Third Circuit Court of Appeals in *Ehrheart v. Verizon Wireless*,<sup>12</sup> trial courts act “as fiduciaries for the absent class members”<sup>13</sup> and the requirement for judicial approval “ensure[s] that other unrepresented parties (absent class members) and the public interest are fairly treated by the settlement reached between the class representatives and the defendants.”<sup>14</sup>

The Ninth Circuit Court of Appeals has described this judicial intrusion into “what is otherwise a private consensual agreement negotiated between the parties to a lawsuit” as necessarily limited.<sup>15</sup> The inquiry seeks to “reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”<sup>16</sup>

The inquiry of collusion is concerned both with “overt misconduct by the negotiators” as well as “incentives for the negotiators to pursue their own self-interest and that of certain class members,”<sup>17</sup> incentives that are “implicit in the circumstances

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(listing nine factors as “(1) the complexity, expense and likely duration of the litigation;(2) the reaction of the class to the settlement;(3) the stage of the proceedings and the amount of discovery completed;(4) the risks of establishing liability;(5) the risks of establishing damages;(6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation,” (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir.1974)); *Churchill Village, LLC v. Gen. Elec.*, 361 F.3d 566, 575-576 (9th Cir. 2004) (listing eight factors as “(1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement,” (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998))).

<sup>10</sup> WILLIAM B. RUBENSTEIN ET AL., 4 NEWBERG ON CLASS ACTIONS § 11:43 (4th ed. 2008) [hereafter NEWBERG ON CLASS ACTIONS].

<sup>11</sup> *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 624 (9th Cir.1982) (noting that “[t]he class action device, while capable of the fair and efficient adjudication of a large number of claims, is also susceptible to abuse and carries with it certain inherent structural risks.”).

<sup>12</sup> *Ehrheart v. Verizon Wireless*, 609 F.3d 590 (3d Cir. 2010).

<sup>13</sup> *Id.* at 593.

<sup>14</sup> *Id.* at 594.

<sup>15</sup> *Officers for Justice*, 688 F.2d at 625.

<sup>16</sup> *Id.*

<sup>17</sup> *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003).

and can influence the result of the negotiations without any explicit expression or secret cabals.”<sup>18</sup>

That said, the examination takes place in the shadow of “a strong public policy... which is *particularly muscular in class action suits*, favoring settlement of disputes, finality of judgments and the termination of litigation.”<sup>19</sup> Thus, courts generally presume that a proposed settlement is fair and reasonable when it is the result of arm’s-length negotiations.<sup>20</sup> There is also a presumption that no fraud or collusion occurred between counsel, in the absence of any evidence to the contrary.<sup>21</sup>

Very little has been written in secondary sources about the involvement of mediators in this unique settlement environment. The sparse available commentary encourages mediators to be actively involved in seeking approval for the settlements they broker<sup>22</sup> – a perspective quite different than the typical way a mediator’s work is defined.<sup>23</sup> In 2002, attorney Richard Seymour opined in a book chapter that:

The mediator can provide a direct response to class members claiming improper collusion between the plaintiffs and the defendant in the settlement by testifying to the arms-length character of the negotiations and the vigor with which the parties pursued their competing goals.<sup>24</sup>

This recommended “strategic” use of mediator testimony promotes an alliance of the mediator and named parties – against outsiders – that is clearly at odds with the court’s duty to act as a fiduciary to protect the outsiders’ interests. It is especially troubling that such testimony is encouraged *only* in the face of class objections, rather than as a matter of routine in every case. A classic example is the mediator affidavit presented to the court in *Lipuma v. American Express Co.*:<sup>25</sup>

3. It has come to my attention that counsel for a purported class member has alleged that counsel for the parties “colluded” in reaching the settlement. I submit this affidavit to specifically address those allegations.

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<sup>18</sup> *Id.*

<sup>19</sup> *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 593 (3d Cir. 2010) (emphasis added).

<sup>20</sup> NEWBERG ON CLASS ACTIONS, *supra* note 10, at § 11:41.

<sup>21</sup> *Id.* at § 11:51.

<sup>22</sup> *See, e.g.*, Richard T. Seymour, *Mediating Class Actions: A Plaintiff Lawyer’s View*, in HOW ADR WORKS 389-411 (Norman Brand ed. 2002); Margaret L. Shaw & Linda R. Singer, *Settlement, Post-Settlement, and More: Issues in Mediating Class Action Cases*, 23 ALTERNATIVES TO HIGH COST LITIG. 61 (2005).

<sup>23</sup> *See, e.g.*, UNIF. MEDIATION ACT § 7 (2001) (prohibiting mediator reports to the court except under limited circumstances). *See also In re Tribune Co.*, 464 B.R. 126, 157 n. 44 (Bkrtcy. D. Del. 2011) (rejecting party invitation to “accord special consideration to the fact that the mediation was conducted by my colleague, Judge Gross, whose skills as a mediator are highly respected and much sought after” and emphasizing that “[m]ediations are confidential by custom and under local rule. [citation omitted]. Later assessment of the quality of the mediation, by whomever conducted—absent some identifiable impropriety (and the record here reflects none)—is antithetical to the purpose and atmosphere intended to be created to enable parties to engage in such discussions.”).

<sup>24</sup> Seymour, *supra* note 22, at 392.

<sup>25</sup> *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298 (S.D. Fla. 2005).

Based on my observations as mediator, such allegations are entirely baseless. I observed no signs of collusion or unethical conduct.

4. It is my observation that Defendants and Plaintiffs were represented by highly competent, reputable and ethical counsel who negotiated vigorously and at arms-length for their respective party's interests.<sup>26</sup>

Use of the passive voice to begin the affidavit is particularly telling. The mediator had, of course, per Seymour's advice, been recruited by the negotiating parties to defend the settlement he brokered.

Margaret Shaw and Linda Singer likewise argued in 2005 that, "mediators can provide valuable information at the fairness hearing on subjects outside of the substance of the confidential negotiations."<sup>27</sup> They observed, quite accurately indeed, that "with increasing frequency, the parties or the court may want the mediator to testify at the fairness hearing,"<sup>28</sup> and they offered examples of their own testimony, including evidence "concerning the way in which class representatives were selected, the number of meetings held, the efforts to communicate with absent class members, and the lack of collusion"<sup>29</sup> (as detailed in section III.B. *infra*, mediators frequently also opine on the quality of the settlement reached).

When such testimony is "undertaken with the permission—and often the active encouragement—of all the parties," Shaw and Singer argued, "it does not constitute a breach of confidentiality."<sup>30</sup> This view is apparently widely shared by judges, given that the word "confidentiality" virtually never appears in class action mediation decisions.<sup>31</sup>

This same exception to confidentiality is consistent with the Model Standards of Conduct for Mediators, which provides that "[a] mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, *unless otherwise agreed to by the parties* or required by applicable law" (emphasis added).<sup>32</sup> A number of state confidentiality statutes likewise authorize disclosure with party consent.<sup>33</sup>

However, the Uniform Mediation Act (UMA), (now enacted in ten states and the District of Columbia) expressly prohibits mediator reports to a court with authority to make a ruling on the dispute that is the subject of the mediation,<sup>34</sup> with exceptions limited

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<sup>26</sup> *Id.* at 1306.

<sup>27</sup> Shaw & Singer, *supra* note 22, at 72.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> A rare exception is a 2000 opinion from the Federal Court for the Middle District of Florida, *Diaz v. Hillsborough Cnty. Hosp. Auth.*, No. 8:90-CV-120-T-25B, 2000 WL 1682918 (M.D. Fla. Aug. 7, 2000), where the court took pains to emphasize that the mediator's report protected "the confidentiality of the substance of mediation discussions," notwithstanding its conclusion "that the mediation participants each were acting as zealous advocates for the interests of the party they represented . . . [and] the product of the mediation process is a proposed Consent Decree that provides meaningful monetary and equitable relief to class members." *Id.* at \*6.

<sup>32</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard V(A) (2005).

<sup>33</sup> *See, e.g.*, VIRGINIA CODE ANN. § 8.01-576.9 (2002) (stating that "[t]he neutral shall not disclose information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the dispute resolution proceeding, unless the parties otherwise agree."); WYO. STAT. ANN. § 1-43-103(c)(i) (1991) (no privilege if "[a]ll the parties involved provide written consent to disclose.").

<sup>34</sup> UNIF. MEDIATION ACT § 7(a) (2001).

to “whether mediation occurred or has terminated, whether a settlement was reached, and attendance.”<sup>35</sup> Courts are prohibited from considering evidence submitted in violation of the prohibition;<sup>36</sup> however, there are no sanctions for a mediator who makes reports.<sup>37</sup> While parties are free to waive the evidentiary privileges provided under the UMA,<sup>38</sup> such waivers do not apply to the prohibitions on mediator reports to the court, raising at least a theoretical barrier to the practice.<sup>39</sup>

### III. THE ILLUSION OF TRUTH: PROOF VIA REPEATED ASSERTION

*“Statements repeated even once are rated as truer or more valid than statements heard for the first time, an effect called the illusion of truth.”*  
(Wesley G. Moons, Diane M. Mackie & Teresa Garcia-Marqueset).<sup>40</sup>

#### A. Mediator Participation as Proof of Non-collusive, Arms-Length Bargaining

In 1989, a federal district court judge in the Eastern District of New York<sup>41</sup> approved a mediated class action settlement of a Racketeer Influenced and Corrupt Organization Act (RICO) suit,<sup>42</sup> alleging that a public utility repeatedly testified falsely to the public utilities commission about a nuclear power plant’s construction status and anticipated commercial operation date. According to the class action plaintiffs (including the County of Suffolk, five individual rate payers, and a local business), this false testimony resulted in unwarranted and excessive utility rate increases.<sup>43</sup> In describing the facilitated negotiations leading to the settlement, the trial judge observed:

There is nothing to indicate that the settlement process itself was tainted by collusion or undue pressure by the defendants upon class representatives and counsel. Prior to certification of the class, the court was informed by the parties on a regular basis of the progress of settlement talks. Both sides were possessed of formidable negotiating skills and significant bargaining power, and negotiations were conducted at arm's length. The court observed nothing to suggest otherwise. Additionally, an impartial mediator was appointed by the court at the

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<sup>35</sup> *Id.* at § 7(b).

<sup>36</sup> *Id.* at § 7(c).

<sup>37</sup> COLE ET AL., *supra* note 3, at § 8:40.

<sup>38</sup> UNIF. MEDIATION ACT § 3(c) (2001) (providing that “[i]f the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged, the privileges under Sections 4 through 6 do not apply to the mediation or part agreed upon.”).

<sup>39</sup> *Id.* The § 3(c) waiver provisions are silent about any impact on the § 7 limitations on mediator reports to the court. *See also* COLE ET AL., *supra* note 3, at § 8:40.

<sup>40</sup> Wesley G. Moons, Diane M. Mackie & Teresa Garcia-Marques, *The Impact of Repetition-Induced Familiarity on Agreement With Weak and Strong Arguments*, 96 J. PERSONALITY AND SOC. PSYCHOL. 32, 32 (2009).

<sup>41</sup> *Cnty. of Suffolk v. Alcorn*, 710 F. Supp. 1428 (E.D.N.Y. 1989), *aff'd in relevant part*, 907 F.2d 1295 (2d Cir. 1990).

<sup>42</sup> 18 U.S.C. §§ 1961-68 (2006).

<sup>43</sup> *Cnty. of Suffolk*, 907 F.2d at 1299-1300.

request of the parties to assist in the settlement discussions. *The participation of the court-appointed mediator in the negotiating process helped ensure that the proceedings were free of collusion or undue pressure.*”<sup>44</sup>

That last sentence is effectively “patient zero” in what has evolved into a unique, and very common, form of judicial deference.

Over the last three decades, and with increasing frequency, judges assert that the involvement of a mediator in class action mediations is proof that the resulting settlements were negotiated free of collusion and fraud. To document this phenomena, I searched the Westlaw databases “ALLFEDS” and “ALLSTATES” for the terms “‘class action’ & ‘mediat!’”. The vast majority of the resulting “hits”<sup>45</sup> were simply cases where the court described a procedural posture that included the fact that a class action was mediated (successfully or not). However, in over 200 of the cases, judges cited the use of mediation in support of a conclusion about class action settlement approval. A significant increase in this phenomenon, roughly a tripling, occurred in 2007 (see Table 1 below). Most likely, this increase is attributable to the 2005 Congressional enactment of the Class Action Fairness Act,<sup>46</sup> designed to “federalize” class actions.<sup>47</sup> Indeed, according to a 2008 report of the Federal Judicial Center, federal class action diversity filings increased nearly three-fold in 2006-2007.<sup>48</sup>

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<sup>44</sup> *Cnty. of Suffolk*, 710 F. Supp. at 1436-1437 (emphasis added).

