ARIZONA
ADR
FORUM

winter 2015

CONTENTS

STATE BAR OF ARIZONA

EDITOR | THOM COPE

We welcome comments about this newsletter and invite you to suggest topics or submit an article for consideration. Email the Editor, Thom Cope at tcope@mcraziaw.com

from the chair

Jonathan D. Conant, Esquire

Greetings!

As the Chair of your ADR Section of the State Bar for 2015-2016, it is my pleasure to welcome you to this edition of the *Arizona ADR Forum*. I hope that you will find it as interesting and beneficial as I do. I encourage you to share it with your colleagues, as there is always something to be learned from this publication.

This is an exciting time for ADR in Arizona. In this newsletter you will find a discussion of a case dealing with the heart and soul of mediation – its confidentiality. Just what are the bounds and limitations associated with the disclosure of facts and circumstances contained in those confidential mediation conversations? You will also find several other articles equally as important and interesting, to be sure.

I do need to begin with extending my gratitude and thanks to last year's Executive Council. Under the direction of the past Chair, Jerome Allan Landau, the section accomplished great things. For those of you who have yet to cross paths with Jerome, he is perhaps one of the most grounded professionals that you could ever come across. He brought that mannerism to the Executive Council as well as shared his own professional insight at numerous CLE presentations. I am honored to have been the beneficiary of his tutelage.

Our Budget Officer Bob Copple, kept us fiscally strong and I am fortunate that he has agreed to continue in that position for yet another year. In addition and perhaps of greater impact, Bob shared his vast experience and knowledge of ADR with newly admitted attorneys during a CLE presentation that he presented. It is with great pride and heartfelt appreciation that I am pleased to announce he will be presenting to incoming attorneys again this year. Just think of what the practice of law would (and will) be if more attorneys knew and embraced ADR in their own practices!

Our Secretary for the past several years, Renee Gerstman, has moved into the Vice Chair's position for 2015-2016 and has already proved invaluable in

>

assisting the section. Both in my absence, and in her own right Renee brings not only a level of professionalism that I am proud to associate with, but her organizational skills are invaluable to a Section such as ours. She, along with the Convention Chair for 2015-2016 Steven Kramer, have put together a program that will certainly be of interest to *all* bar members, even those who do not find themselves involved in litigated matters.

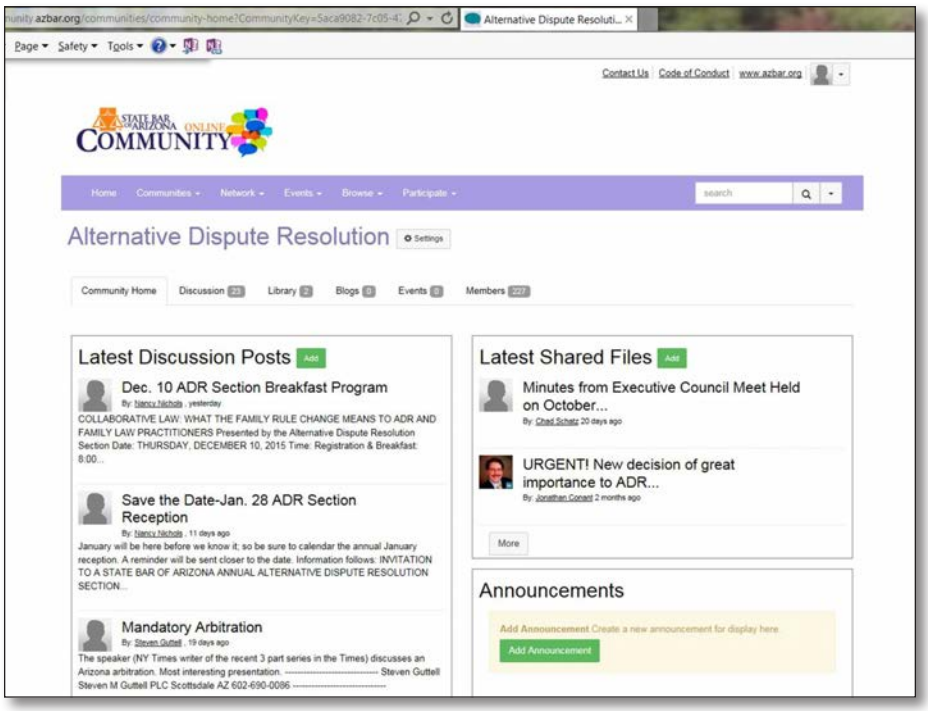
While on the subject of the Annual State Bar of Arizona Convention, I have to give praise to last year's convention Chair, Steven Guttell. The time that goes into planning and producing a full day at the Convention is a grueling task. When you add to that his activities as an ADR professional and an educator at a local Law School, his accomplishment of receiving the President's Award last year is even more incredible. While he has taken this year off from his "convention duties", Steve remains a valuable member of the Executive Council and has provided invaluable assistance to this year's Convention Chair.

Maureen Beyers has joined us as the Secretary for 2015-2016, replacing Renee Gerstman. She brings her own vast knowledge of ADR systems and a level of excitement that has already spawned numerous discussions about the direction of our section. As I said before, these are certainly exciting times!

As has also been said many times before, this publication would not exist without the tireless efforts and contributions of Thom Cope, Editor of the *ADR Forum*. In fact, without his incessant probing this introduction would have never been completed or submitted! In addition, great thanks and appreciation has to be given to our Section Administrator, Nancy Nichols. Ours is not the only section over which she assists and the levels of knowledge and patience that she exudes is certainly a calm port in a storm.

A key aspect of our section has been and will be our CLE offerings. Already this year we are off to a great start under the guidance of our CLE Chair, Alona Gottfried. We are still planning for presentations throughout the year, including partnering with other Sections as well as with the CLE department itself. In addition, we are looking into another "outreach" CLE offering, where members of the Executive Council will travel to areas not easily accessible to Maricopa County for the purpose of doing live CLE Presentations. Expanding our recourses and reach, our goal is to continue to spread knowledge about all things ADR.

This year has already brought the full implementation of the State Bar Social Network, otherwise known as the "Online Community". If you have not signed up for the section community please do so. Think of this community as a "list service" of sorts, where you will be able to pose questions to other ADR practitioners for response and obtain valuable information for use in your practice. In the age of Twitter, LinkedIn and yes of course, Facebook, this is the wave of NOW. The future is here and we need to embrace it.



