HONESTY IS THE BEST POLICY

It's time to disclose lack of jury trial experience.

BY TRACY WALTERS McCORMACK AND CHRISTOPHER BODNAR

INTRODUCTION

The days of the trial lawyer are essentially gone. Even the term has fallen out of favor over the past four decades as a majority of trial lawyers now describe themselves as litigators.[1] Trials themselves are essentially gone as well.[2] Since the 1960s, there has been a steep decline in the actual number of civil jury trials and the number of civil jury trials as a percentage of the cases filed in both state and federal court. While there is no single reason for this decline, the ever-increasing cost of trials, the increased availability of alternative dispute resolution methods, and clients' loss of faith in the jury system have all been contributing factors. So where does this changing landscape leave attorneys? An increasing number of litigators lack jury trial experience and instead are becoming increasingly experienced in ADR methods. Some may view this trend of moving from "antiquated" jury trial skills to "modern" ADR skills as a natural and beneficial evolution. It certainly appears to be the model of many large civil law firms.

Between the increase in the size of the civil litigation bar and the decrease in the number of cases going to trial, there is an entire generation of litigators for whom trial is merely a theoretical concept. This article examines why a litigator's lack of jury trial experience matters regardless of a case's likelihood of going to trial and posits that this deficiency should be disclosed to prospective clients prior to the formation of the attorney/client relationship. In order to test our assumption of the need for disclosure, we conducted a series of surveys to assess client expectations, litigator disclosures, and whether a litigator's lack of jury trial experience is manifested in mediation.[3]

LITIGATOR VERSUS TRIAL LAWYER

As Kimberlee Kovach, a professor of ADR and negotiations at South Texas College of Law, notes, the term "litigator" conjures images of an attorney who tries cases in court.[4] However, as empirical studies have shown, going to court to try a case is actually a very atypical activity for the modern litigator.[5]

Our survey data indicated that litigators have had substantially more experience in resolving disputes through mediation and negotiations than by trying them to a jury. Of respondents with five years of litigation experience, only 30 percent had tried even one case to a jury and only 8 percent had tried two or more jury cases. However, 93 percent of these litigators had settled at least one case through mediation or negotiation and 38 percent had settled 10 or more cases in this manner during their first five years of practice. Within the group of responding litigators with 10 years of experience, 30 percent had still never tried a case to a jury and only 36 percent had tried two or more, but all of them had settled a case through mediation or negotiations, with 70 percent having done so 10 or more times. A majority of responding litigators had not tried a single case to a jury until they had practiced for about seven years. Approximately 30 percent of all litigators responding to the survey had never tried a single case to a jury.

Kovach redefines the job description of a litigator as "one who uses the litigation or court system as the primary tool to resolve the client's problem." This definition assumes, however, a litigator who both consciously chooses the court system of ADR and who can effectively use either. The problem seems to be that modern litigators are making no such choice at all. Thus, it may be more apt to re-redefine a litigator in the 21st century as "one who uses the court system only as a last resort if a dispute cannot be resolved outside its bounds."

If litigators want to distinguish themselves as something more modern than trial lawyers, their tool belts should contain newer ADR skills in addition to, and not in lieu of, trial skills. In order to appropriately advise a client regarding the most advantageous resolution method for the client's dispute, a litigator needs an in-depth knowledge of all available choices. Ideally, the choice of resolution methods should be based on empirical data, as well as actual experience. A litigator lacking jury trial experience lacks the ability to accurately assess this choice if various options are being overvalued or undervalued. Unfortunately, the client is rarely in a position to know that the balanced, objective assessment they paid for may not be provided. Therefore, when the client bases his or her decision on the litigator's advice,[6] the client is making this decision without the benefit of being fully informed.

THE POTENTIAL HARM TO CLIENTS

Regardless of the forum in which a matter is ultimately resolved, a litigator's lack of jury trial experience can have a significant, negative impact on his or her ability to act effectively in the client's best interest. When lawyers

cease to view trial as a viable alternative, settlement becomes the most likely option. Whose job is it to protect the client whose case is resolved for less favorable terms than a judge or jury would have awarded? Or the defendant who is hounded into settling for nuisance value, but could have won the trial outright? Are defense costs saved the same as dollars paid to a plaintiff in settlement? What about the precedential value of a zero liability verdict?

The client is not only harmed if he or she has to hire new, experienced counsel when the matter is set for trial, nor is the client only harmed if the case is tried to the jury by an inexperienced litigator. Rather, this lack of experience has the potential to impact nearly every decision made by the litigator. As a partner with more than 20 years of litigation at a California law firm responded in the survey, "In my view, trial experience informs decision-making in all other aspects of a suit."

The bias against jury trials. One of the reasons for the decline in civil jury trials is the formation of a bias against juries. An oft-cited reason for this tendency or inclination is the belief held by many litigators and clients about the inequity of juries.[7] Especially frightening to defense attorneys and their clients are the anecdotal and media reports about "runaway juries" that have become the poster children for tort reform.