<sup>45</sup> The search yielded 2,847 “hits” in the ALLFEDS database and 623 “hits” in the ALLSTATES database.

<sup>46</sup> Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (now codified at 28 U.S.C. § 1332(d)).

<sup>47</sup> See generally Patricia Hatamyar Moore, *Confronting the Myth of “State Court Class Action Abuses” Through an Understanding of Heuristics and a Plea for More Statistics*, 82 UMKC L. REV. 1 (2013), available at <http://ssrn.com/abstract=2238174> (describing CAFA goals and providing an detailed critique of the “mythology” of state class action abuses so routinely cited in support of the Act).

<sup>48</sup> EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., *THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 6-9* (2008).

Year	# of Cases	Year	# of Cases
1989	1	2002	3
1990	1	2003	8
1991	0	2004	3
1992	0	2005	11
1993	0	2006	9
1994	0	2007	27
1995	0	2008	28
1996	1	2009	20
1997	2	2010	31
1998	8	2011	28
1999	5	2012	38
2000	7	2013	6 <sup>49</sup>
2001	7		

*Table 1: Cases Where Judges Cited Mediation to Support An Opinion on Whether or Not to Approve a Class Action Settlement*<sup>50</sup>

Perhaps most surprising about this collection of opinions is how consistently succinct (and conclusory) the courts' comments are about mediation. *County of Suffolk's* single sentence about what mediation "ensured" is replicated more or less consistently, though with different degrees of confidence. For example, in the Southern District of New York, federal district judges frequently state that "[t]he assistance of an experienced mediator . . . reinforces that the Settlement Agreement is non-collusive."<sup>51</sup>

Other judges state an agreement is entitled a "*presumption of fairness* [where a mediator facilitated arm's length negotiations]"<sup>52</sup> or that the same warrants "[a] *presumption that the settlement achieved meets the requirements of due process.*"<sup>53</sup>

<sup>49</sup> Year-to-date total as of March 19, 2013.

<sup>50</sup> Table 1 includes cases where judges merely asserted that mediation participation was (or, in rare cases, was not) proof of arms-length bargaining and lack of collusion and fraud, as well as cases where judges quoted detailed mediator testimony (affidavit, declaration, or by deposition) on the quality of the bargaining and the merits of the settlement reached.

<sup>51</sup> *Diaz v. E. Locating Serv. Inc.*, No. 10 CIV 4082 JCF, 2010 WL 2945556, at \*1 (S.D.N.Y. July 22, 2010) (emphasis added). *See also* *Toure v. Amerigroup Corp.*, No. 10 CIV. 5391 RLM, 2012 WL 1432302, at \*1 (E.D.N.Y. Apr. 20, 2012) (stating that "[t]he assistance of an experienced mediator, Linda Singer, Esq., reinforces that the Settlement Agreement is non-collusive."); *Matheson v. T-Bone Rest., LLC*, No. 09 Civ. 4214(DAB), 2011 WL 6402303, at \*1 (S.D.N.Y. Sept. 13, 2011) (stating that "[t]he assistance of an experienced mediator, Carol Wittenberg, reinforces that the Settlement Agreement is non-collusive"); *deMunecas v. Bold Food, LLC*, No. 09 CIV. 00440, 2010 WL 2399345, at \*1 (S.D. N.Y. Apr. 19, 2010) (stating that "[t]he assistance of an experienced mediator, Ruth D. Raisfeld, reinforces that the Settlement Agreement is non-collusive."); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06 Civ. 4270, 2008 WL 7863650, at \*1 (S.D.N.Y. Dec. 16, 2008) (stating that "[t]he assistance of an experienced mediator, Carol Wittenberg, reinforces that the Settlement Agreement is non-collusive.")

<sup>52</sup> *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 159–60 (S.D.N.Y. 2011) (emphasis added).

<sup>53</sup> *Guaman v. Ajna-Bar NYC*, No. 12 Civ. 2987(DF), 2013 WL 445896, at \*4 (S.D.N.Y. Feb. 5, 2013) (emphasis added). *See also* *Castagna v. Madison Square Garden, L.P.*, No. 09–cv–10211 (LTS)(HP), 2011

Some courts explain that reaching settlement in mediation “*suggest[s]*”<sup>54</sup> that the settlement agreement was reached through arm’s length negotiations and without collusion. Alternatively, courts state that involvement of an experienced and well known mediator is a “*strong indicator of procedural fairness*”<sup>55</sup> or “*further proof*” of procedural fairness.<sup>56</sup> A 2001 decision of the Second Circuit Court of Appeals borrowed the formulation from the 1989 *County of Suffolk* decision when declaring that “a court-appointed mediator’s involvement in pre-certification settlement negotiations *helps to ensure* that the proceedings were free of collusion and undue pressure.”<sup>57</sup>

I concede these “conservative” presumptions might well be reasonable (even though the rationale is unarticulated) given the relatively low bar for class action settlement review overall. But courts often take a much bolder approach. For example, in *Bert v. AK Steel Corp.*,<sup>58</sup> a judge in the Middle District of the Ohio federal district court stated that “the participation of an independent mediator in settlement negotiations *virtually insures* that the negotiations were conducted at arm’s length and without collusion between the parties.”<sup>59</sup> Courts in New Jersey have repeated the “virtually insures” approach<sup>60</sup> and also deemed use of a mediator to be “*persuasive evidence* that the negotiations were hard-fought, arms-length affairs.”<sup>61</sup>

Moving to the opposite coast and half-way across the Pacific, courts in California and Hawaii have gone so far as to hold that “[t]he assistance of an experienced mediator in the settlement process *confirms* that the settlement is non-collusive.”<sup>62</sup> And in *In re*

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WL 2208614, at \*5 (S.D.N.Y. June 7, 2011) (stating that “[a]rm’s-length negotiations involving counsel and a mediator raise a presumption that the settlement they achieved meets the requirements of due process.”); *Clark v. Ecolab Inc.*, Nos. 07CIV.8623, 04CIV.4488, 06CIV.5672, 2010 WL 1948198, at \*5 (S.D.N.Y. May 11, 2010) (stating the same); *McMahon v. Olivier Cheng Catering and Events, LLC*, No. 08 CIV. 8713, 2010 WL 2399328, at \*4 (S.D.N.Y. Mar. 3, 2010) (stating the same); *Khait v. Whirlpool Corp.*, No. 06-6381 (ALC), 2010 WL 2025106, at \*5 (E.D.N.Y., Jan. 20, 2010) (stating the same).

<sup>54</sup> *See, e.g., Vincent v. Reser*, No. C 11–03572 CRB, 2013 WL 621865, at \*4 (N.D. Cal. Feb. 19, 2013) (noting that “there is no indication that the Settlement is the product of collusion among the negotiating parties. Rather, the parties reached the Proposed Settlement after two days of mediation under the supervision of an experienced and neutral mediator, and subsequent negotiations between counsel with the aid of said mediator. These factors strongly suggest that the settlement agreement was reached through arm’s length negotiations.”) (emphasis added).

<sup>55</sup> *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 618 (S.D.N.Y. 2012) (stating that “[t]he involvement of Ruth D. Raisfeld, Esq., an experienced and well-known employment and class action mediator, is also a strong indicator of procedural fairness.”) (emphasis added).

<sup>56</sup> *In re Indep. Energy Holdings PLC*, No. 00 CIV. 6689 (SAS), 2003 WL 22244676, at \*4 (S.D.N.Y. Sept. 29, 2003) (stating that “the fact that the Settlement was reached after exhaustive arm’s-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable.”) (emphasis added).

<sup>57</sup> *D’Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (emphasis added).

<sup>58</sup> *Bert v. AK Steel Corp.*, No. 1:02-CV-467, 2008 WL 4693747 (S.D. Ohio Oct. 23, 2008).

<sup>59</sup> *Id.* at \*2. *See also Hainey v. Parrot*, 617 F. Supp. 2d 668, 673 (S.D. Ohio 2007) (noting that “[t]he participation of an independent mediator in the settlement negotiations virtually assures that the negotiations were conducted at arm’s length and without collusion between the parties.”) (emphasis added).

<sup>60</sup> *Larson v. Sprint Nextel Corp.*, No. CIV.A. 07-5325 (JLL), 2010 WL 234934, at \*11 (D.N.J. Jan. 15, 2010) (quoting *Bert*, 2008 WL 4693747, at \*2).

<sup>61</sup> *Milliron v. T-Mobile USA, Inc.*, No. 08-4149, 2009 WL 3345762, at \*5 (D.N.J. Sept. 10, 2009) (emphasis added).

<sup>62</sup> *Satchell v. Fed. Express Corp.*, Nos. C03-2659 SI, C 03-2878 SI, 2007 WL 1114010, at \*4 (N.D. Cal. Apr. 13, 2007) (emphasis added); *Int’l Longshore & Warehouse Union, Local 142 v. C. Brewer and Col, Ltd.*, No. CIV. CV0600260SOMLEK, 2007 WL 4145228, at \*2 (D. Haw. Nov. 20, 2007). *See also*

*Electronic Data Systems Corp. "ERISA" Litigation*,<sup>63</sup> the Texas federal district court noted that the settlement “was the product of extensive negotiations coordinated by one of the nation's most respected mediators” leading to the conclusion “that there is *not even a hint* of fraud or collusion between the parties in the proposed settlement.”<sup>64</sup>

In stark contrast to this consistently positive (and in virtually all cases, extremely summary) description of the mediation process, a 2002 case from the Eastern District of Missouri paints a dramatically different picture when the mediation process is overtly attacked by class objectors. In *In re BankAmerica Corp. Securities Litigation*,<sup>65</sup> the court rejected arguments about mediation impropriety but nonetheless refused to approve a proposed mediated settlement in a securities fraud class action arising out of the merger of North Carolina and Delaware banking corporations because the settlement was not fair to a particular subgroup of class members.

The court first emphasized that mediation had occurred “without the Court’s knowledge.”<sup>66</sup> In response to the objectors’ allegation that class counsel was “strong-armed” by the mediator, the court again observed that it “had no involvement in the mediation and, in fact, was unaware of the mediation until informed of its proceedings by the parties.”<sup>67</sup> More importantly, the judge emphasized that he “has been involved as a mediator hundreds of times and is aware that mediators utilize different tactics to bring the parties to compromise.”<sup>68</sup> In the court’s view, the plaintiffs were “not bound by any suggestions that may have been made by the mediator, but instead freely chose to enter the proposed settlement agreement,”<sup>69</sup> which the court deemed fair, reasonable and adequate.

The court went on to also dismiss the argument that the lead plaintiffs were “shut out of the mediation before the moment of settlement,”<sup>70</sup> refused to “stand in judgment of the mediator’s decision to conduct a portion of the mediation with . . . class counsel alone,”<sup>71</sup> and refused to engage in a “he said, she said” argument about comments made during mediation.<sup>72</sup> The court summarily dismissed the class action objectors’ proffer of a declaration by legal ethics Professor Geoffrey Hazard (now emeritus professor at the University of Pennsylvania) critiquing the mediation process, concluding that “Professor Hazard, like the Court, was not present at the mediation and thus is in no position to judge the conduct of the mediator based on the ‘he said’ of one of the mediation’s participants.”<sup>73</sup>

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Nguyen v. BMW of N. Am. LLC, No. C 10-02257 SI, 2012 WL 1677054, at \*3 (N.D. Cal. April 20, 2012) (stating that the court “also relies on the fact that the settlement was reached only after significant arms’ length negotiations in multiple sessions with a nationally recognized mediator.”).

<sup>63</sup> *In re Elec. Data Systems Corp. "ERISA" Litig.*, No. 6:03-MD-1512, 6:03-CV-126, 2005 WL 1875545 (E.D. Tex. June 30, 2005).

<sup>64</sup> *Id.* at \*4 (emphasis added).

<sup>65</sup> See *In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694 (E.D. Mo. 2002).

<sup>66</sup> *Id.* at 699.

<sup>67</sup> *Id.* at 705.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 706.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 706 n.7.