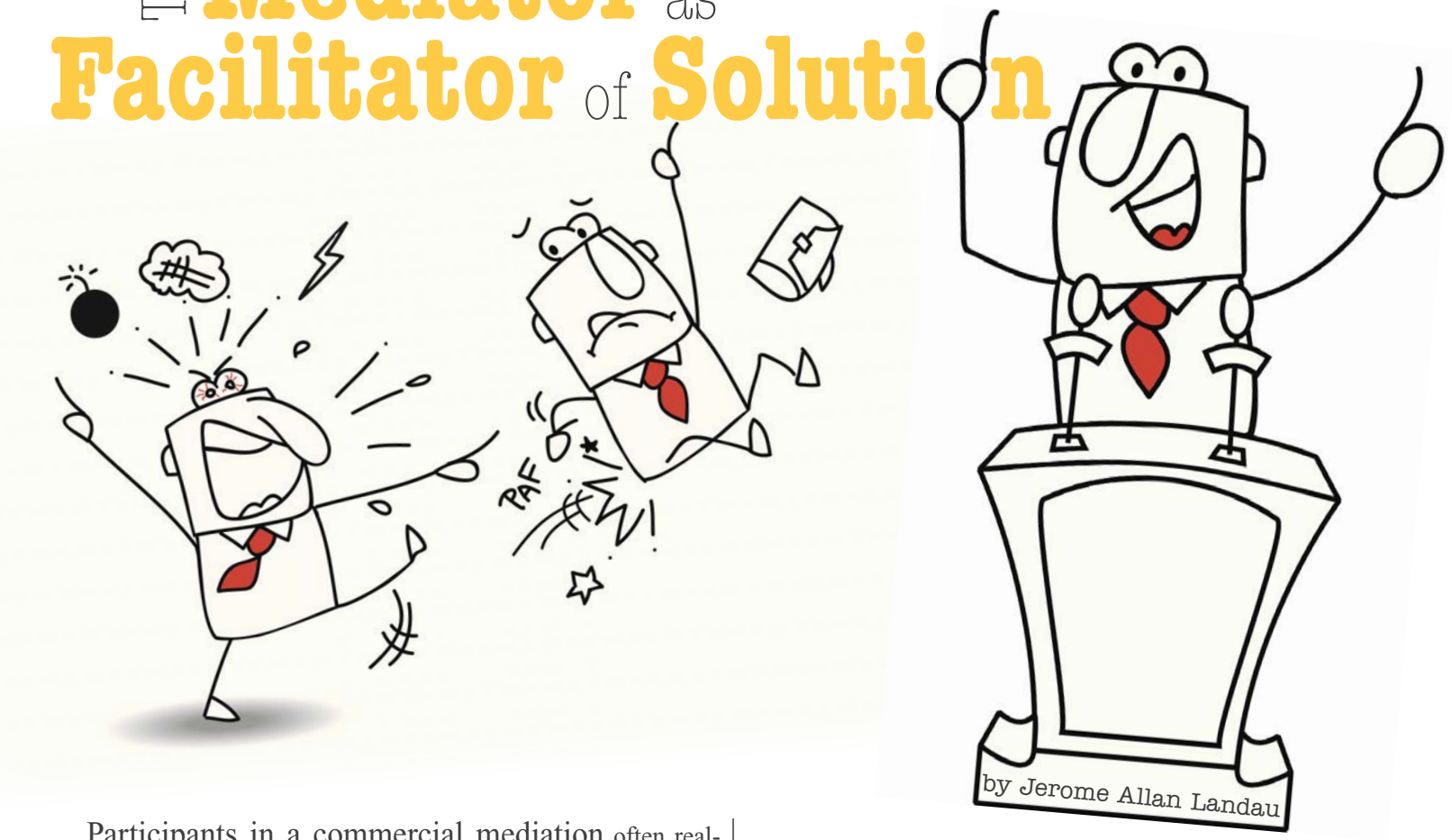
ADR Section Online Community homepage @ the State Bar website.

On that "Network", you will also find messages of importance concerning *your* ADR Section. Please know that the executive Council works for *you*, our section members. You are always welcome to join us at our executive Council meetings that ordinarily take place on the second Wednesday of the month at the State Bar Offices. If you are available, we would encourage you to stop by and introduce yourself. Don't be surprised if someone steps up and asks for your participation though, as *you* are *our* future.

So enough from me – you have a fabulous publication to peruse. Please take advantage of all that your ADR Section has to offer and I encourage you all to get involved and spread the word. After all, this is the *Primary* way to resolve disputes!

—Jonathan D. Conant, Esquire
ADR Section Chair

The Mediator as Facilitator of Solution



Participants in a commercial mediation often realize that it is in their financial self-interest to continue business relations in spite of their dispute. They choose mediation as the most sensible and non-antagonistic method to resolve their conflict and continue working together. Mediation is also an attractive dispute resolution process for business professionals because it allows them to personally participate in the decision making process, rather than placing that power into the hands of a third-party arbitrator or judge.

In working as a mediator with commercial clients and others, I find myself frequently using a facilitation model called the **Technology of Participation (TOP) Focused Conversation Model**. This model was developed by the Institute of Cultural Affairs, a private, non-profit organization specializing in organizational development and problem solving. The ToP Conversation Model includes four categories – **Objective**, **Reflective**, **Interpretive** and **Decisional** – that function as guideposts through which the mediator (or facilitator) draws the group from superficial, subjective, anger-tinged remarks towards an environment that empowers objective, in-depth, creative responses and inspired ideas for solutions.

The mediator asks participants to first objectively review the facts of their history, including those appearing to underlie their dispute, then subjectively reflect upon the emotional reactions and thoughts related to their history and dispute followed by their interpretation of their emotional reactions and thoughts, including consideration of meaning, value and significance and finally guiding them to respond, rather than react, with a group consensus equating to a decision for solution. Throughout the Conversation Model, the mediator moves to inspire a sense of joint effort mutual reliance, and even camaraderie in accomplishing an agreed-upon goal.

This model permits the mediator to lead, rather than "herding" participants from the usual positions of distrust, anger and frustration to an environment where agreement can be reached within a new set of values. The model also endeavors to help participants reframe their own emotional predispositions. Participants often arrive at a mediation dragging the luggage of their own perspectives, prejudgments, fears and survival considerations wrapped in the robes of their personal human qualities, aspirations, egos and foibles. The timing of the steps in the Conversation Model assists the mediator, as facilitator, to more skillfully lead the individuals beyond themselves into a joint effort at solution – a balance and harmony which all ultimately seek, whether or not they are aware of this human inner impulse.

The **Objective Step** permits the mediator to ask questions that lead participants to express specific objective facts concerning the subject of the misunderstanding between them The mediator encourages participants to present the facts without embellishment, fervor or expression of emotions and to express a willingness to be open-minded throughout the process. The mediator might ask participants to answer questions such as "What were the actual steps taken to arrive at the financials?" or "What

effect did the shipment's failure actually have on the production process?"

Throughout the process, we are both subtly and not-so-subtly reminding participants that they each come with a personal belief about the facts underlying the situation and that although these positions might seem quite different, all participants can still be speaking what is true for them. Participants are encouraged to "leave their pre-judgments at the door" along with their expectations and prejudices. To reduce the frustration of not being permitted to "get it all out" at the beginning: the parties are reminded that they will be given the opportunity to be subjective and to reflect upon the matter with a wider perspective at a later step, but in this step the participants are seeking to maintain objectivity.

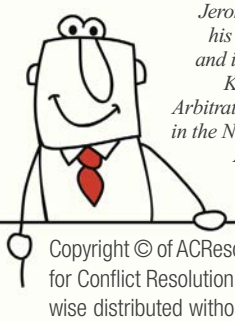
The objective step encourages people to work as a team to achieve a solution for common challenges, which at present are viewed through their differing points of view. Here is where a skillful mediator can inspire a spirit of unity for addressing the issues together and redefining "winning" as a "group" goal. The mediator leads the participants to a resolution of the issues and, at the same time, empowers them to recognize the mutuality of their relationship and its financial and economic benefit to both.

The **Reflective Step** involves asking participants to reflect on their thoughts and feelings about the dispute. There are often strong, unspoken emotions that need to be explored and resolved before a final resolution can be achieved Mediator interventions during this phase of the process might include questions such as "How did you feel when this occurred?" or "What was the reaction from your staff when this was announced?" By hearing the answers to these questions, both participants are able to better understand the impact that the dispute is having on the other person. Business persons can: if properly led, sense the feeling of 'walking in the other's footsteps.'

