Is Mediation A Sleeping Beauty?

On November 2, 2014, the Cardozo Journal of Conflict Resolution asked “Is Mediation a Sleeping Beauty?” in its Annual Jed D. Melnick Symposium. Some have described the event as a “Taking Stock” symposium, which is hopefully “a turning point in reinstating core elements of the mediation process” (email from Chris Stern Hyman to Lela Love). Speakers expressed general concern that mediation was indeed sleeping and not all together beautiful and that action was needed to revive her.

Professor Giuseppe De Palo (ADR Center in Rome, Italy), the keynote speaker, introduced by Hal Abramson, presented a study examining the underuse of mediation throughout the European Union. Professor Abramson asked whether Giuseppe De Palo himself was indeed a real Prince Charming with a proposal that will wake up sleeping beauty! De Palo replied that he probably wasn’t, and that voluntary mediation was also not Prince Charming. De Palo discussed the results of a major mediation study conducted for the European Parliament, showing the tiny size of the EU mediation market, analyzing the ineffectiveness of current pro-mediation policies and calculating the tremendous time and cost savings increased use of mediation would generate. He concluded that mediation in the EU is "dormant" and proposed mandatory mediation with an easy opt-out (or "mitigated mandatory mediation") as the sole, real Prince Charming. In the end, mitigated mandatory mediation in Italy has brought 20 times as many mediations as the second EU country with respect to mediation.
During the first panel titled “Is She Sleeping?” moderated by Professor Jim Stark, Kim Kovach suggested that mediation is in a coma. Kovach examined the process’ early (and beautiful) objectives and discussed the marriage of the adversarial father, litigation, with the beautiful mother, mediation, which produced the mutant child, litigation. The courtship of the two processes hid the ‘real’ features (what many of us would consider the beauty) of mediation and put mediation into its current coma. Professor Jacqueline Nolan-Haley (Fordham Law School) described these times as a season of light: with mediation at the height of its popularity (sometimes displacing arbitration as the usual method of dispute resolution); with mediation as the most frequently used ADR process in state and federal courts; and with international and provider organizations, formerly devoted to arbitration, now enacting new rules that focus exclusively on mediation. But these times are also a season of darkness: darkness from abuse of process, confusion of the mediator’s role, and misapplication of the process in the face of cultural challenges. Professor Robert A. Baruch Bush (Hofstra University School of Law) concluded that mediation had been drawn into an intoxicating problem-solving culture—resulting in many mediators being too focused upon the “drug-like high” of settlement. Instead, he presented an agenda to revitalize self-determination in mediation, calling for (among other things) an end to the fiction that evaluative case settlement is mediation and for a redesign of mediator training.

The second panel, “Is She Beautiful?”, moderated by Professor Doug Frenkel, examined whether mediation lives up to its original promise. Panelists Professor James Coben (Hamline University Law School), Professor Joseph B. Stulberg (Ohio State University Moritz College of Law), and mediator Laurel Kaufer presented varying views. Professor Coben didn’t mince words when he said that he believed mediation has turned ugly - another tool for litigators to delay and abuse the judicial system. He also described our current system for selecting mediators as an “aristocracy,” not based on mediator skill but instead on inflated reputations. Professor Josh Stulberg explored whether interest-based bargaining theory, often the mediator's privileged approach for fostering negotiation, operates to reinforce party inequalities and undermine party self-determination, contrary to the presumptively salient values of the mediation process. Laurel Kaufer found beauty in mediation as she described the success of Prison of Peace, a nonprofit organization she co-founded that trains life and long-term inmates in mediation and peacemaking skills.