Of course the latter point about the absence of the judge in class action mediations is true in virtually every case;<sup>74</sup> yet the same inability to “judge” what transpired in the mediation room is not mentioned once in the numerous cases citing mediation as “evidence” of the positive nature of the bargaining that transpired there. Here, there is a judicial deference of another kind – a distinct unwillingness to probe or in any way second guess the mediation process.

### *B. The Unassailability of Mediator Opinion on Settlement Quality*

Class action mediators frequently go far beyond the examples of evidence Margaret Shaw and Linda Singer offer from their own cases (where they offered testimony “concerning the way in which class representatives were selected, the number of meetings held, the efforts to communicate with absent class members, and the lack of collusion”).<sup>75</sup> Instead, mediators routinely offer opinion about the merits of the settlement the mediators helped to broker. For example, the mediator declaration in *Sobel v. Hertz Corp.*,<sup>76</sup> a 2011 case from the federal District of Nevada, included the observation that the “innovative” settlement package “is well-tailored to the strengths and weaknesses of all parties’ positions.”<sup>77</sup>

Most commonly, mediators declare their settlement “fair and reasonable” and “in the best interest of the class.”<sup>78</sup> One court described such testimony as weighing heavily

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<sup>74</sup> One notable exception is *Green v. Am. Express Co.*, 200 F.R.D. 211 (S.D.N.Y. 2001). There, the court brokered the settlement as mediator, subsequently approved the settlement, and also ruled that the class action settlement notice to class members required by FED. R. CIV. P. 23(e)(1) was unwarranted. In the court’s words:

As I presided over the mediation, I was privy to the arms-length negotiations and both parties’ zealous advocacy for their respective client. Secondly, the settlement agreement provides only for injunctive relief and there is no possibility for the named plaintiff to benefit from this settlement at the expense of the other class members. Furthermore, as there are over one million class members, the \$500,000 cap on TILA [Truth-in-Lending Act] damages could, at best, provide each class member with less than postage, and the cost of notice, to say nothing of the postage, would jeopardize, and likely destroy, the hard fought settlement agreement that the parties have presented to this Court. *Id.* at 212.

<sup>75</sup> *Shaw & Singer*, *supra* note 22, at 72.

<sup>76</sup> *Sobel v. Hertz Corp.*, No. 3:06–CV–00545–LRH–RAM, 2011 WL 2559565 (D. Nev. June 27, 2011).

<sup>77</sup> *Id.* at \*14.

<sup>78</sup> *See, e.g., Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 957 (9th Cir. 2009) (quoting mediator Daniel Weinstein’s declaration that the settlement “was arrived at through arm’s length negotiations by counsel who were skilled and knowledgeable about the facts and law of this case,” and it was “fair, reasonable and adequate in light of the strengths and weaknesses of the claims and defenses and the risks of establishing liability and damages.”); *Bredthauer v. Lundstrom*, No. 4:10CV3132, 4:10CV3139, 8:10CV326, 2012 WL 4904422, at \*5 (D. Neb. Oct. 12, 2012) (citing mediator’s affidavit that “the settlement was fair and reasonable”); *CompSource Oklahoma v. BNY Mellon, N.A.*, No. CIV 08-469-KEW, 2012 WL 6864701, at \*8 (E.D. Okla. Oct. 25, 2012) (citing opinion of the mediator, a former Oklahoma Federal Judge and United States Attorney, that Class Counsel’s request for a 25% fee was “fair and reasonable under the specific facts and circumstances of this case”); *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 56 (D.D.C. 2010) (noting mediator’s opinion that “the settlement is fair and reasonable” and stating that “[t]he opinion of the mediator and experienced Class Counsel weigh in favor of approving the settlement agreement”); *Browning v. Yahoo! Inc.*, No. C04-01463 HRL, 2007 WL 4105971, at \*12 (N.D. Cal. Nov. 16, 2007) (describing the settlement as “the product of mediation by a qualified and experienced lawyer, Rodney A. Max, who reported that the case was ‘professionally,

in favor of settlement approval because it came from the “‘front lines’ of the settlement discussions between the class plaintiffs and the Covered Defendants and their respective insurance carriers.”<sup>79</sup>

In some cases, trial courts simply note that mediators approved the settlement;<sup>80</sup> in others, the mediators actively advocate for approval of it.<sup>81</sup> Thus, for example, in *In re Marsh ERISA Litigation*,<sup>82</sup> the trial judge noted that the mediator “has submitted a declaration in strong support of the Settlement” and quoted the following declaration excerpt:

[B]ased on my knowledge of this action, all of the materials provided to me, the efforts of counsel, the intensity of the negotiations, the litigation risks, and the benefits reached in the proposed settlement, I believe that this is a fair, reasonable and adequate settlement . . . , and I respectfully recommend that it be approved by the District Court.<sup>83</sup>

“In light of the foregoing,” reasoned the Court, there is “no reason to doubt that the Settlement is procedurally fair.”<sup>84</sup>

Mediators have opined that the settlement is an “excellent result” for the class.<sup>85</sup> Mediator Kenneth Feinberg went so far as to declare in *In re Literary Works in*

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ethically, and reasonably mediated, negotiated and resolved’ and noting that the “mediator recommended the settlement to the Court as being ‘fair, reasonable, and adequate.’”); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 509 -510 (E.D.N.Y. 2003) (quoting mediator Eric Green’s declaration that “it is my opinion that the [S]ettlement[s] w[ere] achieved through a fair and reasonable process and [are] in the best interest of the class .... the court system and the mediation process worked exactly as they are supposed to work at their best; a consensual resolution was achieved based on full information and honest negotiation between well-represented and evenly balanced parties.”).

<sup>79</sup> *Jane Doe 30's Mother v. Bradley*, C.A. Nos. N10C-05-023 JRS, N10C-10-317 JRS, 2012 WL 5949216, at \*13 (Del. Super. Ct. Nov. 19, 2012).

<sup>80</sup> *See, e.g., Brazil v. Dell Inc.*, No. C-07-01700 RMW, 2012 WL 1144303, at \*2 (N.D. Cal. Apr. 4, 2012) (noting that “[t]he requested award amount was approved by mediator Randall Wulff, which serves as ‘independent confirmation that the fee was not the result of collusion or a sacrifice of the interests of the class.’”).

<sup>81</sup> *See, e.g., Stratton v. Glacier Ins. Adm'rs, Inc.*, No. 1:02-CV-06213 OWW DLB, 2007 WL 274423, at \*14 (E.D. Cal. Jan. 29, 2007) (noting mediator support for the proposed settlement and encouragement that the court approve it); *Dunk v. Ford Motor Co.*, 56 Cal. Rptr. 2d 483, 489 (Cal. Ct. App. 1996) (emphasizing that “[t]he independent mediator, a retired superior court judge and appellate justice with substantial experience and respect in the legal community, recommended the settlement.”).

<sup>82</sup> *In re Marsh ERISA Litig.*, 265 F.R.D. 128 (S.D.N.Y. 2010).

<sup>83</sup> *Id.* at 141.

<sup>84</sup> *Id.*

<sup>85</sup> *See, e.g., In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, 733 F. Supp. 2d 997, 1007 (E.D. Wis. 2010) (citing mediator’s declaration “describing the contentiousness of the mediation sessions” and stating “that he became very familiar with the legal, factual and procedural issues in this case, and in his opinion the global settlement is an ‘excellent result’ for the class.”); *In re Adelpia Commc'ns Corp. Sec. and Derivative Litig.*, No. 03 CIV.5761, 03 CIV.5771, 03 CIV.5755, 03 CIV.5764, 03 CIV.5776, 03 MDL 1529 LMM, 03 CIV.5758, 03 CIV.5768, 03 CIV.5781, 03 CIV.5785, 03 CIV.5759, 03 CIV.5769, 03 CIV.5790, 03 CIV.5762, 03 CIV.5774, 03 CIV.5756, 03 CIV.5765, 03 CIV.5778, 03 CIV.5783, 03 CIV.5757, 03 CIV.5766, 03 CIV.5786, 03 CIV.5760, 03 CIV.5770, 03 CIV.5791, 03 CIV.5763, 03 CIV.5775, 03 CIV.5780, 03 CIV.5792, 03 CIV.5784, 03 CIV.5787, 2006 WL 3378705, at \*2 n. 4 (S.D.N.Y. Nov. 16, 2006) (noting that the mediator, “a former Judge of the California Superior Court and an experienced mediator, has described the mediation as contentious, extensive, difficult and hard-

*Electronic Databases Copyright Litigation*,<sup>86</sup> that the parties' comprehensive settlement was the "fairest resolution which could be obtained."<sup>87</sup>

Feinberg is by no means the only mediator opining that the parties' settlement was the best possible under the circumstances.<sup>88</sup> He is however, the only one to my knowledge, who has had to disavow an affidavit opining about the reasonableness of a settlement, albeit not one issued in his capacity as a mediator.<sup>89</sup> Instead, in the notorious Fen-Phen litigation, one of the worst cases of attorney fraud in U.S. history, Feinberg issued his affidavit in his capacity as an expert in mass tort litigation, and later retracted it in a subsequent ethics case against one of the lawyers, reportedly telling the disciplinary judge that his affidavit was based solely on misinformation provided by one of the disbarred attorneys.<sup>90</sup> The case certainly is a cautionary tale for anyone believing that third parties in mediation necessarily have all the information they need to opine accurately on the quality of the parties' agreement.<sup>91</sup>

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fought . . . and as resulting in 'an excellent result for the class.'").

<sup>86</sup> *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242 (2d Cir. 2011).

<sup>87</sup> *Id.* at 263. See discussion *infra* at notes 197–200 and accompanying text.

<sup>88</sup> See, e.g., *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 471, 480, 516 (S.D.N.Y. 2009) (approving \$586 million settlement of 309 securities class actions as fair, reasonable, and adequate, and deeming reasonable an attorney fee of one-third of the net settlement fund, where the two mediators that assisted the parties "both attested that the settlement 'was fully negotiated, was the best that the settlement classes could obtain, and is fair, adequate and reasonable to the members of the classes.'"); *Nilsen v. York Cnty.*, 382 F. Supp. 2d 206, 214 (D. Me. 2005) (stating that "[b]oth the mediator and York County's 'regular outside counsel' report that the monetary award represents the maximum amount that the plaintiffs could have obtained in a settlement, and the outside counsel states that York County would have abandoned settlement efforts if the plaintiffs had rejected the \$3.3 million offer.").

<sup>89</sup> See Debra Cassens Weiss, *Ken Feinberg's Retracted Affidavit Cited in Appeals Ruling Favoring FenPhen Lawyers*, ABA JOURNAL LEGAL NEWS NOW (Feb. 18, 2011), [http://www.abajournal.com/news/article/ken\\_feinbergs\\_retracted\\_affidavit\\_cited\\_in\\_appeals\\_ruling\\_favoring\\_fen-phen/](http://www.abajournal.com/news/article/ken_feinbergs_retracted_affidavit_cited_in_appeals_ruling_favoring_fen-phen/).

<sup>90</sup> *Id.*

<sup>91</sup> In 2005, similar concerns led the Wisconsin Legislature to delete a statutory requirement that family mediators "certify that the written mediation agreement is in the best interest of the child based on the information presented to the mediator" (a mandate formerly codified at WIS. STAT. ANN. § 767.11(12) (2005)). See 2005-2006 WISC. LEGIS. SERV. ACT 443 (2005 S.B. 123) § 57 (renumbering § 767.11 to become § 767.405 and amending subsections 2-14). A legislative note accompanying the amendment states:

Deletes current requirement that the mediator certify that the written mediation agreement is "in the best interest of the child" based on the information presented to the mediator. Reflects concern that a mediator, in general, does not have the expertise necessary, or sufficient knowledge of the information presented, to certify that the agreement is in the best interest of the child. The mediator will still be required to certify that the written mediation agreement accurately reflects the agreement made between the parties. *Id.*

#### IV. THE EMPEROR HAS NO CLOTHES: IMPLIED (AND UNCONVINCING) RATIONALES FOR DEFERENCE

*“Blind faith, no matter how passionately expressed, will not suffice.”*  
(Edward O. Wilson)<sup>92</sup>

Judges readily cite the participation of mediators as “proof” that class action bargaining was at arms-length and thus free of collusion and fraud. Moreover, judges seem quite willing to uncritically accept the mediator’s pronouncement that the settlement terms themselves were fair and reasonable under the circumstances. Yet, none of the more than 200 cases I have found bother to provide any explicit reasoning to defend these practices. Into this vacuum, I offer up a number of possibilities at least implied by the decisions. None, in my view, are terribly persuasive rationales for the sweeping set of assumptions about the benefits of class action mediation routinely claimed by the courts.