The **Interpretive Step** encourages participants to reconsider the dispute in light of new information that they have heard from the other side. During this phase, the mediator might ask questions such as "How would your employer evaluate the impact upon your firm's bottom line?" or "What problems did your staff experience as a result of this dispute?" Antagonistic parties often overemphasize the impact of an event, become defensive when they are challenged, and then go on the offensive in order to protect themselves. But after progressing through the first two steps of the ToP Model: we often find that disingenuous negative energies begin to dissolve and that people are better able to understand and empathize with the other. Reality begins to set in, answers become more realistic, and with that comes a more respective leniency in demands for solution.

The **Decisional Step** occurs when participants are ready to resolve the dispute. They have acknowledged that neither will obtain everything he/she may have wanted and that compromise is necessary for a successful resolution. Representatives at a commercial mediation often come with instructions from their boss about what they should say and do. The mediator needs to inspire participants to think out of the box and beyond their initial positions or instructions from their employers. If the employer has given the participant the authority to make a final decision, then the mediator must help that participant feel empowered to do so as thinking professional. During this final phase, the mediator might ask What could we do that would give a sense of completion to this situation? or What would you be willing to do to help John bring something back to his boss and fellow employees as a solution to this problem? This tatter question encourages a joint review and outline that has them working' together for the answer.

I have implemented the I.C.A. Conversation Model in my own professional practice as well as my interactive workshop training for conflict resolution professionals. I have found that this model generates ownership, creates clear goals, opens lines of communication, broadens perspectives and motivates people to adapt to their changing environment while still honoring their respective needs to 'return home,' report and explain. These qualities are all attractive signposts along the mediators path toward solving problems. Properly facilitated, the process decreases adversarial animosity, increases opportunities for the parties to understand better the other's challenges, and inspires participants to join together to find solutions. I trust that you will also find this model to be beneficial to your professional ADR practice. ADR



Jerome Allan Landau PC / Dispute Solutions

Jerome is the past Chair of the SBA ADR Section. A professional Mediator, Arbitrator and Group Facilitator, Jerome brings his 40 years' experience practicing commercial, business, transactional, construction and real estate law on behalf of U.S. and international clients (including clients throughout Europe, India and Asia, and such "out-of-the-box" clients as a Royal Kingdom, Members of a Royal Family and a 900 year old Religious Lineage, to his 35+ years nationwide Mediator and Arbitrator service in these and other industries. His proficiency and experience have been recognized through his Membership in the National Academy of Distinguished Neutrals; certification by the International Mediation Institute (the Hague), multiple AAA Neutral Panels (Arbitrator and Mediator) and other national administrative panels. Jerome is also a national and international trainer of professional Mediators, has twice presented programs at the United Nations, Co-Chaired and presented at six annual Advanced Commercial Mediation Institute two day conferences and many other venues.

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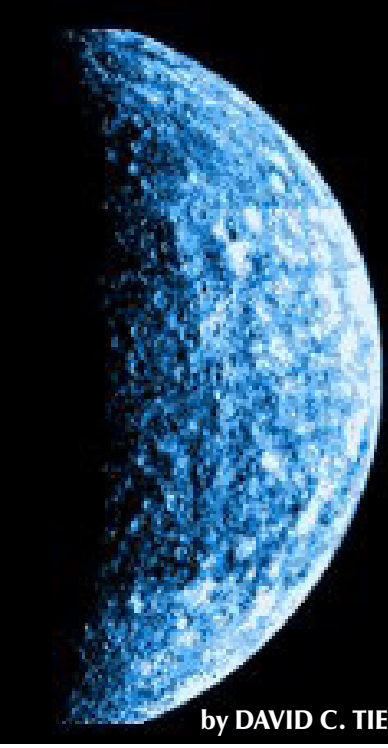


Once In A Blue Moon

We see few reported cases in Arizona which address an aspect of mediation. On September 22, 2015, right about the time when we had a rare "Blood Moon Eclipse Night" in Arizona, the Court of Appeals (Div. I) released a case addressing one of the most important features of mediation – confidentiality.

by DAVID C. TIERNEY

For 22 years, Arizona has had a simple and clear statute (A.R.S. § 12-22381)[1] which envelopes the mediation process in the sort of broad privileged secrecy which we give to the statements made in the confessional.[2] The statute flatly says:

> *"The mediation process is confidential. Communications made ... may not be discovered or admitted into evidence" unless one of four listed exceptions has occurred: (1) all parties to the mediation agree, (2) it's needed to make a claim against the mediator (or his mediation program) related to breach of mediator obligations toward a party, (3) it's required by a statute (perhaps A.R.S. § 46-454(b) re: elder abuse), or (4) it's necessary to enforce an agreement to mediate.*

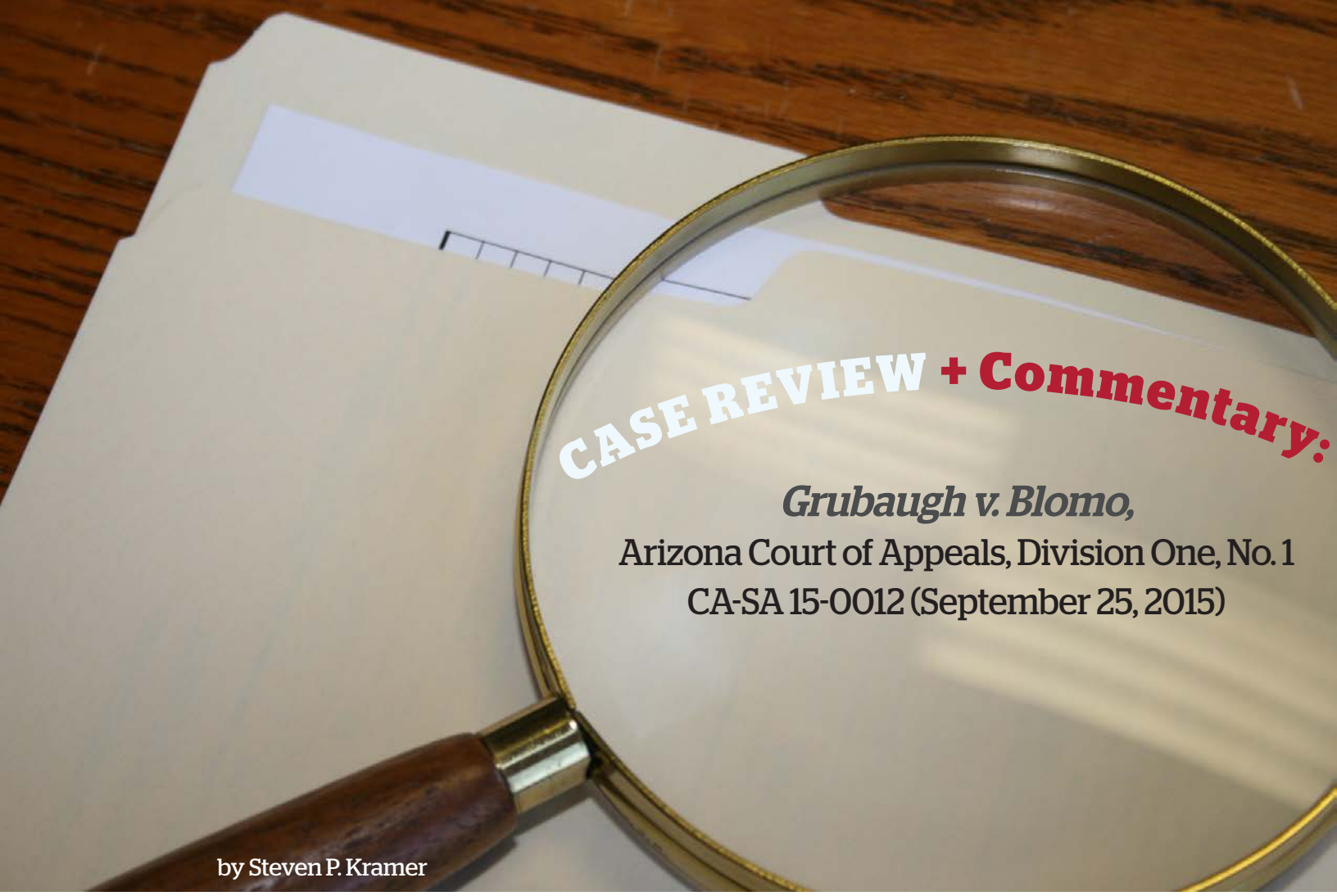
In *Grubaugh v. Lawrence*, 2015 WL 5562347. – P.3d – (No. 1 CA-SA 15-0012, 9/22/15), Judge John Gemmill dealt with a litigant in family court litigation who sued her former attorneys related to their advice to Grubaugh during a mediation. In the mediation of a dissolution of marriage, the attorney's advice on a "distribution of assets" question was, to Grubaugh's belief, below the standard of care. She sued her former attorneys and, before discovery began, sought a ruling from the Superior Court that the Section 12-2238(B) mediation privilege was waived. The attorneys, faced with the claim, sought to reveal other (privileged) communications which would show why they gave such advice during the mediation. The Superior Court held that all the testimony could come into evidence, stating that the mediation privilege statute has simply failed to address this aspect of mediation.