Mediator Eric Galton, Professor Nancy Welsh (Penn State University Dickinson School of Law), and Professor Donna Erez-Navot (University of Wisconsin Law School) reflected on “Who is the Wicked Witch?” for a panel moderated by Dan Weitz. Mr. Galton blamed commercial mediators for caving in to lawyer demands to eliminate joint sessions, limit party participation, and provide evaluations. Professor Welsh shifted to the fairy tale of Cinderella, arguing that as courts prioritize case closure and lawyers’ preferences over process quality or the protection of parties’ self-determination, they too often behave like the self-interested and vain stepmother; but Professor Welsh also urged that courts have the unique potential to be the Fairy Godmother, by granting mediation the markers of legitimacy and thus enabling others to appreciate the process’ inherent beauty. Professor Erez-Navot pointed to “wicked witch” elements in child permanency mediation, including
reduced party participation and representatives who are more concerned with their professional relationships with judges and adversaries than the welfare of the parties they represent.

The final panel, entitled, “Who is Prince Charming?”, moderated by Lela Love, featured Professor Carol Liebman (Columbia Law School), Brad Heckman (the New York Peace Institute), and Tracey B. Frisch (American Arbitration Association). Professor Liebman suggested candidates for Prince Charming might be: mandatory mediation (for certain cases), pay for mediators (in situations where other professionals are being paid), and adherence to core mediation values. Tracy Frisch discussed several efforts of the AAA to respond crises, such as Hurricane Sandy and the bankruptcy crisis in Florida. Brad Heckman shared his experience using social media to promote mediation and described the unparalleled access and exposure he found in using outlets such as Twitter and participating in TEDx.

The Journal of Conflict Resolution will be publishing a symposium edition in Spring 2015. Many of the presenters at the symposium will be publishing articles in line with the themes discussed at the symposium. For more information about the symposium or the Cardozo Journal of Conflict Resolution, visit www.cardozojcr.com.

**Judge Daniel Weinstein (Ret.) Honored as recipient of 2014 Cardozo International Advocate for Peace Award**

The Cardozo Journal of Conflict Resolution will honor Judge Daniel Weinstein as the 2014 recipient of its International Advocate for Peace Award. A ceremony and reception in Judge Weinstein’s honor will be held at Cardozo Law School on Monday, March 16, 2015 – invitation and time to follow.

In selecting Judge Weinstein for the 2014 Advocate for Peace Award, the Journal is recognizing the Judge’s achievements in founding the Weinstein JAMS International Fellowship Program and as a pioneer in the development of mediation worldwide. Judge Weinstein’s ingenuity and vision to build a high-level international peacemaking community through the Weinstein JAMS International Fellowship Program is the very essence of what it means to be an International Advocate for Peace.

Judge Weinstein joins previous recipients of the International Advocate for Peace Award which includes among other distinguished recipients: President Bill Clinton, President Jimmy Carter, Archbishop Desmond M. Tutu, Senator George Mitchell and Seeds of Peace, Ambassador Dennis Ross, Stuart E. Eizenstat, and Eve Ensler.

Judge Weinstein is nationally recognized as one of the premier mediators of complex, multi-party, high-stake cases, both in the United States and abroad. He is a sought after mediator in international disputes including cross boarder and cross-cultural disputes, multinational financial disputes, international securities cases, international intellectual property matters, worldwide entertainment and sports cases, international anti-trust actions, and international environmental disputes. Judge Weinstein also served as U.S. Special Representative in Bosnia from 1999-2000, and is the co-founder of Making Peace our Business, a nonprofit international dispute resolution forum.
Judge Weinstein conceived of and initially endowed the Weinstein JAMS International Fellowship Program. This innovative program provides opportunities for qualified individuals from around the world to study dispute resolution processes and practices in the United States with the goal of advancing the resolution of disputes in their home countries.

Judge Weinstein has recently partnered with the JAMS Foundation to fully endow the Fellowship Program for the next 20 years thereby ensuring the continuation and vitality of the Fellowship Program over decades to come.

