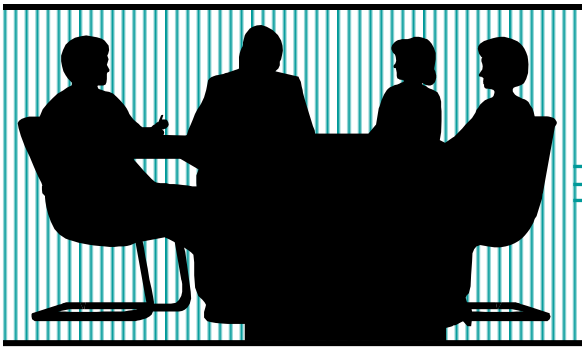

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It's Not Too Late to Renew Your Listing!

The **2011 Renewal Forms** were distributed in September via email. If you have not received your 2011 Renewal Form, please contact Catherine Homra at 615-741-2687 or **Catherine.Homra @tncourts.gov** immediately. The deadline for submission of your 2011 Renewal Form was December 31, 2010.

If you missed the December deadline, you may still submit your 2011 Renewal Form. Please contact Catherine Homra for information on how to renew your listing.

If you wish to go on inactive status, you must notify the ADR Commission in writing of your intentions.

VICTIM-OFFENDER MEDIATION:

The Case for Restorative Justice

by Joseph G. Jarret

As the alternative dispute resolution tool that has come be known as victim- offender mediation (VOM) continues to evolve, so does its definition. However, VOM is most commonly described as the process by which the victim of a crime and the perpetrator of the crime engage in face-to-face dialogue in the presence of a trained mediator. Also known as Restorative Justice due to the attempts made to repair the harm caused or revealed by criminal behavior, VOM is often expanded to include the families of the victim and the offender, and in some instances, members of the community.

In most cases, the VOM process involves four phases. They are:

1. Encounter: Create opportunities for victims, offenders and community members who want to do so to meet to discuss the crime, its aftermath and its effects on the victim individually and the community as a whole
2. Amends: Expect offenders to take steps to repair the harm they have caused by inculcating in them the detrimental effects such behavior has on the victim
3. Reintegration: Seek to restore victims and offenders to whole, contributing members of society
4. Inclusion: Provide opportunities for parties with a stake in a specific crime to participate in its resolution [1]

Prior to beginning this voluntary process, the mediator must insure that both parties are viable candidates for mediation. In particular, assurances have to be given that both parties are psychologically capable of making the mediation a constructive experience, and that the victim will not be further harmed by the meeting with the offender. [2] Further, the mediator most insure that unacceptable referrals such as cases involving domestic violence, abuse or incest, or sexual assault are rejected.

Once the VOM process begins, the mediator assists the parties in resolving their conflict and to construct their own approach to achieving justice in the face of their particular crime. Consequently, both parties are given the opportunity to express their feelings and perceptions of the offence, which often dispels misconceptions they may have had of one another before entering mediation. The meetings conclude with an attempt to reach agreement on steps the offender will take to repair the harm suffered by the victim. [3] The approach taken during the mediation process, i.e. facilitative, evaluative or transformative, is left to the individual style of the mediator assigned to the matter.[4]

One of the measurable benefits of VOM is that, through this process, crime victims have an opportunity to get answers to their questions about the crime and the person who committed it. They take an active role in getting their material and emotional needs met. Research indicates that victims who participate in VOM receive more restitution than those who do not and feel safer and less fearful afterwards than those who do not. [5] Eric Gilman, Restorative Justice Coordinator, Clark County Juvenile Court in Washington State observed that "The restorative value to crime victims of any dialogue process is directly related to how the practitioners of that process understand its function. It is the premise of this essay that regardless of the format of restorative dialogue – meetings, mediation, conferencing, or circles - the primary purpose for making contact with victims should never be to suggest or encourage their participation in a dialogue process. Rather, the purpose of the contact should be primarily, even solely, focused on the community pro-actively responding to individuals who have been harmed by crime in ways that meaningfully address their felt needs."

Some of the more subtle benefits of VOM besides empowering and restoring victims is the opportunity to instill in the offender a sense of moral obligation to the victim. Further, VOM programs can also serve to reduce recidivism. A national study of 1,298 juveniles who participated in pretrial VOM found 32 percent less recidivism compared to the control group.[6] Further, because an offender who goes through a VOM may avoid a conviction on their record, they are likely to be far more successful in finding or retaining a job, thus increasing their ability to make restitution to the victim.

Finally, VOM programs offer victims an expedited means of obtaining justice in contrast to protracted pretrial proceedings, jury selection, and the prospect of seemingly endless appeals.[7]

In summary, VOM is a concept whose time has come. As succinctly pointed out by the American Bar Association, Criminal Justice Section, "One of the chief benefits of the victim-offender mediation/dialogue programs is that they humanize the criminal justice process. By bringing criminal offenders together face-to-face with their victims, it becomes more difficult for the offenders to rationalize their criminal behavior. As they face the individual that they have victimized, the harm caused by their crime is also no longer an abstraction but very real."