The Court of Appeals then accepted Grubaugh's petition for a special action, and Judge Gemmill for the Court of Appeals stated that, had the Legislature *wanted* to create a 5th exception to the mediation privilege statute, it could have done so *as was done* in Florida's statute. (Fla. Stat. § 44.405(4)(a)(4) West 2004). Judge Gemill went on to state that the mediation privilege is not one created by common law (like many other privileges) and therefore the statutory language of Section 12-2228(B) "leaves no room" for an "implied waiver" of mediation privilege related to malpractice claims. Citing Oregon and California precedents, the Court of Appeals noted that Grubaugh's "implied waiver" argument would invade the Legislature's prerogative to create limited exceptions – and noted that the mediation privilege is also "held" by others apart from Grubaugh (i.e. the husband *and the mediator*) and was not one for which Grubaugh *alone* could engineer a waiver.

This short (10 page) opinion therefore issues a ringing endorsement of a broad privilege protecting *all of the process* of mediation (oral communications, demonstrative exhibits created for the mediation, acts, all of which were done in or as part of the mediation. The case was sent back down from the Court of Appeals so the trial court could determine if any of the communications which Grubaugh sought to expose could be said to have occurred "outside" of the mediation process. The final lines of the September 22, 2105 Court of Appeals decision state that, to the extent privileged material was placed in the Superior Court Complaint by Grubaugh, that material will be stricken from the Complaint. ADR

ENDNOTES

1. Amended in 2010 after we adopted our RUAA.
2. A.R.S. § 2233.



CASE REVIEW + Commentary:

Grubaugh v. Blomo,

Arizona Court of Appeals, Division One, No. 1 CA-SA 15-0012 (September 25, 2015)

by Steven P. Kramer

On September 25, the Arizona Court of Appeals, in ***Grubaugh v. Blomo***, held that Arizona's statutory mediation process privilege applies to attorney-client communications during the mediation process, that a client does not waive the privilege by suing his/her attorney, and that a legal malpractice claim based on communications protected by the mediation process privilege must be dismissed.

During a family court mediation, Grubaugh and her ex-husband reached agreements concerning distribution of business assets and tax liability issues. Grubaugh later sued her attorneys for malpractice, claiming that they gave her bad advice during the mediation.

Over Grubaugh's objection, the attorney defendants sought to introduce evidence of their communications with Grubaugh during the mediation. Alternatively, defendants moved to strike Grubaugh's allegations related to the mediation.

The trial court granted defendants' motion, finding that Grubaugh impliedly waived the mediation privilege. This ruling rendered defendants' alternative motion moot. Grubaugh filed a Special Action, seeking to preserve the privilege, and the Court of Appeals accepted jurisdiction.

In a unanimous opinion, the Court held that Arizona's Mediation Process Privilege statute, A.R.S. § 12-2238, protects all communications related to the mediation process, unless one of four specifically enumerated exceptions apply.[1] The parties agreed that none of the statutory exceptions applied.

Looking to the "plain meaning of the statute," the court found no room for "implied" waivers or exceptions. The Court pointed out that the legislature *could have* exempted attorney-client communications from the privilege (as Florida's legislature did, specifically exempting attorney-client communications offered to prove or disprove malpractice claims), but it did not do so.

The Court identified court rules and statutory history that supported its broad construction of the statutory privilege. Rejecting defendants' argument that Grubaugh waived the privilege by filing a malpractice suit, the Court distinguished the attorney-client privilege (which allows implied waivers) on the basis that the attorney-client privilege originated from the common law, while the mediation process privilege was "entirely created by the legislature." The Court concluded that the exceptions stated in A.R.S. § 12-2238(B), occupy the entire field of methods to waive the privilege.

The Court reasoned that its interpretation was supported by strong public policies, including protecting the confidentiality of the mediation process, encouraging candor, and protecting other holders of the privilege, including the ex-husband.

Considering defendants' alternative argument, the Court adopted the reasoning of a California case**, *Cassel v. Superior Court***, 244 P.3d 1080 (Cal. 2011), which held that claims involving confidential mediation-related communications should be stricken from a legal malpractice complaint. Cassell claimed that his attorneys, during mediation, made misrepresentations and coerced him into entering a bad settlement. The California court held that the statutory mediation privilege precluded judicially-crafted exceptions, even if it meant that Cassell would be unable to maintain his malpractice action. An Oregon court, in ***Alfieri v. Solomon***, 329 P.3d 26, 31 (Or. App. 2014), *review granted*, 356 Or. 516, reached a similar conclusion. As of October 8, 2015, the Oregon Supreme Court had not issued its decision on review. (In a case not cited in the ***Grubaugh*** opinion, a California appellate court, citing ***Cassel,*** affirmed summary judgment in favor of attorneys in a malpractice suit alleging that bad advice was given during a mediation. See ***Amis v. Greenberg Traurig LLP et al***, California Court of Appeal, Second District B248447 (filed 3/18/2015).

What does the ***Grubaugh*** decision mean for attorneys and parties participating in mediation? The opinion reinforces the right of mediation participants to believe that the confidentiality of their communications will be protected, unless one of the exceptions set forth in A.R.S. § 12-2238(B) apply.

If an attorney is sued by a client who, in hindsight, is unhappy about a settlement, ***Grubaugh*** prevents the client from using advice given during the mediation process as a sword against the attorney, and also prevents the attorney from using communications made during the mediation process as a shield. In the event the client's malpractice claim hinges advice given during the mediation process, the claim may be subject to dismissal.