##### A. *The Party Choice to Mediate*

A number of cases suggest that the parties’ choice to mediate and settle in mediation shows respect for the difficulty of accurately predicting trial outcomes and signals that the parties had sufficient information (including consideration of the neutral’s opinion) to support a presumption of settlement reasonableness.<sup>93</sup> “The completeness and intensity of the mediation process,” reasoned one court, “coupled with the quality and reputations of the Mediators, demonstrate a commitment by the Parties to a reasoned process for conflict resolution that took into account the strengths and weaknesses of their respective cases and the inherent vagaries of litigation.”<sup>94</sup>

Granted, the give and take in mediation is very helpful at exploring litigation risk. And, truly effective mediation advocacy demands a high level of preparation that may indeed signal a commitment to a reasoned process of conflict resolution. But surely unassisted negotiation also provides an intensive exploration of risk for which class action advocates prepare quite seriously.

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<sup>92</sup> EDWARD O. WILSON, *CONSILIENCE: THE UNITY OF KNOWLEDGE* 6 (1st ed. 1998).

<sup>93</sup> See, e.g., *Murillo v. Pacific Gas & Elec. Co.*, No. 2:08-1974 WBS GGH, 2010 WL 2889728, at \*8 (E.D. Cal. July 21, 2010) (granting approval of final settlement and observing that “[t]he parties’ use of third-party mediation also suggests that they had sufficient information about the claims to present their arguments to an experienced mediator and considered a neutral opinion in evaluating the strength of their arguments in this matter.”); *In re Schering-Plough Corp. Sec. Litig.*, No. 01-CV-0829 (KSH/MF), 2009 WL 5218066, at \*3 (D.N.J. Dec. 31, 2009) (reasoning that “[i]n choosing mediation rather than a jury trial, the parties showed their respect for the difficulty of predicting a trial outcome given the matters in contention: claims of security fraud and actionable misstatement that were strongly disputed, and nuanced legal issues about scienter, loss causation, and the amount of damages” and concluding that “[g]iven all of this, the settlement enjoys the presumption of reasonableness.”); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at \*12 (S.D.N.Y. Nov. 7, 2007) (noting “both sides had exchanged mediation statements which revealed the respective strengths and weaknesses of the claims and defenses”).

<sup>94</sup> *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 285 (D. Colo. 1997).

## B. *Mediation is Long and Hard*

Still other cases emphasize that mediation is difficult, long, and hard-fought.<sup>95</sup> For example, in *Pigford v. Glickman*,<sup>96</sup> mediator Michael Lewis offered the following testimony:

If this case represented collusion or the negotiations in this case represented collusion, I as a mediator never ever want to meet a case in which the parties are at each other's throats. To term this negotiation intensive...understates the difficulty. This was an arduous negotiation. It took a year. It was hard fought.<sup>97</sup>

Parties simply would not work so hard, courts reason, if the goal was to collude against the interests of non-party participants. As explained by one federal district court judge in the Southern District of California:

The protracted and hard-fought nature of this case further militates against the existence of collusion. It is highly unlikely that parties who seek to collude would spend nearly a million dollars in costs (by Plaintiffs alone) and devote thousands upon thousands of valuable attorney hours to the matter. Rather, had the parties sought to collude, they would have been much more likely to reach a collusive settlement as quickly and cheaply as possible to minimize their costs and attorney time while maximizing their personal recovery.<sup>98</sup>

A federal judge from the Northern District of Georgia made a similar argument in *Ingram v. Coca Cola Co.*,<sup>99</sup> reasoning that:

The fact that the entire mediation was conducted under the auspices of Mr. Hughes, a highly experienced mediator, lends further support to the absence of collusion. Indeed, it took all of Mr. Hughes's skill to mediate this settlement because it was so difficult to reach agreement between the

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<sup>95</sup> See, e.g., *In re OCA, Inc. Sec. and Derivative Litig.*, No. 05-2165, 2009 WL 512081 (E.D. La. March 2, 2009) (finding no evidence of fraud or collusion where mediator described the negotiating process as a "long and difficult mediation in which counsel for all parties worked hard to represent the interests of their clients."); *Gates v. Rohm And Haas Co.*, No. CIV.A.06-1743, 2008 WL 4078456 (E.D. Pa. Aug. 22, 2008) (characterizing the settlement as a "product of almost two years of contentious litigation and months of negotiations, including two full days of mediation before an experienced mediator."); *Quintanilla v. A & R Demolition Inc.*, No. CIV.A. H-04-1965, 2007 WL 5166849, at \*4 (S.D. Tex. May 7, 2007) (finding settlement free of fraud or collusion where it "was reached through arms-length negotiations after a long, hard-fought mediation with a neutral.").

<sup>96</sup> *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999).

<sup>97</sup> *Id.* at 101-102.

<sup>98</sup> *Shames v. Hertz Corp.*, No. 07-CV-2174-MMA WMC, 2012 WL 5392159, at \*15 (S.D. Cal. Nov.5, 2012).

<sup>99</sup> *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001).

parties. Parties colluding in a settlement would hardly need the services of a neutral third party to broker their deal.<sup>100</sup>

Finally, in *In re Schering-Plough Corp. Securities Litig.*,<sup>101</sup> the federal district court for the District of New Jersey noted that “[m]ediation sessions began years before the ultimate settlement, foundered, recovered, gained traction, and were successful – a pattern that demonstrates arms-length negotiating.”<sup>102</sup>

All well and good, but other courts routinely cite the failure of mediation to prove lack of collusion and fraud for an agreement negotiated directly by the parties. “A breakdown in settlement negotiations can tend to display the negotiation’s arms-length and non-collusive nature” reasoned the court in *Hicks v. Stanley*,<sup>103</sup> explaining the significance of an unsuccessful mediation. Likewise, in *Ryan v. Gifford*,<sup>104</sup> the court asserted that “multiple failed mediations demonstrate that the Settlement was reached only after intensive arms-length negotiations between the parties.”<sup>105</sup>

### C. *The Mediator Made Me Do It: Mediator Proposals and the Use of Caucus*

A number of courts highlight that settlement was reached because of a mediator proposal.<sup>106</sup> Typical is *Lewis v. Vision Value, LLC*,<sup>107</sup> where the court concluded that a proposed settlement “is not tainted by collusion,” where “the mediator issued a mediator’s compromise which both sides accepted” and the “[m]ediator’s compromise was consistent with the range of Plaintiffs’ claim value.”<sup>108</sup> In *Hyland v. HomeServices of*

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<sup>100</sup> *Id.* at 693.

<sup>101</sup> *In re Schering-Plough Corp. Sec. Litig.*, No. 01-CV-0829 (KSH/MF), 2009 WL 5218066 (D.N.J. Dec. 31, 2009).

<sup>102</sup> *Id.* at \*3.

<sup>103</sup> *Hicks v. Stanley*, No. 01 CIV. 10071 (RJH), 2005 WL 2757792, at \*5 (S.D.N.Y. Oct. 24, 2005).

<sup>104</sup> *Ryan v. Gifford*, No. 2213-CC, 2009 WL 18143 (Del.Ch. Jan. 2, 2009).

<sup>105</sup> *Id.* at \*6. *See also* *Gong-Chun v. Aetna Inc.*, No. 1:09-CV-01995-SKO, 2012 WL 2872788, at \*12 (E.D. Cal. July 12, 2012) (finding the settlement to be the result of arms-length negotiation because “[w]hile the action was not settled during the course of the mediation,” it “resulted in the narrowing of issues related to class[-]wide liability and damages”); *Henley v. FMC Corp.*, 207 F. Supp. 2d 489, 493 (S.D. W.Va. 2002) (finding no indication of bad faith or collusion where “both sides diligently pursued their respective positions since the inception of the case” and observing that “[t]estament to the parties’ previous intractable positions is the failure of a lengthy mediation conducted in Boston in advance of the *second* trial to attempt a resolve the case.”).

<sup>106</sup> *See, e.g.*, *Morales v. Stevco, Inc.*, No. 1:09-cv-00704 AWI JLT, 2011 WL 5511767, at \*11 (E.D. Cal. Nov. 10, 2011) (deeming the settlement to be the product of non-collusive conduct, where the parties utilized an impartial mediator and the matter was “resolved by means of a mediator’s proposal.”); *Singer v. Becton Dickinson & Co.*, No. 08-CV-821-IEG (BLM), 2010 WL 2196104, at \*6 (S.D. Cal. June 1, 2010) (noting that the “proposed settlement in this case is the direct result of Mr. Grossman’s mediator proposal, which was made to resolve the parties’ impasse.”); *Estate of Dolby*, No. 8:03-cv-2246-T-23TGW, 2006 WL 2474062, at \*5 (M.D. Fla. Aug. 25, 2006) (finding persuasive evidence of non-collusion where the “settlement negotiations were initiated by the Eleventh Circuit and facilitated by an experienced Eleventh Circuit mediator, who, according to both parties, encouraged the resolution.”).

<sup>107</sup> *Lewis v. Vision Value, LLC*, No. 1:11-CV-01055-LJO, 2012 WL 2930867 (E.D. Cal. July 18, 2012).

<sup>108</sup> *Id.* at \*3.

*America, Inc.*,<sup>109</sup> the court justified approval of a controversial provision in a settlement by noting it was suggested by the mediator and induced the defendants to settle, “thereby conferring a benefit to the class.”<sup>110</sup>

At least one case seems to imply that arms-length negotiation is accomplished physically – presumably by the mediator keeping the parties separated in caucuses.<sup>111</sup> These “mediator made me do it” rationales fail for several reasons: First, they simply ignore the possibility that the mediator could be knowingly or unknowingly involved in selling short the absent class members. Indeed, as recommended in many well-respected texts, mediators often offer their “own” proposals as a proxy for one authored by one of the parties, as a way of overcoming the well-documented heuristic known as reactive devaluation.<sup>112</sup> Moreover, as observed by the Sixth Circuit Court of Appeals in *Olden v. Gardner*,<sup>113</sup> the relationship of a mediator’s proposal to the terms of an ultimate settlement says little about collusion (or lack of it) if the court is without specific information to understand the basis of the mediator’s recommendation.

Second, caucused mediation indeed puts people “physically” at arms-length, but is certainly no effective barrier against fraud, though it raises special concerns about how evidence would be offered to prove it.<sup>114</sup>

#### *D. The Mediator’s Duty to Stop Collusion and Fraud*

Perhaps judges are assuming the mediators will exercise an ethical duty to stop collusion and fraud. This rationale might be persuasive if there was such a duty. There is not. Under the most widely known ethical code – the Model Standards of Conduct for Mediators – it is “highly desirable” but not mandatory for a mediator to promote honesty and candor.<sup>115</sup> According to the Model Standards Reporters’ Notes, this obligation:

[R]eflects the nuanced environment in which mediation occurs . . . [and] acknowledges that resolving matters in mediation is not always predicated

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<sup>109</sup> *Hyland v. HomeServices of Am., Inc.*, No. 3:05-CV-612-R, 2012 WL 1575310 (W.D. Ky. May 3, 2012).

<sup>110</sup> *Id.* at \*5.

<sup>111</sup> *See* *Rolland v. Cellucci*, 191 F.R.D. 3, 6 (D. Mass. 2000) (including the somewhat cryptic report that “[i]ndeed, the court is given to understand that the parties were kept at significantly greater than arms length during the course of mediation.”).

<sup>112</sup> *See, e.g.*, COLE ET AL., *supra* note 3 at § 3:13; JENNIFER K. ROBBENHOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* 298 (2012); JOSEPH B. STULBERG & LELA LOVE, *THE MIDDLE VOICE: MEDIATING CONFLICT SUCCESSFULLY* 136–37 (2009).

<sup>113</sup> *Olden v. Gardner*, 294 F. App’x 210, 219 (6th Cir. 2008) (affirming trial court class action settlement approval as close call, and specifically noting that fact that mediator’s recommended settlement was less than value eventually agreed upon was not decisive on lack of collusion given that the basis of the mediator’s recommendation was unclear).

<sup>114</sup> *See, e.g.*, *Murray v. Talmage*, 151 P.3d 49 (Mont. 2006) (granting a new trial to the plaintiff note holder in an airplane security agreement dispute, based on improper admission of defendant debtor’s testimony about what the mediator said in caucus which the court deemed prejudicial hearsay).