Fear can be a powerful motivating source for lawyers who already possess well-developed powers of rationalization. And a jury trial can be a scary place for litigators. Few circumstances expose a litigator to the exercise of professional judgment, the occurrence of mistakes, and the resulting accountability as trying a case to a jury. Jury trials that reach a verdict result in actual winners and losers. In large civil disputes, this means that one set of high-powered, high-priced litigators will find themselves with a loss, a client demanding to know why, and the potential for malpractice claims. Thus, trying a case to a jury means that the litigator stakes his or her reputation, and that of the firm (*i.e.*, its future ability to attract high-dollar clients), on a skill set that the litigator may not have used since trial advocacy class in law school—assuming that he or she even took such a course.

With such economic, social, and possible legal pressures, it makes sense that lawyers will cling to any lifeline thrown their way, and the prevailing zeitgeist, erroneously informed as it may be, happily obliges. Both the legal community and the public seem securely ignorant that the "problem of runaway juries" may be a great bogeyman, as evidence suggests that there is rarely a scary monster in the courtroom just waiting to strong-arm your client.[8]

Another reason given for this bias against jury trials is the perceived inadequacy of juries. As noted by deans Larry Lyon and Bradley Toben and assistant professors James Underwood and James Wren—all of Baylor Law School—this perception is often intertwined with the perception of jury inequity:

> The premise of [stories like the McDonald's coffee and the injured burglar recovering from the homeowners] seems to be that uneducated juries are frequently wooed by sharp plaintiff trial lawyers to reach ridiculous verdicts. The point of the stories suggests that juries can no longer be trusted to find the truth on matters of both liability and damages.[9]

Rather than wagering the future on an undeveloped—or underdeveloped—trial skill set, a litigator may be more likely to take the "known road" and advise the client to pursue resolution outside the traditional court setting.[10] This phenomenon is discussed by Professor Kevin McMunigal in his article titled "The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers."[11]

Unfortunately, once developed, a bias against jury trials is likely to reinforce itself in a positive-feedback-system manner. Litigators will not risk a jury trial because they lack previous jury trial experience. Without trying jury trials, litigators never gain jury trial experience. Lack of experience influences future decisions not to pursue jury trial. And round and round the system churns. It is highly likely that a bias formed early in a litigator's legal career will increase over time if he or she is unable to gain jury trial experience. As the monetary and reputational stakes increase, the stronger the bias will likely be against risking it all in an unfamiliar forum.

For a modern litigator who participates in numerous mediations, arbitrations, and out-of-court settlements, but never in actual trials, a mindset can develop that it is not below the standard of care to do what everyone else is doing; therefore, it must be right (*i.e.*, resolution without trials must be the best course for clients). Herd mentality prevails.

The effect on the discovery process. The discovery process has become the backbone of civil trials. Whether gearing up for trial or working to settle the case in another forum, discovery is a necessary part of litigation. It is also an area where a litigator's lack of trial experience can have significant indirect consequences.

For civil matters, the goal of discovery is to "present both sides with a clearer view of the merits of the case." This enables the parties to fulfill the two principal purposes of discovery: (1) to evaluate the strengths and weaknesses of your client's position to negotiate an effective settlement and/or (2) to gather ammunition to be victorious in a trial between adversaries. These purposes are often intertwined because the discovery process is frequently used as a method of evaluating whether to settle or proceed to trial. Therefore, discovery is often conducted as if the matter were going to trial and, certainly in theory, that is the ultimate destination.

Herein lies the problem: in a world without trials, discovery can easily lose its moorings. If a litigator lacks jury trial experience, how does that litigator know what discovery to conduct in order to prepare to try a case to a jury? Along with the problem of not knowing what to discover are the problems of not knowing how much discovery to conduct or the best manner in which to conduct it. Without a clear understanding of the evidence necessary for trial, the litigator is more likely to engage in "extensive, expensive, and unfocused discovery."

Where does our current practice leave clients? Right now, we do not require lawyers to disclose their lack of trial experience, and there is no legal ramification for a failure to do so. Our data showed that lawyers are not voluntarily disclosing this information either. Perhaps we assume that clients ask directly; however, based on the results of client assumptions about trial, this seems unlikely. How would a client exercising due diligence ever discover that the last motion to compel or the 30th request for production was unnecessary? At what point is overbilling for unnecessary legal work by $1,000 or $50,000 harmless? At what point is learned inefficiency punishable? Who would even be able to evaluate the client's claim? If the case settles, the charges and behaviors become "whitewashed" in the settlement process. The client never knows, the inefficiency becomes justified, and our economic model of doing business remains intact. Without mandatory disclosure, the client is left in the dark, and it is a rare occurrence if this conduct is exposed to the light of day.

The effect on ability to settle. With many clients expressing a desire to settle cases from the outset, it is easy to overlook the value of a litigator's jury trial experience. In fact, when surveyed about whether a litigator's jury trial experience would be important in a hiring decision, a number of attorneys responded with comments such as that of this D.C. firm partner, who stated, "Whether jury trial experience is important depends on whether one is hiring an attorney to do a jury trial." Other respondents also indicated that jury trial experience would become important only if it appeared that the matter would go to trial. Yet, even in situations where the client wants to settle, being represented by a litigator without jury trial experience can negatively affect the litigator's ability to reach the best possible settlement for the client. As a responding litigator from Texas noted, "Without the knowledge and experience of what happens next [pre-trial, post-trial, appeal], how does one intelligently judge the [negotiation to a] BATNA [best alternative to a negotiated settlement]?"