Attorneys should recognize that, under exception 1 (A.R.S. §12-2238(B)(1)), the privilege can be waived if "All of the parties to the mediation agree to the disclosure." This means that if a party wishes to present or discover evidence of communications made during the mediation process, the party may be able to waive the privilege if (s)he persuades all other parties to the mediation to also waive the privilege.

Is this a fair result? In the ***Cassell*** case, concurring justices struggled with the result:

> "But I am not completely satisfied that the Legislature has fully considered whether attorneys should be shielded from accountability in this way. There may be better ways to balance the competing interests than simply providing that an attorney's statements during mediation may never be disclosed. For example, it may be appropriate to provide that communications during mediation may be used in a malpractice action between an attorney and a client to the extent they are relevant to that action, but they may not be used by anyone for any other purpose. Such a provision might sufficiently protect other participants in the mediation and also make attorneys accountable for their actions. But this court cannot so hold in the guise of interpreting statutes that contain no such provision. As the majority notes, the Legislature remains free to reconsider this question. It may well wish to do so."

The last word is probably not in on this issue. An attorney who properly advises a client during mediation, and allows the client to make a non-pressured decision may subsequently be blamed by a client who experiences "buyer's remorse" over the settlement. ***Grubaugh*** should discourage such lawsuits. On the other hand, should the mediation process privilege shield an ill-prepared attorney who gives his/her client bad advice, or pressures the client to take a bad settlement for self-serving reasons? According to ***Grubaugh***, any answer to this problem will have to come from the legislature. ADR

endnotes

The exceptions, set forth in A.R.S. § 12-2238(B), are:

1. All of the parties to the mediation agree to the disclosure.
2. The communication, material or act is relevant to a claim or defense made by a party to the mediation against the mediator or the mediation program arising out of a breach of a legal obligation owed by the mediator to the party.
3. The disclosure is required by statute.
4. The disclosure is necessary to enforce an agreement to mediate.

Grubaugh v. Blomo
Opinion by Hon. John C. Gemmill

KAREN GRUBAUGH, a single woman,
Petitioner,
v.
THE HONORABLE JAMES T. BLOMO, Judge of the SUPERIOR COURT OF THE STATE OFARIZONA, in and for the County of MARICOPA,
Respondent Judge,
ANDREA C. LAWRENCE and JOHN DOE LAWRENCE, wife and husband; HALLIER & LAWRENCE, P.L.C. d/b/a HALLIER LAW FIRM, a public limited company;
ABC CORPORATIONS I-X; BLACK and WHITE PARTNERSHIPS AND/OR SOLE PROPRIETORSHIPS I-X; JOHN DOES I-X and JANE DOES I-X,
Real Parties in Interest.

No. 1 CA-SA 15-0012

ARIZONA COURT OF APPEALS
DIVISION ONE

September 22, 2015

Petition for Special Action from the Superior Court in Maricopa County
No. CV 2013-007431
The Honorable James T. Blomo, Judge

JURISDICTION ACCEPTED, RELIEF GRANTED IN PART

COUNSEL

Sternberg & Singer Ltd., Phoenix
By Melvin Sternberg
And
Law Office of Paul M. Briggs PLLC, Phoenix
By Paul M. Briggs
Co-Counsel for Petitioner

Page 2

Broening Oberg Woods & Wilson PC, Phoenix
By Donald Wilson, Sarah L. Barnes, Kevin R. Meyer
Counsel for Real Parties in Interest

OPINION

Presiding Judge John C. Gemmill delivered the opinion of the Court, in which Judge Donn Kessler and Judge Kenton Jones joined.

GEMMILL, Judge:

¶1 Plaintiff/petitioner Karen Grubaugh brought this legal malpractice action against her former attorneys, defendants/real parties in interest Andrea Lawrence and the Hallier Law Firm (collectively "Lawrence"), seeking damages for allegedly substandard legal advice given to Grubaugh during a family court mediation. Grubaugh challenges the superior court's ruling that the Arizona mediation process privilege created by Arizona Revised Statutes ("A.R.S.") section 12-2238(B) has been waived or is otherwise inapplicable. We accept special action jurisdiction and grant relief as described herein. Any communications between or among Grubaugh, her attorney, or the mediator, as a part of the mediation process, are privileged under § 12-2238(B). Based on the statute and the record before us, that privilege has not been waived. Because these communications are neither discoverable nor admissible, the superior court is directed to dismiss any claims in the complaint dependent upon such communications.

¶2 Grubaugh alleges that Lawrence's representation of Grubaugh in marital dissolution proceedings fell below the applicable standard of care. Grubaugh's malpractice claim is premised, in part, on the distribution of certain business assets. Agreement regarding the method of distribution, and the handling of the tax liability resulting therefrom, was reached during a family court mediation involving Grubaugh, her ex-husband, their attorneys, and the neutral mediator. Before formal discovery began in this matter, Lawrence asked the superior court to order that the A.R.S. § 12-2238(B) mediation privilege was waived as a result of Grubaugh's allegations of

malpractice. Lawrence seeks to utilize as evidence communications between herself and Grubaugh, occurring during and after mediation, which led to Grubaugh's ultimate acceptance

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of the dissolution agreement. In the alternative, Lawrence moved to strike Grubaugh's allegations relating to the mediation if the court held the pertinent communications are protected as confidential.

¶3 The superior court granted Lawrence's motion in part, concluding the mediation privilege was waived as to all communications, including demonstrative evidence, between the mediator and the parties and between Lawrence and Grubaugh. The court reasoned in part that the privilege was not applicable in this instance because the statute did not contemplate the precise issue presented. The court then ruled that Lawrence's alternative motion to strike was moot.

¶4 Grubaugh filed this special action challenging the court's order. Because this is a matter involving privilege and imminent disclosure of potentially privileged information, remedy by appeal is inadequate and we therefore accept special action jurisdiction. *See Roman Catholic Diocese of Phoenix v. Superior Court ex rel. Cnty. of Maricopa*, 204 Ariz. 225, 227, ¶ 2, 62 P.3d 970, 972 (App. 2003); *Ariz. Bd. of Med. Exam'rs v. Superior Court*, 186 Ariz. 360, 361, 922 P.2d 924, 925 (App. 1996).

ARIZONA'S STATUTORY MEDIATION PROCESS PRIVILEGE

¶5 Arizona's mediation process privilege is created by A.R.S. section 12-2238(B):

> The mediation process is confidential. Communications made, materials created for or used and acts occurring during a mediation are confidential and may not be discovered or admitted into evidence unless one of the following exceptions is met:
>
> 1. All of the parties to the mediation agree to the disclosure.
>
> 2. The communication, material or act is relevant to a claim or defense made by a party to the mediation against the mediator or the mediation program arising out of a breach of a legal obligation owed by the mediator to the party.
>
> 3. The disclosure is required by statute.

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> 4. The disclosure is necessary to enforce an agreement to mediate.

Subsection (C) of § 12-2238 provides further protection for a mediator against being forced to testify or produce evidence in response to service of process or subpoena:

> Except pursuant to subsection B, paragraph 2, 3 or 4, a mediator is not subject to service of process or a subpoena to produce evidence or to testify regarding any evidence or occurrence relating to the mediation proceedings. Evidence that exists independently of the mediation even if the evidence is used in connection with the mediation is subject to service of process or subpoena.