<sup>115</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard VI(A)(4)(2005) (“A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.”).

on their having been complete honesty and candor among those present. To state the matter differently, while mediation participants might engage in negotiating tactics such as bluffing or exaggerating that are designed to deceive other parties as to their acceptable positions, a mediator must not knowingly misrepresent material fact or circumstances in order to advance settlement discussions.<sup>116</sup>

Implicit in this approach is the idea that the mediator can control his or her own behavior, but not that of the participants. As Ellen Waldman puts it in her 2011 book on mediation ethics:

[I]mposing a duty to speak on mediators, is, however, a dicey business. Mediators encourage parties to lower defenses and increase information exchange by promising to serve as discrete interlocutors. This translation function does not include serving as fact checker or truth monitor. Moreover confidentiality strictures preclude mediators from revealing information told to them in confidence. Rather than expect mediators to take it on themselves to set the record straight, it is more realistic to look to them as truth cheerleaders who encourage parties toward probity.<sup>117</sup>

Even where mediation is being used to further criminal conduct, the Model Standards state that mediators “should” (not “shall”)<sup>118</sup> “take appropriate steps, including, if necessary, postponing, withdrawing from or terminating the mediation.”<sup>119</sup> The drafters of the Model Standards expressly refused to adopt an obligation to affirmatively report illegal conduct, preferring instead to reserve flexibility to respond to such situations because of the subtlety of such matters and also out of concerns that confidentiality laws and agreements might prohibit reporting.<sup>120</sup>

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<sup>116</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard VI(A)(4), Reporters’ Notes H3 (2005).

<sup>117</sup> ELLEN WALDMAN, *MEDIATION ETHICS: CASES AND COMMENTARIES* 202 (2011).

<sup>118</sup> The Model Standards define these terms as follows:

The use of the term “shall” in a Standard indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Note on Construction.

<sup>119</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard VI(A)(9) (2005).

<sup>120</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard VI(A)(9), Reporters’ Notes H5 (2005) which provides:

[The standard] . . . guides a mediator who confronts mediation participants using mediation to further criminal conduct, not simply illegal conduct, to take appropriate steps to deter them from accomplishing that goal. Several public comments suggested that the mediator’s duty in such a situation was to affirmatively report such conduct to appropriate legal authorities. The Joint Committee rejected that suggestion for two reasons. First, , the subtlety of such matters – including there being multi-issue cases in which only one issue raised a specter of criminal conduct – requires that a mediator be firm but flexible in addressing such a situation; second, confidentiality laws or agreements may prevent it, such that unless there were an exception in the confidentiality agreement for this situation or a mediator had a duty to report such conduct, a mediator might expose himself or herself to liability by reporting such conduct.

### *E. The Mediator's Duty to Protect Third Parties*

Judges might also be assuming that mediators have a duty to protect third parties, or at the very least to “police” the substantive fairness of the agreements. There is no such duty.<sup>121</sup> As succinctly summarized by Ellen Waldman:

The [Model] standards are silent on the matter of substantive fairness. This is astonishing when one reflects that mediators are, after all, in the business of helping bring disputes to closure and that one fairly uncontroversial goal society might hold for its dispute resolvers is to work toward agreements that are fair and just.<sup>122</sup>

Instead, ethical aspirations are entirely focused on process, not substance.<sup>123</sup> As Joseph Stulberg forcefully advocated in one of the earliest academic exchanges about mediator accountability, “a mediator must be neutral with regard to outcome” because neutrality as to outcome is imperative to the trust necessary for the parties to realize that they “have nothing to lose and everything to gain by the mediator’s intervention.”<sup>124</sup> From this perspective, still a dominant one in mediation circles more than three decades after it was posited, nothing the mediator does “could jeopardize or abridge the substantive interests of the respective parties.”<sup>125</sup>

### *F. Deterrence: The Mediator as Witness*

Having a third party in the negotiation room who could potentially be a witness to collusion and fraud is another possible justification for the presumption of mediation’s value on the arms-length bargaining issue. Obviously, the presence of a possible adverse witness could operate as a powerful deterrent to misconduct.

There are several problems with this rationale. First, as a threshold matter, no confidentiality schemes expressly permit an exception to mediation confidentiality for mediator evidence on the quality of bargaining in class actions.<sup>126</sup> Moreover, while some confidentiality statutes provide an exception to mediation confidentiality for civil fraud in

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<sup>121</sup> See *infra* notes 180–200 and accompanying text in section VI for detailed discussion of judicial opinions reaching the same conclusion.

<sup>122</sup> WALDMAN, *supra* note 117, at 115.

<sup>123</sup> *Id.* at 116.

<sup>124</sup> Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 96 (1981).

<sup>125</sup> *Id.* For a review of alternative perspectives on substantive justice in mediation, see James R. Coben, *Gollum, Meet Sméagol: A Schizophrenic Ruminant on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. OF CONFLICT RESOL. 65, 78-85 (Spring 2004). See also Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1 (2012); Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157 (2002).

<sup>126</sup> See COLE ET AL., *supra* note 3, at § 8:25 (noting that while “no state statute provides an express exception, it is accepted practice in class action fairness hearings that the parties and, frequently, the mediators will report to the court about what went on during the mediation.”).

addition to criminal acts,<sup>127</sup> many do not, including the Uniform Mediation Act. According to the UMA reporters' notes:

While ready to exempt attempts to commit or the commission of crimes from confidentiality protection, the Drafting Committees declined to cover "fraud" that would not also constitute a crime because civil cases frequently include allegations of fraud, with varying degrees of merit, and the mediation would appropriately focus on discussion of fraud claims.<sup>128</sup>

Putting aside any limitations posed by affirmative prohibitions on mediator disclosure,<sup>129</sup> it is true that in many jurisdictions with privilege approaches to mediation confidentiality, it would be possible for the parties and the mediator to waive confidentiality protection.<sup>130</sup> Of course, this waiver option would be unavailable in jurisdictions where the mediator is deemed "incompetent" to testify.<sup>131</sup>

Of course, there is a far more practical problem. If there actually was collusion or fraud, it is hard to imagine that the required mutual waivers of privilege would occur. The parties who agreed to the settlement certainly will not choose to undermine it. And is it realistic to expect that the mediator, who labored long and hard to broker the settlement (and was paid handsomely by the parties to do so), will volunteer to testify against it? Indeed, it comes as no surprise that there is not a single case where class objectors offered up the mediator's affidavit, declaration, or deposition testimony to support an argument about the infirmities in the bargaining process or unreasonableness of the settlement.

In fact, class objectors face significant hurdles getting access to information about the mediation process beyond the now routine positive declarations of success.<sup>132</sup> As emphasized by the Ninth Circuit Court of Appeals, "[s]ettlement negotiations involve sensitive matters" and discovery is warranted "only where the party seeking it lays a

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<sup>127</sup> See, e.g., KAN. STAT. ANN. § 23-3505 (2006) (providing that confidentiality protections do not apply to "any information that is reasonably necessary to stop the commission of an ongoing crime or fraud or to prevent the commission of a crime or fraud in the future for which there was an expressed intent to commit such crime or fraud."); N.D. CENT CODE § 31-04-11(1) (1989) (providing no restriction on compulsion or admissibility of evidence that "relates to a crime, civil fraud, or a violation under the Uniform Juvenile Court Act."); S.D. CODIFIED LAWS § 19-13-32 (1998) (deeming privilege inapplicable "if the communication was made in furtherance of a crime or fraud").

<sup>128</sup> UNIF. MEDIATION ACT § 6(a)(4), cmt. 5.

<sup>129</sup> See *supra* notes 126-128 and accompanying text.

<sup>130</sup> See generally COLE ET AL., *supra* note 3, at § 8:29. For example, under UNIF. MEDIATION ACT § 5, waivers of privilege are permitted if expressly made by all parties (and in the case of a privilege of the mediator, also with the express waiver by the mediator) and recorded or made orally during proceedings. See generally, COLE ET AL., *supra* note 3, at § 8:13.

<sup>131</sup> See, e.g., MINN. STAT. ANN. § 595.02(1)(a) (2008) (deeming a mediator incompetent to testify except to statements or conduct that could constitute a crime, give rise to attorney disqualification proceedings, or constitute professional misconduct).

<sup>132</sup> See generally NEWBERG ON CLASS ACTIONS, *supra* note 10, at § 11:57 (noting that "[t]he objector does not have an absolute right to discovery and presentation of evidence.").

foundation by adducing from other sources evidence indicating that the settlement may be collusive.”<sup>133</sup>

This is a formidable “Catch-22.” A rare favorable decision in favor of class objectors came in a 2012 decision of the Montana Supreme Court. In *Pallister v. Blue Cross and Blue Shield of Montana*,<sup>134</sup> the court vacated approval of a mediated class action settlement and ordered discovery of settlement negotiations after concluding that the state’s confidentiality statute did not apply to bar objectors from receiving information from class plaintiffs with whom they were aligned. A vigorous dissent suggested, like the trial court, that the mediator was in the best position to state “objectively” whether the agreement was “free of collusion.”<sup>135</sup> Moreover, in even raising the concerns, reasoned the dissent, the objectors were inappropriately “disparaging” the mediator.<sup>136</sup> In other words, “how dare they!”

## V. DEALING IN VIRTUE: THE UNEXPRESSED ASSUMPTION UNDERLYING DEFERENCE

*“They are purportedly selected for their ‘virtue’ – judgment, neutrality, expertise – yet rewarded as if they are participants in . . . deal-making.”*  
(*Yves Dezalay & and Bryant G. Garth*)<sup>137</sup>

When all is said and done, none of the attributes of mediation offered above – even if they were explicitly articulated (and they were not) – adequately explain why trial courts are so comfortable claiming that mediation alone is proof of arms-length bargaining and lack of collusion and fraud. Nor can these attributes fully justify why judges so readily defer to the mediators’ assessment of the quality of class action bargaining (and in many cases, as described above, the quality and adequacy of the settlement reached).

There is, however, one unexpressed assumption that is infused throughout the judicial opinions: Class action mediators are members of a small fraternity highly respected by the judiciary.<sup>138</sup> Though class action judicial opinions typically say little

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<sup>133</sup> *Lobatz v. U.S. West Cellular of California, Inc.*, 222 F.3d 1142, 1148 (9th Cir. 2000) (quoting *Mars Steel Corp. v. Continental Illinois Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir. 1987)). *Accord* *Thornton v. Syracuse Sav. Bank*, 961 F.2d 1042, 1046 (2d Cir. 1992).

<sup>134</sup> *Pallister v. Blue Cross and Blue Shield of Montana*, 285 P.3d 562 (Mont. 2012).

<sup>135</sup> *Id.* at 574 (Morris, J. dissenting).

<sup>136</sup> *Id.*

<sup>137</sup> *See* DEZALAY & GARTH, *supra* note 1, at 8 (describing international arbitrators, but as argued *supra* at note 2 and in accompanying text, could just as easily describe the small, elite group of private mediators who are regularly chosen in class action cases).

<sup>138</sup> Indeed, given how frequently the class action mediators are former judges (sometimes even former colleagues of the judge presiding over the case), it would appear that it is a small fraternity that the decision-makers may themselves have hope to someday join. *See, e.g.*, *Lucken Family L.P., LLLP v. Ultra Resources, Inc.*, No. 09-CV-01543-REB-KMT, 2010 WL 2650037, at \*3 (D. Colo. June 30, 2010) (noting input and assistance of former judge, now a “respected and qualified mediator”); *In re Apple Computer, Inc. Derivative Litig.*, No. C 06-4128 JF (HRL), 2008 WL 4820784, at \*3 (N.D. Cal. Nov. 5, 2008) (highlighting participation of “a former magistrate judge of this court” as weighing “considerably against any inference of a collusive settlement”); *Miracle v. Bullitt County, Ky.*, No. CIV.A. 05-130-C, 2008 WL 4974799, at \*1 (W.D. Ky. Nov. 19, 2008) (observing that mediation was conducted by a former judge “who knows the obligation of the court in overseeing class action settlements”); *In re System Software*

about the mediation process beyond the summary statements illustrated above, the opinions are chock full of superlatives when it comes to describing the mediator and his or her qualifications.