The Weinstein JAMS International Fellowship Program recruits promising dispute resolution professionals from all over the globe and provides them with an opportunity to gain a firsthand glimpse into the world of complex, multi-party mediations in the United States. The Program has developed a platform for these international professionals to engage with one another and to exchange peacemaking ideas and practices from all over the world.

The Program began in 2008, and to date there have been sixty one fellows from fifty countries including Bhutan, Egypt, Afghanistan, Cameroon, Ecuador, Armenia, Pakistan, Thailand, Nigeria, Bosnia, Malaysia, Nepal, Turkey, Jordan, Iran, and China.

Those selected, from the hundreds of applicants annually, to participate in the Fellows Program are provided with the guidance of experienced JAMS panelists, and attend seminars and classes in all facets of dispute resolution. They are then encouraged to pursue various projects that are designed to advance each Fellow’s dispute resolution career in their home countries. Previous Fellowship recipients have returned to their countries to lead high-level mediation and arbitration trainings, implement dispute resolution programs privately and in their court systems, write dispute resolution legislation, and develop major dispute resolution centers.

For more information about the awards ceremony please visit www.cardozo.yu.edu/kukin or www.cardozojcr.com.

CARDOZO ADR COMPETITION TEAM UPDATE

Cardozo Students Place 1st and 2nd at Cyberweek EMediation Competition

Lara Traum (2L) received first place as a mediator, and Noelle Forde (2L) and Glenne Fucci (2L) placed second as parties at the Cyberweek EMediation Competition. Co-sponsored by Cornell University's Scheinman Institute on Conflict Resolution and Modria Mediation Room, the EMediation Competition takes place during the annual Cyberweek Conference, November 3-7, 2014, which focuses on the world of online dispute resolution.
Cardozo Team Places 5th at the Regional ABA Negotiation Competition

Cardozo students Jennifer Edelson (2L) and Scott Miller (2L) placed fifth at the regional ABA Negotiation Competition held November 9-10, 2014 at Touro Law School. Elana Freeman (2L) and Jonah Zweig (3L) also competed in the competition. Professor David Weisenfeld and students Glenn Thompson (3L) and Dera Barlow (3L) served as coaches.

Cardozo Places 2nd at Jeffrey Abrams Mediation Competition

Zachary Beal (2L) was awarded 2nd place at the Jeffery Abrams Mediation Competition at the University of Houston Law School on October 24-25, 2014. Nicholas Schmitt (3L) also competed for Cardozo. Professor Lela P. Love and Team Leader Ella Voloshina served as coaches. In this competition, students serve as mediators and are judged on their effectiveness as such for a simultaneous representation in mediation competition of the University of Houston’s law students.

Cardozo Competes at St. Johns Annual Securities Dispute Resolution Triathlon

A joint initiative of the Hugh L. Carey Center for Dispute Resolution at St. John’s School of Law and the Financial Industry Regulatory Authority (FINRA), St. John's Annual Securities Triathlon was held at St. John’s University's Manhattan Campus in Tribeca on October 18th and 19th, 2014. The competition consisted of a negotiation, mediation, and arbitration round. Coached by Professor David Weisenfeld and Team Leader Victoria Serigano (3L), the two Cardozo teams consisting of Daniel Joy (3L), Shakira Wallace (2L), Mary Beth Winningham (2L), Victoria Serigano (3L), Kori Clanton (3L), and Joenni Abreu (2L) competed against 20 other teams from around the country.
ALUMNI SPOTLIGHT

Romina Canessa ‘13 Helps Found Dispute Resolution Program in Afghanistan

After graduation, Romina Canessa ‘13 followed her passion for Dispute Resolution to Kabul by way of Rome. In a leap of faith, Canessa decided to apply for and subsequently accept a temporary position working for the ADR Center (a part of JAMS International) in Rome, Italy. Canessa had never lived in Rome before, and after encouragement from friends, family, and Cardozo faculty, moved there in October 2013.