¶6 When interpreting a statute, we look to the plain meaning of the language as the most reliable indicator of legislative intent and meaning. *New Sun Bus. Park, LLC v. Yuma Cnty.*, 221 Ariz. 43, 46, ¶ 12, 209 P.3d 179, 182 (App. 2009); *see also Maycock v. Asilomar Dev. Inc.*, 207 Ariz. 495, 500, ¶ 24, 88 P.3d 565, 570 (App. 2004). When the statute's language is "clear and unequivocal, it is determinative of the statute's construction." *Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991). This court will apply the clear language of a statute unless such an application will lead to absurd or impossible results. *City of Phoenix v. Harnish*, 214 Ariz. 158, 161, ¶ 11, 150 P.3d 245, 248 (App. 2006).

¶7 The mediation process privilege was not waived when Grubaugh filed a malpractice action against her attorney because none of the four specific statutory exceptions in A.R.S. § 12-2238(B) is applicable. The statute's language is plain, clear, and unequivocal: The privileged communications "are confidential and may not be discovered or admitted into evidence *unless one of the following exceptions is met*." A.R.S. § 12-2238(B) (emphasis added). It provides for a broad screen of protection that renders confidential all communications, including those between an attorney and her client, made as part of the mediation process. Further, of the four exceptions listed in the statute, none excludes attorney-client communications from mediation confidentiality. The legislature could have exempted attorney-client communications from the mediation process privilege, but it did not do so. *Cf.* Fla. Stat. § 44.405(4)(a)(4) (West 2004) (specifically exempting from the mediation privilege those communications "[o]ffered to report, prove, or disprove professional malpractice occurring during the mediation").

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¶8 Our construction of this wide-reaching statute is confirmed by complementary rules of court referencing it. Arizona's Rules of Family Law Procedure emphasize that "all communications" in the context of the mediation are confidential and § 12-2238 is applicable: "Mediation conferences shall be held in private, and *all communications, verbal or written, shall be confidential*. . . . Unless specifically stated otherwise in these rules, the provisions of A.R.S. § 12-2238 shall apply to any mediation conference held in conformance with this rule." Ariz. R. Fam. L. P. 67(A) (emphasis added). Similarly, the Maricopa County Local Rules further express that the only exceptions to mediation confidentiality are found in § 12-2238(B): "Mediation proceedings shall be held in private, and *all communications, verbal or written, shall be confidential except as provided in A.R.S. § 12-2238(B).*" Ariz. Local R. Prac. Super. Ct. (Maricopa) 6.5(b)(1) (emphasis added).

¶9 The history of the mediation process privilege further supports its application in this case. From 1991 to 1993, mediation confidentiality was codified in A.R.S. § 12-134. The current statute was created by an amendment in 1993. The 1991 statute differed significantly from the current version by expressly limiting confidentiality to "communications made *during a mediation*." A.R.S. § 12-134 (West 1993) (Emphasis added.) In contrast, the current statute states that the "mediation process" is confidential. When the legislature alters the language of an existing statute, we generally presume it intended to change the existing law. *State v. Bridgeforth*, 156 Ariz. 60, 63, 750 P.2d 3, 6 (1988). Therefore, by casting a wider net of protection over mediation-related communications, acts, and materials, the legislature altered the statute by increasing its reach.

¶10 In holding that the mediation process privilege had been waived, the superior court reasoned that the situation at hand was analogous to one in which a party impliedly waives the attorney-client privilege. The

mediation process privilege, however, differs from the attorney-client privilege, which may be impliedly waived. *See Church of Jesus Christ of Latter-Day Saints v. Superior Court in & for Maricopa Cnty.*, 159 Ariz. 24, 29, 764 P.2d 759, 764 (App. 1988); *see also State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 56-57, ¶¶ 10-11, 13 P.3d 1169, 1173-74 (2000). The attorney-client privilege originated at common law and was subsequently codified by the Arizona legislature. At common law, the privilege was impliedly waived when a litigant's "course of conduct [was] inconsistent with the observance of the privilege." *Bain v. Superior Court in & for Maricopa Cnty.*, 148 Ariz. 331, 334, 714 P.2d 824, 827 (1986).

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¶11 Consistent with the common law, the codified attorney-client privilege includes a broad waiver provision: "A person who offers himself as a witness and voluntarily testifies with reference to the communications . . . thereby consents to the examination of such attorney, physician or surgeon." A.R.S. § 12-2236. Moreover, there is no indication that the legislature, when codifying the attorney-client privilege, intended to abrogate the common law implied waiver of the privilege. *See Church of Jesus Christ of Latter-Day Saints*, 159 Ariz. at 29, 764 P.2d at 764 (holding that A.R.S. § 12-2236 does not abrogate common law forms of waiver); *Carrow Co. v. Lusby*, 167 Ariz. 18, 21, 804 P.2d 747, 750 (1990) ("[A]bsent a manifestation of legislative intent to repeal a common law rule, we will construe statutes as consistent with the common law"); *see also Wyatt v. Wehmueller*, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991) (explaining that if the common law is to be "changed, supplemented, or abrogated by statute," such a change must be express or a necessary implication of the statutory language).

¶12 In contrast to the attorney-client privilege, Arizona's mediation process privilege has no common law origin. It was created entirely by the legislature. Therefore, this court must rely upon the language of the statute to determine its meaning. Unlike waiver of the attorney-client privilege under the statute and common law, the statutory waiver provisions of the mediation process privilege are specific and exclusive:

> The mediation process is confidential. Communications made, materials created for or used and acts occurring during a mediation are confidential and may not be discovered or admitted into evidence unless one of the following exceptions is met.

A.R.S. § 12-2238(B). By expressly shielding the entire mediation process, other than when an exception provided by the statute applies, § 12-2238(B) "occup[ies] the entire field" of methods by which the mediation process privilege might be waived. The statute therefore leaves no room for an implied waiver under these circumstances. *Cf. Church of Jesus Christ of Latter-Day Saints*, 159 Ariz. at 29, 764 P.2d at 764 (explaining that attorney-client privilege statute allows room for implied waiver under the common law).

¶13 The parties do not contend that the communications at issue here come within any of the four exceptions specifically delineated within

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A.R.S. § 12-2238(B). In finding an implied waiver, the superior court reasoned in part that the statute "did not contemplate the exact issue" presented by this case. But we cannot reach the same conclusion in light of the language of the statute, which does not allow us to infer the existence of an implied waiver. *See Morgan v. Carillon Inv., Inc.*, 207 Ariz. 547, 552, ¶ 24, 88 P.3d 1159, 1164 (App. 2004) (explaining that even though the

legislature did not include a specific provision that would have been beneficial, the court will not "interpret" the statutes "to add such a provision"), *aff'd*, 210 Ariz. 187, 109 P.3d 82 (2005). The privilege is therefore applicable.