*A. Members of the Club: Respected, Experienced, and Well-Versed in the Law*

Mediators have been described as “highly regarded”;<sup>139</sup> “prominent”;<sup>140</sup> and independent<sup>141</sup>. Respect is a common refrain, including “respected”;<sup>142</sup> “highly respected”;<sup>143</sup> “respected and fully informed”;<sup>144</sup> “well respected and experienced”;<sup>145</sup> or “respected and impartial.”<sup>146</sup>

Knowledge of the court’s burden is highly valued. For example, in *Miracle v. Bullitt County, Kentucky*, the federal district court judge emphasized that the experienced mediator, a former judge, “knows the obligations of the Court in overseeing class action settlements of this kind.”<sup>147</sup>

The alternative ways judges emphasize mediator experience are dazzling, including use of the words “experienced”;<sup>148</sup> “extremely experienced”;<sup>149</sup> “highly experienced”;<sup>150</sup> “extensive experience”;<sup>151</sup> “experienced and neutral”;<sup>152</sup> “experienced

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Assoc., Inc., No. 97 C 177, 2000 WL 283099, at \*9 (N.D. Ill. March 8, 2000) (emphasizing that “negotiations were mediated by an objective outsider,” a former Appellate Court Justice).

<sup>139</sup> *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 141 (S.D.N.Y. 2010); *In re Schering-Plough Corp. Sec. Litig.*, No. 01-CV-0829 (KSH/MF), 2009 WL 5218066 at \*3 (D.N.J. Dec. 31, 2009); Schwartz v. TXU Corp., No. 3:02-CV-2255, 3:02-CV-2279, 3:02-CV-2322, 3:02-CV-2328, 3:02-CV-2339, 3:02-CV-2360, 3:02-CV-2334, 3:02-CV-2343, 3:02-CV-2366, 3:02-CV-2243-K, 3:02-CV-2337, 3:02-CV-2346, 3:02-CV-2438, 3:02-CV-2471, 3:03-CV-0289, 3:03-CV-0290, 3:02-CV-2248, 3:02-CV-2416, 3:02-CV-2262, 3:02-CV-2315, 3:02-CV-2270, 3:02-CV-2600, 3:02-CV-2450, 3:02-CV-2525, 3:02-CV-2739, 3:02-CV-2586, 3:02-CV-2458, 3:02-CV-2689, 3:02-CV-2314, 2005 WL 3148350, at \*10 (N.D. Tex. Nov. 8, 2005).

<sup>140</sup> *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal. 2008).

<sup>141</sup> *Bert v. AK Steel Corp.*, No. 1:02-CV-467, 2008 WL 4693747, at \*2 (S.D. Ohio Oct. 23, 2008).

<sup>142</sup> *Farinella v. Paypal, Inc.*, 611 F. Supp. 2d 250, 265 (E.D.N.Y. 2009); *Becher v. Long Island Lighting Co.*, 64 F. Supp. 2d 174, 181 (E.D.N.Y. 1999).

<sup>143</sup> *In re Sterling Foster & Co., Inc.*, Nos. 99 CV 2789(ADS)(MLO), 97 CV 189(ADS)(MLO), 97 CV 610(ADS)(MLO), 97 CV 1689(ADS)(MLO), 97 CV 3253(ADS)(MLO), 97 CV 3775(ADS)(MLO), 2006 WL 3193744, at \*3 (E.D.N.Y. Oct. 31 2006).

<sup>144</sup> *In re Aquila ERISA Litig.*, No. 04-00865-CV-DW, 2007 WL 4244994, at \*2 (W.D. Mo. Nov. 29, 2007).

<sup>145</sup> *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010).

<sup>146</sup> *Esslinger v. HSBC Bank Nevada, N.A.*, No. CIV.A. 10-3213, 2012 WL 5866074, at \*8 (E.D. Pa. Nov. 20, 2012).

<sup>147</sup> *Miracle v. Bullitt Cnty., Ky.*, No. CIV.A. 05-130-C, 2008 WL 4974799, at \*1 (W.D. Ky. Nov. 19, 2008).

<sup>148</sup> *See, e.g.*, *Adoma v. Univ. of Phoenix, Inc.*, No. CIV. S-10-0059 LKK/GGH, 711 F. Supp. 2d 1142, 2012 WL 6651141, at \*9 (E.D. Cal. Dec. 20, 2012); *Toure v. Amerigroup Corp.*, No. 10 CIV. 5391 RLM, 2012 WL 1432302, at \*1 (E.D.N.Y. Apr. 20, 2012); *Diaz v. Eastern Locating Serv. Inc.*, No. 10 CIV 4082 JCF, 2010 WL 2945556, at \*1 (S.D.N.Y. July 22, 2010); *Satchell v. Fed. Express Corp.*, Nos. C03-2659 SI, C 03-2878 SI, 2007 WL 1114010, at \*4 (N.D. Cal. Apr.13, 2007); *Estate of Dolby*, No. 8:03-cv-2246-T-23TGW, 2006 WL 2474062, at \*5 (M.D. Fla. Aug. 25, 2006).

<sup>149</sup> *Hanlon v. Palace Entm’t Holdings, LLC*, CIV.A. No. 11-987, 2012 WL 27461, at \*5 (W.D. Pa. Jan. 3, 2012).

<sup>150</sup> *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001); *In re Toys R Us Antitrust Litig.*, 191 F.R.D. 347, 352 (E.D.N.Y. 2000).

and well regarded”;<sup>153</sup> “experienced and reputable”;<sup>154</sup> “experienced and well known”;<sup>155</sup> “experienced and well-qualified”;<sup>156</sup> and “experienced and respected.”<sup>157</sup> Pity the poor soul referred to only as a “skilled ADR practitioner.”<sup>158</sup>

Still other judges choose to emphasize mediators’ legal expertise, most commonly deeming them “well versed” in the relevant law.<sup>159</sup> It certainly does not hurt to be “nationally recognized.”<sup>160</sup> But “one of the nation’s most respected mediators”<sup>161</sup> is arguably even better.

All of this approbation fails utterly in the face of “indisputably exquisitely qualified” – praise reserved for mediator William Webster in *Cook v. Powell Buick, Inc.*,<sup>162</sup> a 1998 Fifth Circuit Court of Appeals decision. There, the court cited Webster’s testimony as particularly important in establishing “beyond peradventure” that interveners were adequately represented by the existing parties and class counsel.<sup>163</sup>

You might think that “beyond peradventure” could be getting close to the limits of deference that trial court judges give to mediator conclusions. The prize however belongs to a Western District of Pennsylvania judge’s description of a former colleague, now mediator, in a protracted class action battle about an alleged illegal home equity

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<sup>151</sup> *Stratton v. Glacier Ins. Adm'r, Inc.*, No. 1:02-CV-06213 OWW DLB, 2007 WL 274423, at \*14 (E.D. Cal. Jan. 29, 2007).

<sup>152</sup> *Vincent v. Reser*, No. C 11–03572 CRB, 2013 WL 621865, at \*4 (N.D. Cal. Feb. 19, 2013).

<sup>153</sup> *In re Bear Stearns Co., Inc. Sec., Derivative, & ERISA Litig.*, No. 08 MDL 1963, 08 CIV. 2793, \_\_\_ F.Supp.2d \_\_\_, 2012 WL 5465381, at \*3 (S.D.N.Y. Nov. 9, 2012).

<sup>154</sup> *Int’l Bhd. of Elec. Workers Local 697 Pension Fund v. Int’l Game Tech., Inc.*, No 3:09-CV-00419-MMD-WGC, 2012 WL 5199742, at \*2 (D. Nev. Oct. 19, 2012).

<sup>155</sup> *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 618 (S.D.N.Y. 2012).

<sup>156</sup> *Tucker v. Walgreen Co.*, No. CIV. 05-440-GPM, 2007 WL 2915578, at \*3 (S.D. Ill. Oct. 5, 2007).

<sup>157</sup> *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1384 (S.D. Fla. 2007); *Garnica v. Verizon Wireless Telecom, Inc.*, No. A128577, 2011 WL 2937236, at \*8 (Cal. Ct. App. July 21, 2011).

<sup>158</sup> *Jane Doe 30's Mother v. Bradley*, C.A. Nos. N10C–05–023 JRS, N10C–10–317 JRS, 2012 WL 5949216, at \*13 (Del. Super. Ct. Nov. 19, 2012).

<sup>159</sup> *See, e.g., Guaman v. Ajna-Bar NYC*, No. 12 Civ. 2987(Df), 2013 WL 445896, at \*4 (S.D.N.Y. Feb. 5, 2013) (emphasizing mediator’s knowledge of wage and hour law); *In re Toys R Us Antitrust Litig.*, 191 F.R.D. 347, 352 (E.D.N.Y. 2000) (noting mediator’s background in antitrust law); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 141 (S.D.N.Y. 2010) (noting mediator’s extensive experience in “complex ERISA breach of fiduciary duty class actions”); *Glass v. UBS Fin. Servs., Inc.*, No. 06-4068, 2007 WL 221862, at \*5 (N.D. Cal. Jan. 26, 2007) (noting mediator’s “substantial experience in employment litigation”); *Reyes v. Altamarea Group, LLC*, No. 10–CV–6451 (RLE), 2011 WL 4599822, at \*4 (S.D.N.Y. Aug. 16, 2011) (noting use of experienced employment mediator, “well-versed in wage and hour law”).

<sup>160</sup> *Amunrud v. Sprint Commc’ns Co. L.P.*, No. CV 10-57-BLG-CSO, 2012 WL 443751, at \*3 (D. Mont. Feb. 10, 2012); *Nguyen v. BMW of North Am. LLC*, No. C 10-02257 SI, 2012 WL 1677054, at \*3 (E.D. Cal. April 20, 2012).

<sup>161</sup> *In re Elec. Data Sys. Corp. “ERISA” Litig.*, No. 6:03-MD-1512, 6:03-CV-126, 2005 WL 1875545, at \*4 (E.D. Tex. June 30, 2005).

<sup>162</sup> *Cook v. Powell Buick, Inc.*, 155 F.3d 758, 762 n. 14 (5th Cir. 1998) (noting “[t]he mediator was indisputably exquisitely qualified, having served in seriatim on a federal district court, a federal circuit court of appeals, as Director of the Federal Bureau of Investigation, and as Director of the Central Intelligence Agency, the Honorable William H. Webster.”).

<sup>163</sup> *Id.* at 762.

lending scheme.<sup>164</sup> Deeming the settlement entitled to a presumption of fairness based on the mediator’s testimony, the court offered up the following:

This court took no role in the parties’ retention of Judge Lewis as a mediator to facilitate the settlement. Indeed, the court was not aware of his involvement until after the fact. However, Judge Lewis is well known to the court, having served on this court as well as the court of appeals, with distinction. His integrity is beyond reproach and *no credible attack has been, or could be, lodged against his assurances.*<sup>165</sup>

“Case closed, end of discussion.”<sup>166</sup>

### *B. A Poor Match: Private Selection, Public Responsibility*

“Case closed, end of discussion,” might work for rapper Eminem (particularly in a song accompanied with a strong parental advisory warning of explicit content).<sup>167</sup> But successful class action mediations yield settlements with profound implications for absent class members. As eloquently stated by dissenting Fifth Circuit Court of Appeals Judge Jeffrey Smith in *In re Asbestos Litigation*:<sup>168</sup>

The difficulty inherent in assessing the substantive fairness of a settlement makes prophylactic procedural protections crucial to the protection of absent plaintiffs. The range of “fair” settlements is wide in any case, and settlement classes present unique opportunities for collusion between class counsel and defendants. Once the machinery of a settlement class action is set in motion, the judiciary has a very hard time controlling it; thus, it is critical that we craft that machinery well.<sup>169</sup>

In his dissent, Judge Smith took the majority to task for affirming denial of a motion to recuse the trial court judge who mediated a class action settlement and then conducted a fairness hearing on the same settlement. The majority, like many courts hearing the same challenge,<sup>170</sup> found no reasonable basis to question the judge’s impartiality.<sup>171</sup>

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<sup>164</sup> *In re Cmty. Bank of Northern Virginia*, NO. MDL 1674, 03-0425, 2008 WL 3833271 (W.D. Pa., August 15, 2008), *vacated and remanded by In re Cmty. Bank of Northern Virginia*, 622 F.3d 275 (3rd Cir. 2010), as amended (Oct. 20, 2010).

<sup>165</sup> *In re Cmty. Bank*, 2008 WL 3833271, at \*11 (emphasis added). While the appellate court also found no reason to discount the mediator’s assurances about lack of collusion and fraud, it nonetheless did strike down the settlement on other grounds. *See In re Community Bank*, 622 F.3d 275 (3rd Cir. 2010).