Upon arriving in Rome, Canessa began work at the ADR Center, under the supervision of Professor Giuseppe De Palo. Canessa soon became involved in the Center’s initiative to apply for funding to build two dispute resolution programs in Kabul, Afghanistan. In May 2014, after a long application process, the Center was awarded a contract to build and establish the Afghanistan Center for Dispute Resolution (ACDR) and the Consumer Protection Analysis and Investigation Project. For Canessa, what was initially a three month position, developed into full time work.

The objective of the ACDR is to provide mediation and arbitration services for commercial disputes in Afghanistan. Canessa explained that there is a need for this type of entity in Kabul because, “presently there are a lot of international companies working with Afghani companies, and when disputes arise, the Afghani courts can be inefficient and corrupt.” Since the Center was awarded the contract, Canessa has worked to locate and construct an office space; interview, hire and train Afghani staff; develop mediation and arbitration rules; write training materials; recruit and train a roster of international mediators; and conduct various workshops in local and international communities in Kabul.

Through her work, Canessa learned that dispute resolution is not a foreign concept in Afghanistan, as two traditional councils, called the Jrga and the Shura, administer dispute resolution throughout Afghanistan. Generally these councils are made up of community elders that offer assessments and recommendations to parties as a method of dispute resolution. Canessa explained that the ACDR differentiates itself from the Jrga and Shura because parties can select their neutral, and elect to have a facilitative (non-directive) or evaluative (directive) mediator conduct their session.

Canessa is also working on behalf the Center to develop the Consumer Protection Analysis and Investigation Project which aims to assist the Competition Promotion and Consumer Protection Department (CPCPD) of the Ministry of Commerce and Industry of Afghanistan. The objective of this project is to create an effective legal consumer protection framework and build the capacity of the CPCPD so that it can ensure effective competition in the marketplace and protect consumers.
Primarily, Canessa works at the Center in Rome. She has been to Kabul twice, and plans to visit a third time in November of 2014. Canessa said she was surprised during her first visit to Kabul, because although there are always security concerns, she feels comfortable there and finds Kabul to be a busy Middle Eastern metropolis.

To date, the response to the Center’s work has been positive, and the ACDR staff is excited to begin work once the ACDR facilities are open.

Canessa acknowledges that it was “scary taking on a non-traditional position” and explained that it “was something that I had to accept was OK for me to do.” She elaborates, “I’m so glad I did it now, and it is sometimes surreal that I get to go to Afghanistan, and do all these really cool things that I would never be doing if I had stayed in the US.”

While a student at Cardozo, Canessa was co-president of the Cardozo Dispute Resolution Society, and participated in the Willem C. Vis International Commercial Arbitration Moot in Hong Kong.

Simone K. Lelchuk ’10 Hired as Associate for JAMS Mediation Firm Weinstein Melnick LLC

Simone K. Lelchuk, Esq., ’10, recently accepted a position as associate mediator for Weinstein Melnick LLC, a mediation firm specializing in large, complex, and high profile disputes in the United States and in Europe. Weinstein Melnick LLC, founded by JAMS panelists, Judge Daniel Weinstein (ret.) and Jed D. Melnick, Esq., ‘99, has a mediation center in Napa, California, as well as offices located at JAMS in New York City and San Francisco. Lelchuk primarily works alongside Melnick, managing partner of Weinstein Melnick LLC. Her responsibilities include mediating various matters with Melnick through JAMS, as well as reviewing party submissions, researching and reviewing relevant case law, and working with parties in advance of the mediation sessions to ensure parties are adequately prepared for mediation. Lelchuk is also responsible for conducting various post mediation session follow-up efforts to resolve any final or outstanding matters that may present barriers to settlement.

Matters mediated by Lelchuk at Weinstein Melnick LLC (via JAMS) include, anti-trust matters, Chinese securities litigation, contract disputes, coverage litigation, legal malpractice matters, mergers and acquisition litigation, personal injury litigation, securities class actions and subprime litigation.