¶14 Additionally, a plain-language application of the statute in this case does not produce an absurd result, but is supported by sound policy. *See State v. Williams*, 209 Ariz. 228, 237, ¶ 38, 99 P.3d 43, 52 (App. 2004) (examining a rule's policy implications in deciding whether its application would lead to absurd results) *See also State v. Estrada*, 201 Ariz. 247, 251, ¶ 17, 34 P.3d 356, 360 (2001) (explaining that a result is "absurd" when "it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion" (internal quotation omitted)). By protecting *all* materials created, acts occurring, and communications made as a part of the mediation process, A.R.S. § 12-2238 establishes a robust policy of confidentiality of the mediation process that is consistent with Arizona's "strong public policy" of encouraging settlement rather than litigation. *See Miller v. Kelly*, 212 Ariz. 283, 287, ¶ 12, 130 P.3d 982, 986 (App. 2006). The statute encourages candor with the mediator throughout the mediation proceedings by alleviating parties' fears that what they disclose in mediation may be used against them in the future. *Id.* The statute similarly encourages candor between attorney and client in the mediation process.

¶15 Another reason confidentiality should be enforced here is that Grubaugh is not the only holder of the privilege. The privilege is also held by Grubaugh's former husband, the other party to the mediation. *See* A.R.S. § 12-2238(B)(1).[1] The former husband is not a party to this malpractice action and the parties before us do not claim he has waived the mediation process privilege. It is incumbent upon courts to consider and generally protect a privilege held by a non-party privilege-holder. *See Tucson Medical Center Inc. v. Rowles*, 21 Ariz. App. 424, 429, 520 P.2d 518, 523 (App. 1974). The former husband has co-equal rights under the statute to the

confidentiality of the mediation process. Although the superior court did rule that the privilege was not waived as to communications between the mediator and the former husband, waiving the privilege as to one party to the mediation may have the practical effect of waiving the privilege as to all. In order to protect the rights of the absent party, the privilege must be enforced.

¶16 Accordingly, we hold that the mediation process privilege applies in this case and renders confidential all materials created, acts occurring, and communications made as a part of the mediation process, in accordance with A.R.S. § 12-2238(B).

¶17 In her reply, Grubaugh identifies several classifications of the communications at issue, asserting that some are covered by the mediation process privilege while others are not. **[Reply at 2]** Rather than this court undertaking to identify precisely the application of the mediation process privilege to specific communications, it is more appropriate to allow the superior court to determine, in the first instance, which of the communications, materials, or acts are privileged under A.R.S. § 12-2238(B) as part of the mediation process and which are not confidential under the statute.

DISPOSITION OF MEDIATION-PRIVILEGED CLAIMS

¶18 In light of our determination that the mediation process privilege has not been waived, it is necessary to address Lawrence's alternative argument. Lawrence cites *Cassel v. Superior Court*, 244 P.3d 1080 (Cal. 2011), for the proposition that claims involving

confidential mediation-related communications should be stricken from the complaint. In *Cassel*, a client brought a malpractice action against his former attorneys, claiming they coerced him into accepting an improvident settlement agreement during the course of a pretrial mediation. 244 P.3d at 1085. The client alleged the attorneys misrepresented pertinent facts about the terms of the settlement, harassed him during the mediation, and made false claims that they would negotiate an additional "side deal" to compensate for deficits in the mediated settlement. *Id.* The court explained that absent an absurd result or implication of due process rights, California's mediation privilege statute "preclud[ed] judicially crafted exceptions" to allow an implied waiver of their express technical requirements.[2] *Id.* at 1088. It held

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that all communications, including attorney-client communications, were confidential and undiscoverable if made "for the purpose of, in the course of, or pursuant to, [the] mediation." *Id.* at 1097. Accordingly, it granted the attorneys' motion in limine to exclude all evidence related to these communications, *id.*, even if that meant the former client would be unable to prevail in his malpractice action, *id.* at 1094 (refusing to create an exception to statute even when the "equities appeared to favor" it); *see also Alfieri v. Solomon*, 329 P.3d 26, 31 (Or. Ct. App. 2014), *review granted*, 356 Or. 516 (explaining that a trial court "did not err in striking the allegations that disclosed the terms of [a mediated] settlement agreement" because there was no "valid exception to the confidentiality rules" governing the agreement).

¶19 We agree with the reasoning of the California Supreme Court. Application of the mediation process privilege in this case requires that Grubaugh's allegations dependent upon privileged information be stricken from the complaint. To hold otherwise would allow a plaintiff to proceed

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with a claim, largely upon the strength of confidential communications, while denying the defendant the ability to fully discover and present evidence crucial to the defense of that claim. *Cassel*, 244 P.3d at 1096. A privilege should not be invoked in a way that unfairly prevents one party from defending against a claim of another. *See Elia v. Pifer*, 194 Ariz. 74, 82, ¶ 40, 977 P.2d 796, 804 (App. 1998). As already noted, the legislature could have, but did not, create an exception to this privilege for attorney-client communications and legal malpractice claims. Striking from the complaint any claim founded upon confidential communications during the mediation process is the logical and necessary consequence of applying the plain language of this statutory privilege.

CONCLUSION

¶20 Arizona's mediation process privilege promotes a strong policy of confidentiality for the mediation process. The Arizona Legislature specified the exceptions to the application of the privilege and left no room for implied common-law waiver. The privilege applies under the facts of this dispute. We therefore vacate the order of the superior court that declared the privilege inapplicable. We also direct the superior court to determine which communications are privileged and confidential under A.R.S. § 12-2238 and to strike from the complaint and ensuing litigation any allegation or evidence dependent upon such privileged communications.

Footnotes:

1. The mediator may also be a holder of the privilege, but we need not reach that issue in this opinion.

2. In pertinent part, the California statute provides:

> (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (b) No writing . . . prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

Cal. Evid. Code § 1119 (West 1997).

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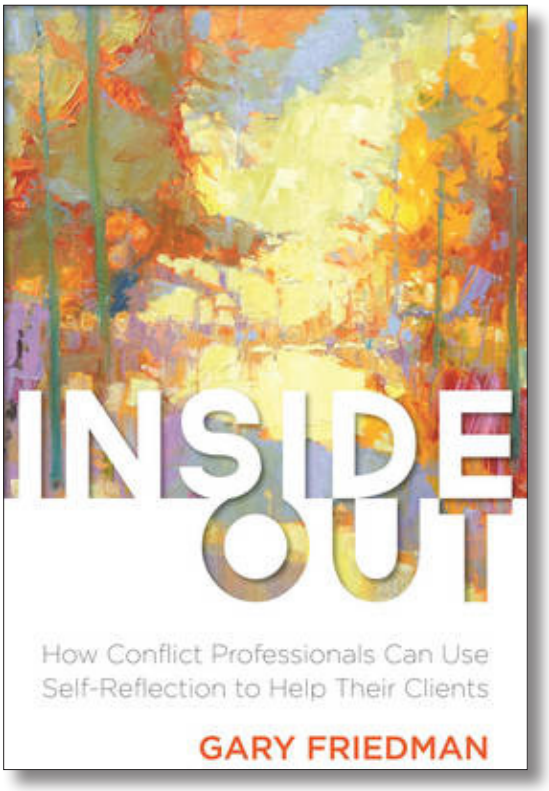
by Sherman D. Fogel

INSIDE OUT:

How Conflict Professionals Can Use Self-Reflection to Help Their Clients



Gary J. Friedman | Paperback | 186 pages | American Bar Association | 2015

Whether you are a new mediator, or a conflict professional with many years of experience and hundreds of mediations under your belt, you probably view the development and refinement of your mediation skills as a continuous work in progress. In the early years, every ADR program you attend and every book or article your read seems filled with useful information you can incorporate into your practice. As the years go by, though, most of the programs and literature just reinforce what you already know, and, if you're lucky, you occasionally pick up a new tidbit. Every once in a while, however, if you keep an open mind and don't get too comfortable and complacent about what you do, something you read or hear gives you a really fresh insight. *Inside Out: How Conflict Professionals Can Use Self Reflection to Help Their Clients* by Gary J. Friedman may be just such a book.