<sup>166</sup> Eminem, *Greg*, on SO U WANNA FREESTYLE (HipHop Village 2008).

<sup>167</sup> *Id.*

<sup>168</sup> *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996) (affirming denial of motion to recuse trial court judge who mediated settlement and then conducted fairness hearing regarding same).

<sup>169</sup> *Id.* at 1008 (Smith, J., dissenting).

<sup>170</sup> *See, e.g., S.E.C. v. Sunwest Mgmt., Inc.*, No. 09–6056–HO, 2009 WL 1065053, at \*2 (D. Or. Apr. 20, 2009) (finding no basis to recuse a magistrate judge who served as a mediator and later as presiding judge because the mediation was not an “extrajudicial” proceeding that could bias the judge’s knowledge of facts gained in the process); *Garrett v. Delta Queen Steamboat Co., Inc.*, No. 05-1492-CJB-SS, 2007 WL 837177, at \*3 (E.D. La. March 14, 2007) (noting that if recusal was warranted “then any judge or

Yet, as noted by Judge Smith, proof of actual bias is not necessary before impartiality can reasonably be questioned.<sup>172</sup> In Judge Smith's view:

Having helped to craft the settlement, Chief Judge Parker had a personal stake in finding it to be fair: A determination that the settlement was unfair would imply that he had acted unfairly in helping to craft it. In light of these facts, a person might reasonably conclude that Chief Judge Parker, despite his dedicated and painstaking efforts, probably developed a natural bias in favor of his own work.<sup>173</sup>

The same "natural bias" might well color a private mediator's characterization of the virtues of the bargaining process he or she supervised, not to mention settlement quality. Indeed, the stakes are arguably even higher for the private mediator, than for the reviewing judge: Only the former's paycheck is potentially linked to settlement approval; class action mediators who do not successfully assist parties to settle cases are unlikely to be hired.

But why not rely on the virtue, the selflessness, of the mediator to protect against this threat? When all is said and done, they are not the ultimate arbiters of any parties' rights so the procedural due process concerns are conceivably significantly less than those present when evaluating judicial or arbitral impartiality.<sup>174</sup>

However, while the procedural due process concerns are certainly reduced, they are by no means eliminated. While mediators arguably lack decision-making power, the power they do exercise is unguided by the formalities of procedure and rules. Indeed, the possibility of bias (and the appearance of bias) is compounded by the very informality that is one of mediation's primary characteristics. And this informality becomes especially troubling in the class action mediation context when it comes to the selective

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magistrate judge who conducted a settlement conference would be precluded in all such cases from considering the validity of the settlement." *But see* Kearny v. Milwaukee County, No. 05-C-834, 2007 WL 3171395, at \*3 (E.D. Wis. Oct. 26, 2007) (stating a general practice by the magistrate judge to recuse himself from proceeding as a trial judge in any case in which he conducted a mediation based upon a referral from another judge). "Once a magistrate judge has shed the role of a presiding judge and acted solely in the role of mediator," the Magistrate Judge explained, "it is impossible to un-ring that bell; a magistrate judge who acts as a mediator without the expectation that the case may be re-assigned to him or her for the purposes of proceeding as the trial judge will almost invariably be presented with a case where impartiality may reasonably be questioned, thereby necessitating a recusal pursuant to 28 U.S.C.A. § 455(a)." *Id.* at \*2. The court in *S.E.C. v. Sunwest Management, Inc.*, dismissed this reasoning as "based on [that Magistrate Judge's] particular philosophy and beliefs rather than binding legal precedent." 2009 WL 1065053, at \*3.

<sup>171</sup> The law governing a federal judge's disqualification is codified at 28 U.S.C. § 455(a). *See also* CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3C (Disqualification), providing that: "(1) A judge shall disqualify himself or herself in the a proceeding in which the judges impartiality might reasonably be questioned, including but not limited to instances in which: (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings."

<sup>172</sup> *In re Asbestos Litig.*, 90 F.3d at 1014 n. 50 (citing *In re Faulkner*, 856 F.2d 716, 721 (5th Cir. 1988) (per curiam)(Smith, J., dissenting)).

<sup>173</sup> *In re Asbestos Litig.*, 90 F.3d at 1014.

<sup>174</sup> *See generally*, Richard Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1091-1095 (2000).

nature of information emerging from it.<sup>175</sup> Fundamentally, the intersection of private rights (the parties' choice to have the mediator they want and the process they want) does not mesh neatly with the public rights at stake in the class action settlement approval process – the necessity to protect the interests of the absent class members.<sup>176</sup> And at this intersection lies a fundamental unfairness when judges defer too much to the mediator's perception of fairness in process and outcome. Even if this unfairness does not reach constitutional dimensions, it certainly has the potential to erode the public perception of procedural justice,<sup>177</sup> especially from the perspective of the absent class member (and potential objector).

At the simplest of levels, we are, in the gendered language of John Adams, “a government of laws, not of men,”<sup>178</sup> – no matter how respected, virtuous, and experienced those individuals might be. As aptly stated by bankruptcy court Judge Kevin J. Carey, Jr., a “proposed settlement must stand or fall on its own merits and is not dependent upon the identity of the Mediator.”<sup>179</sup> There are at least some judges who have wisely reached the same conclusion in the context of class action cases.

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<sup>175</sup> Of particular concern is party choice to “strategically” use mediator evidence to counter class objector's settlement challenges. *See, e.g.*, *Lipuma v. Am. Express*, 406 F.Supp.2d 1298 (S.D. Fla. 2005), discussed *supra* at notes 25–26 and accompanying text.

<sup>176</sup> *See supra* notes 11–21 and accompanying text.

<sup>177</sup> *See generally* E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, in *EVERYDAY PRACTICES AND TROUBLE CASES* 177 (Austin Sarat, et al. eds. 1998); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L. J. PSYCHOL. 117 (2000). For a discussion of procedural justice and structural bias in disputing systems, *see* Nancy A. Welsh, *Mandatory Pre-dispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. U. L. REV. 187, 197 n. 60 (2012) (providing a detailed list of her own extensive writings on the subject, including Nancy A. Welsh, *What is “(Im)Partial Enough” in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 424–426 (2010); Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About the Place, Value and Meaning of Mediation*, 19 OHIO ST. J. ON DISP. RESOL. 573, 648–50, 659–61; Nancy A. Welsh, *Perceptions of Fairness*, in *THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* 165, 171 (Andrea K. Schneider & Christopher Honeyman, eds. 2006); and Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. OF CONFLICT RESOL. 117, 131 (2004)).

<sup>178</sup> JOHN ADAMS, *Novanglus Papers, no. 7*, in *THE WORKS OF JOHN ADAMS* 106 (Charles Francis Adams, ed. 1851).

<sup>179</sup> *In re Tribune Co.*, 464 B.R. 126, 157 n. 44 (Bankr. D. Del. 2011) (dismissing a party's request that he “accord special consideration to the fact that the mediation” resulting in one of the reorganization plans competing for his approval was conducted by the Judge's colleague “whose skills as a mediator are highly respected and much sought after”).

## VI. LONE VOICES OF REASON: THE UNCOMMON JUDICIAL ARGUMENT AGAINST DEFERENCE

*“It is . . . no answer to say that a private mediator helped frame the proposal. Such a mediator is paid to help the immediate parties reach a deal. Mediators do not adjudicate the merits. They are masters in the art of what is negotiable. It matters little to the mediator whether a deal is collusive as long as a deal is reached. Such a mediator has no fiduciary duty to anyone, much less those not at the table.”*  
*(The Honorable William Alsup)<sup>180</sup>*

To date, California federal district court Judge William Alsup is the only jurist to so explicitly state an obvious truth – the complete lack of private mediator responsibility for class action settlement outcome. Like most things, his unusually blunt characterization is easier to understand in context. In *Kakani v. Oracle*,<sup>181</sup> Judge Alsup was asked by class action parties to preliminarily approve a mediated settlement purporting to fully resolve a class action brought on behalf of Oracle employees who alleged they had been systematically deprived of overtime pay because of the employer’s mischaracterization of their status as exempt employees. In Judge Alsup’s words, the mediated settlement was a “bonanza” for the company and for class counsel. Among other things:

- 1) payments from the nationwide settlement fund that were unclaimed by class members were retained by the company, while plaintiff’s counsel would receive \$2.25 million regardless of how many claims were actually submitted by class members;
- 2) California class members would receive at least twice as much as non-California plaintiffs;
- 3) the settlement provided an extraordinarily short period of time for workers to claim benefits under the settlement;
- 4) a proposed Fair Labor Standards Act release was not limited to those employees who affirmatively opt-in to the settlement but extended to all eligible class members; and
- 5) the negotiated release was ambiguous with respect to class members’ waiver of state law claims other than those brought under California state law.<sup>182</sup>

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<sup>180</sup> United States District Judge from the Northern District of California, explaining his denial of the parties’ joint motion to preliminarily approve proposed class action settlement in *Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 WL 1793774, at \* 11 (N.D. Cal. June 19, 2007).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at \* 2–6. As the court summarized it:

In sum, the fundamental substance of this proposal is so unfair to absent class members that it cannot pass even the threshold of plausibility required for even preliminary approval under Rule 23. For *all* workers, *all* wage-and-hour rights under federal and various state laws and statutory limitations periods, including the various local laws where they reside, would be extinguished and replaced by a fleeting opportunity to prepare and to deliver a claim on a compressed schedule. Workers would be saddled as well with a covenant not to sue that would bar all suits, expressly even *existing* lawsuits pending elsewhere in the country (¶

In the face of such fundamental unfairness, correctly reasoned the judge, the mediator's stamp of approval meant nothing.<sup>183</sup> He denied the settlement, rescheduled a hearing on the parties' pending motion for class certification, but also reserved hearing time to permit the parties to attempt renewed settlement dialogue. Several weeks later when presented with a revised settlement curing the obvious deficiencies of the earlier mediated version, Judge Alsup deemed the revised settlement "sufficiently fair and reasonable for absent class members" to warrant "at least preliminary approval."<sup>184</sup>

Other courts have raised similar doubts about the value of mediator involvement, though none with the sense of outrage Judge Alsup marshaled to the task. For example, in *Acosta v. Trans Union*,<sup>185</sup> the trial court took a much kinder approach to discounting mediator endorsement of a settlement. There, in denying class action settlement approval, the court lauded the mediator's involvement in the case but delicately pointed out that he was essentially duped by the parties into believing that hard trade-offs were made during the mediation process he brokered and wholeheartedly endorsed, when in fact, the trade-offs had been negotiated secretly by the parties before the mediation even began.<sup>186</sup>

In *In re Bluetooth Headset Products Liability Litig.*,<sup>187</sup> the Ninth Circuit Court of Appeals vacated district court approval of a class action attorney fee award and mediated settlement where the gross disproportion between the class award and the negotiated fee award raised at least an inference of unfairness, and the record failed to "adequately dispel the possibility that class counsel bargained away a benefit to the class in exchange for their own interests."<sup>188</sup> The appellate court pointed out that "the mere presence of a neutral mediator, though a factor weighing in favor of a finding of non-collusiveness, is not on its own dispositive of whether the end product is a fair, adequate, and reasonable settlement agreement."<sup>189</sup>

Some thirteen years earlier in *Hanlon v. Chrysler Corp.*,<sup>190</sup> the Ninth Circuit directly addressed a class objector's contention that the trial court gave so much weight to the mediation proceedings that there had been an effective abrogation of the court's duty

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15(b)). The chance that notice by mail would really reach all workers is very remote, especially since many are *former* workers and have scattered to the winds, yet the release would be absolute and universal. From practical experience, the Court is confident that a significant proportion of all workers would not submit timely claims. No doubt, this is what the company is counting on to reduce its exposure. No doubt, this is also why counsel want a fee based on the theoretical maximum payout rather than the actual benefit conferred. *Id.* at \*6.

<sup>183</sup> For teachers or trainers looking for an entertaining way to jumpstart discussion on this theme, I highly recommend the short video (less than two minutes) that I produced in 2008, which imagines Judge Alsup delivering his condemnation of mediation from the bench dressed as Darth Vader with the famous John Williams "Imperial March" soundtrack playing in the background. The video is downloadable for free as part of my mediation case law project. See <http://law.hamline.edu/dri/mclp/videos.html>.

