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Digging Deeper

December

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Greetings from the Editor!



Extra Extra Read All About It ... We Have an Exciting New Look!



We're excited to announce the launching of our redesigned website and Improvisational Negotiation Blog (www.improvisationalnegotiationblog.com) We hope you'll visit regularly and find information that is both helpful and of interest.

You can find all of our archived articles and newsletters on the website in a new easy searchable format. If you check back in the near future, you'll see that we'll also be adding podcasts on Improvisational Negotiation for those

who enjoy "reading" on the go.

Since we're big on balance, you can be sure to find posts on our our blog that not only cover significant events in the legal field but also topics of personal interest to us. To help you get acquainted with our blog, we've included a sampling of our recent posts in this month's newsletter.

We welcome your feedback and comments and look forward to hearing from you!

Recent Confidentiality Decisions ... In a Nutshell

In light of the extensive blogosphere



Welcome to our Digging Deeper newsletter.

We hope you will join us one or more of the following upcoming events where Jeff and/or I will be presenting.

- **Mariam Zadeh**

Calendar of Events:

February - April 2009:
Advanced Mediation Course at Pepperdine School of Law, Straus Institute for Dispute Resolution

coverage that mediation confidentiality has received in recent months, we will keep this post short and sweet. The last year has yielded a host of decisions from across the country that has impacted the confidentiality protections afforded parties to a mediation.

We have summarized these cases with their respective citations so that the information is available and encapsulated in one area for easy reference.

Estate of Thottam, Case No. B196933 (Cal. App. 8/13/2008). Three siblings mediated a dispute concerning distribution of their deceased mother's estate and trust. At the outset of the mediation, the parties all signed a mediation confidentiality agreement. During the course of the mediation, a chart was prepared that delineated how the estate would be dispersed as among the three siblings. The chart was later introduced at trial by one of the siblings as evidence of the agreement over objection of the other two siblings. The trial court found the chart inadmissible, rejecting the introducing party's argument that any mediation confidentiality was waived pursuant to the provision in the confidentiality agreement stating that confidentiality would apply ". . . except as may be necessary to enforce any agreements resulting from the Meeting." (Emphasis added.) The appellate panel determined that the confidentiality agreement between the siblings that all matters discussed or agreed to in mediation "(2) shall not be used in any current or future litigation between us (except as may be necessary to enforce any agreements resulting from the Meeting)" was an enforceable agreement even though made prior to any settlement being reached. The appellate court reversed the trial judge and decided that California Evidence Code §1123(c) requires neither that the express agreement in writing permitting disclosure be contained in the settlement agreement itself nor that it even be made at or after the time the settlement agreement is entered into.

Simmons v. Ghaderi, Case No. S147848 (Cal. App. 7/21/2008). In this medical malpractice case, the defendant, Dr. Lida Ghaderi, gave her insurer consent during mediation to settle the case for \$125,000. After the parties reached an agreement and the mediator drew up the contract, Dr. Ghaderi retracted her consent and left the mediation. The plaintiffs sought to enforce the settlement with a declaration from the mediator outlining the events as they transpired at the mediation. Dr. Ghaderi objected and claimed the mediator's declaration was a breach of mediation confidentiality and the oral settlement should be thrown out. The California Supreme Court agreed with Dr. Ghaderi, reversed the lower court's decision and held that the "Court of Appeal improperly relied on the doctrine of estoppel to create a judicial exception to the comprehensive statutory scheme of mediation confidentiality and that the evidence relating to the mediation proceedings should not have been admitted at trial."

Wimsatt v. Superior Court, (6/18/2007) 152 Cal.App.4th 137. In a legal malpractice action, the plaintiff-client claimed his attorney cut his settlement demand by more than half without his authorization. Plaintiff sought discovery of all mediation briefs, including the one prepared by his own lawyer, and e-mails sent the day before the mediation that quoted from the mediation brief to support his contention that he had not authorized the reduced demand. The Court of Appeal issued a writ of mandate directing the trial court to prohibit disclosure of the mediation briefs, holding that mediation confidentiality protects mediation communication in the context of a legal malpractice action arising from the handling of the underlying settlement process. The Court of Appeal reversed the decision, properly relying on *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, *Rojas v. Superior Court* (2007) 33 Cal. 4th 407, *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, and the California Evidence Code and held firm to the position that there are no exceptions to strict mediation confidentiality, even where the result seems unjust. The Court of Appeal reaffirmed the importance of confidentiality to the mediation process and emphasized the Supreme Court's repeated refusal to "judicially create exceptions to the statutory scheme, even in situations where justice seems to call for a different result."

June 2009: 22nd Annual Summer Professional S Program in Dispute Resolution at Pepperdine School of Law, Straus Institute for Dispute Resolution.

[Click here for more information on upcoming conferences and training programs.](#)

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Hauzinger v. Hauzinger, 2008 NY Slip Op. 05781 (NY Ct. App., June 26, 2008). The New York Court of Appeals affirmed the Appellate Division's holding that where one party signs a waiver releasing the mediator from maintaining confidentiality and the other party waives confidentiality by seeking disclosure from the mediator, the mediator is not allowed to assert a qualified privilege and is required to testify at trial if subpoenaed.