During the last 40 years, Gary Friedman has conducted over 2000 mediations. For more than 25 years he has been training lawyers, judges and others in conflict resolution throughout the United States and abroad, through The Center for Understanding in Conflict (formerly The Center for Mediation in Law), which he co-founded. He has taught mediation and negotiation at Stanford University Law School, and teaches at Harvard Law School's Program on Negotiation and at the World Intellectual Property Organization in Geneva. Prior to his work as a mediator and mediation teacher, Friedman was a trial lawyer in Connecticut.

In 2008 Gary Friedman and Jack Himmelstein presented their "understanding-based model" of mediation in *Challenging Conflict: Mediation Through Understanding* (reviewed in the Spring, 2009 issue of this newsletter). They observed that parties and their lawyers traditionally viewed conflict through a legal lens, focusing on the parties' positions, who was right or wrong, and winning or losing, without regard for the feelings and perceptions existing below the surface. From that prospective, the parties and their lawyers looked to mediators to "simply to broker a deal", which often was done by resorting to coercion, persuasion and even manipulation to pressure the parties into a compromise. The understanding-based model relies on uncovering what is bubbling beneath the surface and helping the parties, through understanding rather than coercion and persuasion, to take responsibility, work together and fashion a satisfying solution.

Inside Out picks up where *Challenging Conflict* left off:

> The conflict was never really only about what the parties thought it was about. It was rooted in all those feelings and perceptions below the surface.

But, while the understanding-based model debuted in 2008 focused on what is really going on with the **parties** beneath the surface, their feelings, perceptions and what they really care about, *Inside Out* zeros in on a wholly new idea: what is going on beneath the surface with the **mediator**. As mediators, we tend to think of ourselves as neutral, non-judgmental and above the fray, not a party to of. But this view of ourselves may be not only unrealistic, but naïve. Friedman summarizes conversations with his longtime colleague and co-author Jack Himmelstein:

> As Jack and I talked about the emotional side of my cases, I realized how powerfully I was being affected by my clients' stories. They reminded me

> of my own life, sometimes in an unpleasant way, and I might like clients or dislike them or be upset with them depending on which buttons they pushed in my own memories and experiences.
>
> * * *
>
> It became clear as I talked to Jack that all of these feelings and reactions, whether negative or positive, weren't just a personal concern. They played an enormous role in my effectiveness with clients.

Friedman's great insight, almost an epiphany, is that once the mediator enters the picture, the dynamics of the conflict are changed, and the feelings and perceptions of the mediator may have a profound effect on the process and the outcome. How the mediator feels about the parties and their problems will not only affect how the mediator treats the parties, but the parties will sense those feelings, and they will affect how the parties interact with the mediator and even with each other. It is reminiscent of the butterfly effect in chaos theory – the idea that the path of a tornado in the Midwest may be influenced by the flapping of the wings of a butterfly on the west coast several weeks earlier. In *Inside Out* Friedman explores the importance of the mediator being sensitized to his or her own feelings and reactions, and through self-reflection going deeply beneath the surface to understand those feelings and perceptions and the underlying causes of them in the mediator's own life. Then using that understanding the mediator can empathize with the parties and help them to better understand their own perceptions and feelings, and build on their new and deeper understanding to reach a meaningful and satisfying resolution of the conflict.

In our effort to be, and to be seen as, objective professionals in control of the process, we may be unintentionally distancing ourselves from the parties we are trying to help. By closing off our emotions and pretending our feelings and perceptions are not involved, we may be preventing ourselves from connecting with the parties on the truly human level that can create the kind of working partnership with the parties needed to help them take responsibility and fashion a lasting resolution.

Friedman observes that a person in a life crises wants and needs to be understood. As mediators, we need "to be open to the clients' experience and to deeply sense what they are going through." We can best do that not by remaining detached, but by using "our own lives as a point of connection to allow ourselves to enter into an empathetic relationship." He comments:

> Our essential job in all this is simply to be there, entering the clients' situation and experiencing it not as an "outside expert" or arbitrator of good/bad, right/wrong but as an equal. In understanding-based conflict resolution, clients and conflict professionals are in the room – and in the soup – together.

Bill Clinton was really on to something when he said "I feel your pain." The connection to the voters that resulted from that simple expression of understanding and empathy was remarkable.

Building self-reflection into the understanding-based model put forward in 2008, in *Inside Out* Friedman offers five central premises for his approach to conflict resolution:

1. You don't have to take sides to help clients through a conflict.
2. The solutions to conflict lie in the feelings and perceptions hidden below the surface.
3. There's no such thing as an objectively neutral mediator.
4. The fundamental goal of conflict work is to help the parties better understand themselves, each other, and the realities they face.
5. Learning to listen to the self makes it possible to listen usefully to others – and help them.

Toward the end, Friedman devotes an entire chapter to the fascinating question of "why we ever wanted to spend our days being pulled into people's crises, fears, and ugliest behavior." He suggests that understanding why we do this work will keep us centered "when we're exhausted and filled with doubts, fear, or confusion... [and] give us the courage to reach out to others in an open, vulnerable way and bring the best of ourselves to serve them." Although it may be very difficult for some of us to unearth our deeply felt emotions and share some of that with the parties to better connect and empathize with them, if Friedman is right, when we better understand why we do conflict work, we may be more willing and able to open up with the parties.

Friedman spends considerable time discussing a methodology for engaging in self-reflection that borders on Freudian analysis, and which I suspect will be a little too much for most of us. Do not be turned off, however, by that aspect of Friedman's work. The idea that our perceptions and feelings impact the process, and that we should be more introspective and better understand them and bring them to bear for the benefit of the parties, is a really important concept, and should be examined and considered by everyone who engages in conflict management and dispute resolution work. The stories and illustrations from Friedman's practice and teaching are not only thought provoking, but at times deeply moving. Whether a beginner or a highly experienced mediator, you will benefit from reading *Inside Out: How Conflict Professionals Can Use Self Reflection to Help Their Clients.*

© 2015, Sherman D. Fogel. After 40 years as a trial lawyer, Sherman Fogel is now a full time mediator and arbitrator, and is a former Chair of the Alternative Dispute Resolution Section of the State Bar of Arizona. He frequently speaks on arbitration and mediation at programs sponsored by the American Arbitration Association, the American Bar Association, the College of Commercial Arbitrators and the State Bar of Arizona. He has been selected for inclusion in the 2008–2015 lists of *The Best Lawyers in America* in Alternative Dispute Resolution, and was named *Best Lawyer*'s 2016 Phoenix Arbitration "Lawyer of the Year". Mr. Fogel can be reached by phone **602-264-3330**, email **mede8@msn.com** or through **www.shermanfogel.com**.

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from the editor

by Thom Cope

As always this edition could not have been possible without the sterling efforts of section members responding to my call for articles. Thanks to all of you who contributed to the success of this newsletter. Again I encourage everyone with an idea for an article to contact me at any time. Or if you have published somewhere else, we can re-publish it for the benefit of our section members.

Also, there would be not be a newsletter without the assistance of the AZ Bar staff. Thanks to them as well.

I hope everyone has a very prosperous year. Be Well. Thom Cope