<sup>184</sup> *Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 WL 2221073 (N.D. Cal. Aug. 2, 2007).

<sup>185</sup> *Acosta v. Trans Union, LLC*, 243 F.R.D. 377 (C.D. Cal. 2007).

<sup>186</sup> *Id.* at 399 (noting that "[t]here is no reason to believe, however, that Justice Trotter was ever aware of the September 1 e-mail that now gives rise to an inference of impropriety or of any communications forging a deal between Plaintiffs and Equifax that occurred prior to the Global Mediation.").

<sup>187</sup> *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

<sup>188</sup> *Id.* at 938.

<sup>189</sup> *Id.* at 948.

<sup>190</sup> *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1030 (9th Cir. 1998).

to independently adjudicate whether a fee award was proper.<sup>191</sup> Though the reviewing court rejected the abrogation argument, it did assert that the court, not the mediator, has the primary responsibility to guard against collusion.<sup>192</sup> In the court's view, the trial judge had merely (and permissibly) relied on the mediator "as independent confirmation that the fee was not the result of collusion or a sacrifice of the interests of the class, an inquiry the court was required to make."<sup>193</sup>

Citing *Hanlon*, the Eastern District of California federal district court in 2008 emphasized that "[t]he fact that the parties reached an agreement before an experienced mediator, while commendable, does not preclude a detailed review of the settlement terms."<sup>194</sup> Similarly, in *In re Mfrs. Life Ins.*,<sup>195</sup> the court specifically rejected the plaintiffs' assertion that deference must be given to the mediator's "thorough and careful consideration" of a fee question, instead citing *Hanlon* for the proposition that the mediator's findings and conclusions "may be used only to confirm this Court's own analysis."<sup>196</sup>

Finally, what about mediator Kenneth Feinberg's sworn declaration, quoted earlier in this article, that the parties' resolution of their "very complex matter . . . is the fairest resolution which could be obtained?"<sup>197</sup> In *In re Literary Works in Electronic Databases Copyright Litig.*,<sup>198</sup> the Second Circuit Court of Appeals vacated the trial court's approval of that "fairest resolution," and stated:

The participation of impartial mediators and institutional plaintiffs does not compensate for the absence of independent representation. Although the mediators safeguarded the negotiation process, and the institutional plaintiffs watched out for the interests of the class as a whole, no one advanced the strongest arguments in favor of Category C's recovery.<sup>199</sup>

However, as I transition to this article's closing section on recommendations, it is worth noting that not all judges on the Second Circuit panel were so inclined to prune back the deference owed to class action mediators. As dissenter Judge Chester J. Staub put it:

These negotiations...occurred under the direction of an impartial mediator who could search out each party's respective strengths and weaknesses, advise them to adjust their positions accordingly, and vouch that each side

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<sup>191</sup> *Id.* at 1029.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 663 (E.D. Cal. 2008) (expressing significant concerns but nonetheless granting preliminary approval to class action settlement). The court was particularly troubled that "[t]he lack of an adversarial record in this matter, coupled with mediation and settlement prior to the formal discovery phase, has left the court with little tangible evidence regarding many of plaintiff's assertions." *Id.* at 661 n. 5.

<sup>195</sup> *In re Mfrs. Life Ins.*, No. 1109, 96-CV-230 BTM(AJB), 1998 WL 1993385, at \*9 (S.D. Cal. Dec. 21, 1998).

<sup>196</sup> *Id.* at \*9 n. 10.

<sup>197</sup> See *supra* notes 86–91 and accompanying text.

<sup>198</sup> *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 243 (2d Cir. 2011).

<sup>199</sup> *Id.* at 253.

fully represented its clients to the best of its ability.... The participation of mediator Feinberg in this case, while by no means ensuring fully adequate representation, does make it more likely that the parties reached the limits of compromise.<sup>200</sup>

## VII. RECOMMENDATIONS FOR CHANGE

*“There are certain labels in this country that are very, very critical.”  
(Former Solicitor General Theodore B. Olson)<sup>201</sup>*

Tinkering with the presumptions judges make about mediator participation in class action settlement is certainly an option for change. A “pruning” of deference is certainly warranted. When describing the impact of mediator involvement, courts could be called upon to substitute the sweeping use of terms such as “insures”<sup>202</sup> or “confirms”<sup>203</sup> the quality of bargaining and lack of collusion with less categorical pronouncements such as “reinforces,”<sup>204</sup> which implies confirmation of the court’s independent judgment and exercise of its fiduciary duty on behalf of absent class members. The problem with mere pruning is that courts are not expressly deferring in the first place. Instead, they are exercising an implicit, ill-defined, and unreasoned form of deference. Well-established class action principles give trial court judges the sole responsibility to determine that a settlement is “fair, reasonable, and adequate”;<sup>205</sup> no appellate decision suggests that a trial court judge may defer to anyone on this ultimate responsibility. Yet courts routinely, but implicitly, do so. “Pruning” deference when deference is not overtly acknowledged as happening is unlikely to be an effective solution.

A more concrete possibility: If and when mediator evidence is offered, courts should insist on objective evidence, rather than opinion-infused subjective declarations. This would, theoretically at least, increase the possibility that trial judges would render their “fair, reasonable, and adequate” determinations on evidence, rather than simply the “pronouncements” of the virtuous neutral.<sup>206</sup>

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<sup>200</sup> *Id.* at 263.

<sup>201</sup> Attorney for Petitioners in *Hollingsworth v. Perry* (case 12-144). Quote from oral argument before the U.S. Supreme Court on March 26, 2013. Transcript *available at* [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-144a.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144a.pdf) (last accessed March 27, 2013).

<sup>202</sup> *See supra* notes 58–61 and accompanying text.

<sup>203</sup> *See supra* notes 62–64 and accompanying text.

<sup>204</sup> *See supra* note 51 and accompanying text.

<sup>205</sup> FED. R. CIV. P. 23(e). *See supra* notes 6–21 and accompanying text.

<sup>206</sup> For a similar argument in the context of good faith obligation to mediate, *see* Peter N. Thompson, *Good Faith Mediation in Federal Court*, 26 OHIO ST. J. ON DISP. RESOL. 363, 426–428 (2010) (proposing an amendment of FED. R. CIV. P. 16 to permit party and mediator testimony in support of motions alleging breach of the duty to mediate, but limiting mediator evidence “to objective observations of the events giving rise to the issue” and precluding “the mediator’s subjective assessment of the state of mind or motives of the parties.”).

Better by far is to appoint class action mediators as special masters under Federal Rule of Civil Procedure 53 (or state equivalent). Authority to do so is well established.<sup>207</sup> Doing so would solve a number of problems. First, by appointing the mediator as a special master, the court could invest the master with the same express fiduciary duty that it itself holds to protect the interests of the absent class members.<sup>208</sup>

Second, the settlement appointment would carry with it a systematic approach to reporting of mediator conclusions about the quality of the bargaining and merits of settlement. Under Federal Rule of Civil Procedure 53(e),<sup>209</sup> the appointing court's order could require findings and conclusions to be drafted and submitted to the court for review in all cases, not simply in response to outside objectors' concerns.

Third, the order appointing a master must state the nature of the materials to be preserved and filed as a record of the master's activities,<sup>210</sup> and state the reporting requirements and standards for reviewing the masters' findings and recommendations.<sup>211</sup> This would be a vast improvement over the current haphazard approach for compiling and reporting mediator evidence, and establishes a form of "transparency and accountability" likely to improve procedural fairness in class action settlement approval decision-making.<sup>212</sup>

Moreover, there is an added benefit to appointing mediators as special masters, that flows from the significance of the "label" attached to the work. In "traditional" settlement-oriented mediation, neutrals use all of their skills to assist the parties to resolve their dispute but the mediator is never a post-settlement public endorser and promoter of the resolution reached. Nor is it expected by the parties, the judicial system, or the public that mediators would routinely provide evidence to the court about the quality of the parties' bargaining or merits of their settlement. Class action mediators are called upon to do something quite different. They too facilitate the bargaining, but then are often expected to report to the court on the quality of the bargaining, and in many cases, the quality of the settlement. Without formal appointment to do so, and without any duty owed to the most vulnerable participants in the process – the absent class members – the class action mediator profoundly influences the ultimate legal conclusion in a settled class action case: Whether the settlement was "fair, reasonable, and adequate."<sup>213</sup>

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<sup>207</sup> See generally Margaret G. Farrell, *Amended Rule 53 and the Use of Special Masters in Alternative Dispute Resolution*, ALI-ABA COURSE OF STUDY, SJ034 ALI-ABA 261 (2003); Kenneth R. Feinberg, *Creative Use of ADR: The Court-Appointed Special Settlement Master*, 59 ALB. L. REV. 881 (1996).

<sup>208</sup> See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 762-63 (E.D.N.Y.1984) (stating that "negotiations and settlement discussions were observed by Special Masters accountable to the court insuring against any selling out of the class for the benefit of insiders.").

<sup>209</sup> FED. R. CIV. P. 53(e) (providing that "[a] master must report to the court as required by the appointing order.").

<sup>210</sup> FED. R. CIV. P. 53(b)(2)(C). See also ADVISORY COMMENT NOTE TO THE 2003 AMENDMENT TO RULE 53 (noting that a basic requirement is that "the master must make and file a complete record of the evidence considered in making or recommending findings of act on the basis of evidence.").

<sup>211</sup> FED. R. CIV. P. 53(b)(2)(D).

<sup>212</sup> See, e.g., Nancy A. Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. U. L. REV. 187, 222 (2012) (describing how a skeptical public's perception of the thoroughness and accuracy of decision-making in mandatory predispute arbitration would be much improved by "[t]he clarity that comes with admitting the existence of conflict, combined with the potential transparency and accountability offered by discovery into administrators' claims processing").

<sup>213</sup> FED. R. CIV. P. 23(e). See *supra* notes 6–21 and accompanying text.

At the front end of this process, the “label” mediator might make sense. But at the back end, the “label” mediator has nothing to do with what the class action neutral is called upon to do. “Labels,” as former solicitor general Theodore Olson reminded us in a recent Supreme Court oral argument,<sup>214</sup> matter. And a far better “label” for a class action mediator would be “special master.”

## VIII. CONCLUSION

The February 22, 2013 symposium ended with an impassioned plea from Professor Thomas Carbonneau for more deference rather than less in the context of arbitration:

[A]rbitration is not perfection but it is certainly a better way to live. . . . Functionality vs. appeal: That’s the whole point here today. Should the courts tell arbitrators how to rule? Or when they got it wrong? My answer is clearly no. Because there aren’t enough cases where the arbitrators will be wrong in order to subvert the entire system.<sup>215</sup>

Should we apply the same substantial deference to class action mediators? Undoubtedly, they too are “virtuous” people, members of a very select group chosen because of their “judgment, neutrality, expertise,” – their “symbolic power.”<sup>216</sup>

When it comes to the illusion of truth, repetition of the mantra that mediator participation ensures fairness and settlement quality is only effective “when people are paying little attention.”<sup>217</sup> Agree or disagree with my particular conclusions and recommendations, but above all else, please look closely at this little niche of excessive implied deference; it merits far closer examination and thoughtful critique than it has received to date.

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<sup>214</sup> See *supra* note 201.

<sup>215</sup> Thomas Carbonneau, closing remarks at The Pennsylvania State University Dickinson School of Law, Yearbook on Arbitration and Mediation Symposium: The Role of the Courts: Judicial Review of Arbitral Awards and Mediated Settlement Agreements (Feb. 22, 2013), *available at* <http://mediasite.dsl.psu.edu/Mediasite/Play/273f33c3c18b49fc9faa05b94614fb5c1d> (calling for serious scrutiny of what we mean as a society by “impartiality” and concluding: “[M]aybe mediators are biased, maybe arbitrators are biased. But I’ll bet you my entire salary that judges are just as biased. And most of them are appointed by politicians. And you can’t think of a deeper form of bias than that.”).

<sup>216</sup> See DEZALAY & GARTH, *supra* note 1, at 8.

<sup>217</sup> *The Illusion of Truth* on PSYBLOG, *available at* <http://www.spring.org.uk/2010/12/the-illusion-of-truth.php> (last accessed March 24, 2013) (citing Wesley G. Moons, Diane M. Mackie, and Teresa Garcia-Marques, *The Impact of Repetition-Induced Familiarity on Agreement With Weak and Strong Arguments*, 96 J. PERSONALITY AND SOCIAL PSYCH. 32 (2009)).