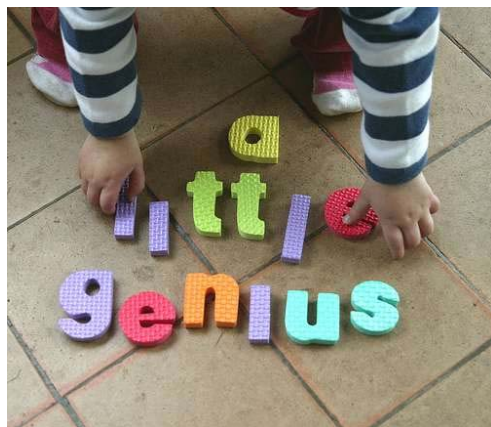
Williams v. Johanns, 2008 WL 36633 (D.D.C., January 2, 2008). Counsel for plaintiff was found in civil contempt by the U.S. District Court for the District of Columbia for filing a pleading containing statements made in mediation. The Court held a show of cause hearing and ultimately imposed a nominal fine noting the importance of confidentiality in the mediation process.

Rees v. Tingey Construction, Case No. 20060594 (Utah February 1, 2008). The trial court's order requiring counsel for a party to be deposed to determine whether the parties had orally agreed to settle during mediation was reversed. The decision was based on state law prior to the Utah Uniform Mediation Act taking effect on May 1, 2007.

Arben Corp. v. NYS Thruway Authority, Case No. 2008- 036-308 (NY Ct. Cl., February 26, 2008). In litigation over an alleged written settlement agreement, the New York trial court on a motion in limine ruled that post-mediation evidence from the mediator was permitted to determine whether or not a settlement agreement had been finalized and then breached. The court based its decision on a written agreement to mediate between the parties and on New York Law (CPLR 4547) which codifies the common law "settlement privilege." The court concluded that negotiations concerning the underlying dispute between the parties were protected by mediation confidentiality but that CPLR 4547 does not block efforts to prove the existence of a settlement agreement.

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Malcolm Gladwell Explores the Connection Between Genius and Precocity



In his article in *The New Yorker* - Late Bloomers, Malcolm Gladwell, considers the work of an economist at the University of Chicago named David Galenson and why we tend to equate genius with precocity.

In biology, the term precocial refers to species in which the young are relatively mature and mobile from the moment of birth or hatching. In the context of Gladwell's article, he explores precocity - the manifestation of unusually early development or maturity, especially in mental aptitude - in the context of literary

and artistic genius. Referencing Galenson's book, *Old Masters and Young Geniuses*, Gladwell talks about the way our minds work by "entertaining the notion that there are two very different styles of creativity, the Picasso and the Cézanne."

In *Late Bloomers*, Gladwell writes: Galenson did a simple economic analysis, tabulating the prices paid at auction for paintings by Picasso and Cézanne with the ages at which they created those works. A painting done by Picasso in his mid-twenties was worth, he found, an average of four times as much as a painting done in his sixties. For Cézanne, the opposite was true. The paintings he created in his mid-sixties were valued fifteen times as highly as the paintings he created as a young man. The freshness, exuberance, and energy of youth did little for Cézanne. He was a late bloomer-and for some reason in our accounting of genius and creativity we have forgotten to make sense of the Cézannes of the world.

Galenson's idea that creativity can be divided into these types-conceptual and experimental-has a number of important implications. For example, we sometimes think of late bloomers as late starters. They don't realize they're good at something until they're fifty, so of course they achieve late in life. But that's not quite right.

We also sometimes think of them as artists who are discovered late; the world is just slow to appreciate their gifts. In both cases, the assumption is that the prodigy and the late bloomer are fundamentally the same, and that late blooming is simply genius under conditions of market failure. What Galenson's argument suggests is something else-that late bloomers bloom late because they simply aren't much good until late in their careers.

There's something comforting about knowing that youth and genius don't necessarily go hand in hand. Who said you can't teach an old dog new tricks.

[Improvisational Negotiation Blog](#)

Setting the Stage of Negotiation

In Jeff's recent article published in the November 2008 issue of Plaintiff Magazine, he explains why engineering the negotiation prior to the mediation is the secret to maximizing results.

This story is for you if: · You show up to mediation and have never discussed settlement numbers with the defense; · The defense has not revealed to you their assessment of liability and damages; or · You are often disappointed at the defendant's inability to settle in a reasonable range at the first mediation.

[You can read the full article here.](#)



Last Minute Club - Become a Member!

We realize that it is often difficult to schedule cases with us on short notice or in instances where there are critical time pressures. As a result and in an effort to accommodate our colleagues when faced with this situation, we have instituted the *Last Minute Club*.

As a member of the *Last Minute Club*, you will be notified in the event of a cancellation or opening in our calendar and will be given priority to book that last minute spot. You can choose to be notified by email or phone, at which point we will advise of the



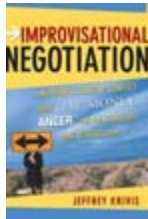
date, time and number of hours available.

Please keep in mind that the first to respond with a firm acceptance by all parties of the opening will be able to reserve the date.

We are hopeful that becoming a member of the *Last Minute Club* will help accommodate your firm and serve your needs for any last minute mediations.

[Last Minute Club Membership Form](#)

Improvisational Mediation



A Mediator's Stories of Conflict, About Love, Money, Anger and The Strategies That Resolved Them
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How To Make Money as a Mediator (And Create Value for Everyone)



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