Prior to working for Weinstein Melnick LLC, Lelchuk was an associate at KPMG LLP, in its valuation group, and an associate at Kasowitz, Benson, Torres & Friedman LLP. At Kasowitz Lelchuk worked in the bankruptcy group, and then subsequently helped to launch Kasowitz’s new real estate group.

As a law student at Cardozo, Lelchuk served as an extern for Weinstein Melnick LLC, earned her Certificate in Dispute Resolution, was president of the Cardozo Dispute Resolution Society, and was a participant in the Cardozo mediation clinic.
Daniel Ben-Zvi ‘81 is Founder and Chair of Los Angeles Mediation Awareness Week

Daniel Ben-Zvi ‘81 a mediator for ADR Services, Inc. is the founder and chair of Mediation Awareness Week in Los Angeles, California. Ben-Zvi developed Mediation Awareness Week as a way to promote awareness of mediation to the public, the legal bar, and government officials throughout Los Angeles County. Ben-Zvi conceived of Mediation Awareness Week in 2004 with former LA City Council Woman Wendy Gruel.

Each year, Ben-Zvi, alongside public officials including the mayor of Los Angeles, the Los Angeles City Attorney, the heads of the two largest trial lawyers associations in the country, and the president of the Southern California Mediation Association, gather at City Hall to kick off Mediation Awareness Week before council members, the public, and members of the media. The Los Angeles City Council also adopts a resolution in honor of Mediation Awareness Week, which promotes and supports the practice of mediation and declares the specific dates of Mediation Awareness Week.

Now in its tenth year Mediation Awareness Week in Los Angeles is more important than ever due to the elimination of the Los Angeles Superior Court Dispute Resolution Program, and the closure of ten court houses and sixty courtrooms throughout Los Angeles County. Ben-Zvi explains that during mediation week, “we [leaders in the mediation field] work with board members of the Los Angeles Department of Public Works as well as city council members to brainstorm ways in which dispute resolution can be used to resolve public disputes.” Often as a result of these meetings, government disputes that have been long left unresolved are discussed and on occasion Ben-Zvi has been hired to serve as the mediator to resolve these long standing city disputes.

Ben-Zvi has mediated over 2,000 cases and has served as a panelist for ADR Services, Inc., Alternative Resolution Centers, Institute of Conflict Management, World Intellectual Property Organization, and DB Mediation Services.
Carol Pauli ’07 To Be Published in Pepperdine Dispute Resolution Law Journal

Carol Pauli, ’07 will be published in the forthcoming issue of the Pepperdine Dispute Resolution Law Journal. Her article, *Transforming News: How Mediation Principles Can Depolarize Public Talk*, discusses the application of transformative mediation principles to the field of journalism with the hope that journalists can use transformative mediation techniques to “increase the capacity of participants [public figures and media consumers] to clarify their views and respond with generosity to the views of opponents.”

Prior to attending Cardozo, Pauli worked as a professor of mass communication law, press history, and journalism, and before that she worked as a journalist. She explains that as a reporter she would often write about local issues and conflicts, first interviewing one side of the debate then the other. Similar to a mediator, Pauli found that she was able to empathize with both sides to a dispute, and withhold judgment in order to write an unbiased story. It was her work as a journalist that inspired Pauli to study mediation and conflict resolution.

While a student at Cardozo, Pauli was competitively selected to participate in the Mediation Clinic, and was the 2006 winner of the prestigious ABA James B. Boskey Law Student Essay Contest on Dispute Resolution.

Pauli is currently an associate professor of Law at Texas A&M University School of Law.

Brad Roth ‘10 is NY Chapter President of Mediators Beyond Borders International

Brad Roth ‘10 is the current New York chapter president of Mediators Beyond Borders International. Roth has been a member of Mediators Beyond Borders since 2011 and founded the New York Chapter in 2011. While a student at Cardozo, Roth participated in the mediation clinic.