End Notes:

1. Mark G. Chupp, Assistant Professor Mandel School of Applied Social Sciences Case Western Reserve University.
2. Id
3. Restorative Justice as Community Building," Full Circle, I, 4: 2. Washington, DC: Restorative Justice Institute.
4. For an excellent analysis on mediations styles see Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation by Zena Zumeta, on the web at www.mediate.com
5. See, Victim Offender Mediation Association, on the web at **www.voma.org**
6. William Nugent, Jeff Paddock, Mark Umbreit and Lizabeth Winamaki, "Participation in victim-offender mediation reduces recidivism.
7. Victim-Offender Mediation and Plea Bargaining Reform in Texas by Marc Levin Esq., director of the Center for Effective Justice

Joseph G. Jarret is a Federal and Rule 31 listed general civil mediator and an attorney serving Knox County as its Law Director. He has lectured across the country on various mediation issues and is the 2009-2010 president of the Tennessee Valley Mediation Association, a member of the Tennessee Association of Professional Mediators, Tennessee Bar Association, and the ADR Section of the Knoxville Bar Association. Joe is also an award-winning writer who has published over 85 articles in various professional journals and a former active duty United States Army Combat Arms Officer and Air Force Special Agent. He holds the juris doctorate degree, the masters in public administration degree, a bachelors degree, and a post-graduate certificate in public management. Joe Jarret can be reached at* **joe.jarret@knoxcounty.org .

2011 Regional ABA Representation in Mediation Competition

The University of Tennessee College of Law will be hosting the 2011 Regional ABA Representation in Mediation Competition. While the precise timetable for the event has not yet been finalized, 8-12 teams from law schools all over the Southeast will be competing for 1-2 days at the UT COL over the weekend of March 11-13, 2011. This is a wonderful opportunity for law students to engage in well-designed mediation simulations and to receive valuable feedback on, and to improve, their practice skills.

However, in order to provide this valuable experience, the competition relies upon experienced mediators to serve as mediators/judges for the event. Accordingly, UT's Becky Jacobs would like to enlist Tennessee mediators to participate in these roles to showcase our commitment to the advancement of our profession. UT hopes that you will be a part of the program. For more information, you may reach Professor Jacobs at **jacobs@utk.edu** .

The Concept of Reciprocity in Mediation

In response to my October 2006 article, "Purchasing Habits of Sophisticated Mediation Services Consumers," I received the following startling e-mail from a prominent Southern California Judge

by Jeff Kichaven

> *Your article is very well written, but I dispute a point you make. In my 30-year career as a business litigator, I was often asked to recommend mediators. Almost always, attorneys told me they wanted mediators who were aggressive, arm-twisting interventionists. They often specifically said they did not want the sort of mediators who, claiming to value the "process," would not twist arms. I know many [Southern California] attorneys who travel up to the [San Francisco] Bay Area for aggressive mediators in one particular firm because they believe there are few to be found in Southern California. I recall a mediation with that firm where the mediator told my client, a very sophisticated CEO, that he would be an idiot if he did not accept a $5 million dollar proposal. I cringed. The CEO loved it, and settled. It seems we have surveyed different samples in arriving at our conclusions, but I did enjoy your article*

This jurist's comments are serious and deserve serious reflection. Ultimately, the reality he reflects should cause the commercial mediation community to reject two clods of conventional wisdom that have retarded the growth and acceptance of our services by many of our litigation brethren. To satisfy clients, commercial mediators must learn to love—not disdain—"evaluation." To understand both why and how to do that, commercial mediators must also remember to love—and again, not disdain—lawyers.

How I Learned To Stop Worrying and Love "Evaluation"

"Evaluation" in commercial mediation is nothing more than sharing helpful information based on our knowledge, experience, and training. It's common decency! We expect it from all professionals, commercial mediators included.

It's instructive to compare developments in psychotherapy, a field to which mediation is sometimes compared. Remember the stereotype of the monocle-wearing Freudian therapist, sitting near the patient on the couch, never hearing a word? Conventional wisdom at work once again. Now, a more popular approach is typified by Dr. Mark Goulston of Los Angeles, a psychiatrist, partner at the national management consulting firm, Ferrazzi Greenlight, and author of *Get Out of Your Own Way at Work* (Perigee, 2006):

- I will occasionally say to my clients, "What you're attempting to do is stupid, foolish and even idiotic and I will fight you on it rather than have you wake up in a week or a month to realize just how destructive to you it was."
- For some fortunate reason, I am rarely perceived as condescending or judgmental. This has enabled me to be very direct, blunt, and use very foul language to make a point, because it comes off to the client as clearly in their best interest.
- If the intent is to humiliate, ridicule, belittle or excoriate—as, in a mediation, some lawyers might want a mediator to do to retaliate for how their "unreasonable, unrealistic, and completely

infantile" clients have treated them—then the words won't even matter. The negative tone, pitch and body language will say it all.

- But if the intent is to let the patient, or client, stay as "Grand Poo-Bah" but still do the right thing in terms of putting this chapter behind him or her, then you can use almost any words you want.

- Over 90 percent of the clients with whom I have used this approach have liked my shows of force in this way and many have even thanked me, admitting they know that they can really get in their own way.

So, the challenge: If psychotherapists can take this activist approach, why can't commercial mediators? Because, let's face facts, it is hard for lawyers to break bad news to their own clients. The lawyer's fears are real: Loss of client confidence and loyalty, reputation for toughness, future business. So, as Dr. Goulston has done, commercial mediators must heed the wisdom of Alexis de Tocqueville in *Democracy in America*: "Men do not receive the truth from their enemies, and their friends scarcely offer it to them; that is why I have spoken it."

Beyond the Platitudes

To be effective, the mediator's evaluative truths must go beyond the paleomediation bromides of the 1980s, "This case will cost a lot to litigate" and "Lots of people have been surprised by losing when they should have won." If these are the mediator's only tools, then as soon as he leaves the room, someone is sure to sneer dismissively, "He says that to everybody." He might as well walk into a bar and ask, "What's your sign?" Mediators need to engage based on the specifics and realities of each particular case. Just as psychotherapy patients expect therapists to be direct, honest and specific, in an appropriate way, so do the clients of the commercial mediator.

But how direct, honest, and specific is it appropriate for a mediator to be? The answer lies in the concept of reciprocity. Just as litigators need honesty from mediators, mediators need honesty from litigators. Mediators need signals from litigators regarding how far to go. A mediator cannot effectively work at cross-purposes from a client's own lawyer. Although few clients understand legal ethics, they do understand, at some inchoate level, that their own lawyer owes them a fiduciary duty of undivided loyalty, and a mediator does not. At some level, the mediator is interested in "the deal." So if a mediator's advice conflicts with a lawyer's advice, the odds are overwhelming that the client will favor her own lawyer over the mediator.

Litigators and mediators need to communicate, before the day of mediation if possible, about the intramural challenges the litigator faces, so that together they can plan the interventions with the client that are most likely to work.

Critically, look at where our judge wants the mediator's evaluative missile fired: At his own client. In this regard, the judge is 100 percent right. With appropriate preparation and coordination between a litigator and a mediator, an emotional, stubborn, or even ideological client can often be nudged from anger into acceptance, and then settlement. But sometimes, clients are not ready to put a situation behind them. It can take some time for the steamship of emotion behind a lawsuit to make a U-turn. Excessive pressure in these cases will only backfire. The art of the mediator, in teamwork with the litigator, is therefore to assess the client's likely reaction to different kinds of influences or pressures, and to be able to change course or even stop if nothing seems to be working that day. That's where appropriate follow-up is key.

By contrast to our Judge's scenario, if one side wants the evaluative assault directed at the other side, it is not likely to work. If your case is really as strong as you think it is, and nobody on the other side "gets it," even after months or years of litigation, there's probably not much a mediator can do. With luck, though, opposing counsel does "get it," and will signal the mediator that help is needed with his client as well.

How I Learned To Stop Worrying and Remember To Love Lawyers

Effective commercial mediators approach their task with malice toward none and charity toward all—even lawyers. Much conventional mediation training takes the condescending view that lawyers just get in the way, and mediators have to eliminate them at best, work around them at worst. More paleomediation cliches.

Every year, about 500 lawyers ride up the elevator to my office. Maybe 2 percent do a poor job. The other 98 percent are well-prepared and are putting their clients' interests ahead of their own. That's my definition of a good job. So I trust them until they prove themselves unworthy of trust, and I am rarely disappointed. Conversations with other commercial mediators lead me to believe that my experience is typical. So when litigators ask me for help with their clients, I am almost always happy to oblige.

Mediators are here to help lawyers and their clients make the best decisions possible under the circumstances. Most will decide to settle, but some will not. When we follow up with those who do not, their emotional states may change and more settlements will follow. For those few risk-takers who, with their eyes wide open, insist on vindicating their Constitutional right to a jury trial, well, it's a free country, right?

In every case, though, the people in the room deserve our best. As mediators, our experience, skills, and training give us knowledge, opinions and—if we are lucky—wisdom, that can help them make better choices. Generally, we need not resort to vulgar obscenities, but on those few occasions when we must do so to get our point across, so be it. Whether our diction is elevated or crass, though, a spirit of charity and loving kindness toward the litigators and their clients requires that we not sit silent.

Important ADRC Dates

March 9, 2011	Rule 31 Mediator Applications Deadline for ADRC review on April 26, 2011
April 26, 2011	ADR Commission Meeting, Administrative Office of the Courts, Nashville
June 8, 2011	Rule 31 Mediator Applications Deadline for ADRC review on July 26, 2011
July 26, 2011	ADR Commission Meeting, Administrative Office of the Courts, Nashville
September 9, 2011	Rule 31 Mediator Applications deadline for ADRC review on October 25, 2011
October 25, 2011	ADR Commission Meeting, Administrative Office of the Courts, Nashville

We Would Like to Hear From You!

The Administrative Office of the Courts gladly accepts articles from ADR professionals for publication in the *ADR News*. For more information, please contact Catherine Homra at Catherine.Homra@tncourts.gov.