In particular, there are at least three important ways that a litigator lacking jury trial experience is at a disadvantage in the settlement arena: (1) making accurate jury-value predictions, (2) objectively assessing a settlement offer, and (3) bargaining for a better settlement.

Settling a case requires a litigator to evaluate and make predictions regarding a jury's likely reaction to a particular witness, evidence, or argument—we will call this "jury-value." Jury-value is not just the damage award that a jury would likely give to a particular case, but rather the assignment of value—or weight—that a jury would likely give to facts and testimony, if presented at trial. The ability to predict jury-value—as it relates to evidence and the claims as a whole—is important. This predictive ability is often one of the driving forces behind the decision of whether to settle or to proceed to trial. As respondents to the Litigation Survey noted, along with the discussion of the associate economic costs of various forms of dispute resolution, liability and damage predictions are the most frequently discussed issues between the litigator and client when deciding whether to pursue a jury trial or an alternative means to resolution.

Because of the trend toward privatizing the justice system, making accurate jury-value predictions can prove to be a daunting task, regardless of whether the litigator has jury trial experience. As Stephan Landsman, the Robert A. Clifford professor of tort law and social policy at DePaul University College of Law, notes, "Without trial judgments to serve as guideposts, what remains is subjective groping unlikely to yield reliable or consistent results."[12] Without jury verdicts, the public ceases to have a function in determining issues like reasonableness, causation, and damages. Questions of evidence are never presented. Jury-value ceases to be known in most categories of claims. Settlements are then controlled by the corporate repeat players in the system on one side and individual participants on the other.[13] The individual participants are not only disconnected from the external reality of what a jury has done in similar circumstances but are equally disconnected from any external reality against which to measure their recommendations regarding settlement values in ADR. This is a self-reinforcing behavior since if the only known guide is the attorney's past ADR settlement experience, then that attorney has no choice but to value every case, in his or her narrow experience, similarly—regardless of what a jury might do and regardless of what the many unknown players in the ADR system are doing in their confidential settlements.

Even if a litigator accurately predicts jury-value, the ability to objectively assess an opposing settlement offer may still be negatively affected by a litigator's lack of jury trial experience. As McMunigal explains, a litigator without jury trial experience will likely evaluate a particular settlement offer by inflating both the advantages of settlement and the risk of trial.[14] This non-objective view is attributable to two things: (1) The litigator consciously concludes that his or her lack of trial experience decreases the chance for success at trial; and/or (2) the litigator subconsciously magnifies the risks and uncertainties of trial

because of a fear of the unknown. Regardless of the reason, McMunigal argues that "the lawyer's lack of trial competence introduces an additional element of risk unrelated to the merits and decreases the settlement value of the case." Thus, an interest in reputation preservation may cause the litigator to lose his or her independent judgment when advising a client in settlement negotiations.[15]

Fiduciaries cannot take advantage of their principal's trust and cannot benefit without full knowledge and consent of the principal. This is a fundamental aspect of agency law. Lawyers are agents of their clients; agents are fiduciaries for their principals. By definition, once the independent judgment of counsel is compromised by their own self-interest on a material issue, a breach of fiduciary duty has occurred if this compromise is not fully disclosed and consented to by the client. This assumes that consent is possible, which is not always the case under conflicts of interest rules. If a lawyer lacks the skills necessary to evaluate the settlement value of the case, the client deserves to know. We can hardly claim that settlements or demands for arbitration are in fact voluntary when the client lacks essential information for consent. Like any other conflict of interest under the rules of professional responsibility, the client must be fully informed before the conflict can be waived[16]—if waiver is even permitted.[17] Here, our client is never even alerted to the existence of the conflict, and yet we pretend that the consent to ADR is both voluntary and informed while we extol the virtues of client self-determination and empowerment.

McMunigal argues that the strength of a litigator's bargaining position is at least partially a function of his or her willingness to try the case if settlement negotiations break down. If settlement negotiations do break down, or the opposing party provides an inadequate offer, it is certainly a valuable bargaining chip if the litigator can at least legitimately threaten to go to trial. As a responding litigator at a large New York firm explained, "Very few cases actually go to trial, it's true. But to hire someone without any experience is to leave yourself forced to settle, with no backup plan if the other side does not make a good enough offer." Thus, a litigator without jury trial experience may be more likely to advise a client to accept the opposing party's inadequate settlement offer.

THE EFFECT ON MEDIATION

Whatever justice many clients are receiving is occurring over conference room tables without judicial scrutiny. While this may be hypothetically fine with some clients, it is important to examine whether clients believe this because of their lawyer's assurance that it is OK to avoid judicial scrutiny because it involves a trial.

Determining whether clients need the protection of disclosure depends in part on what protections, if any, are being provided in the mediation process and the assumptions being made about the actual consent of clients to the process. To probe these assumptions, we surveyed mediators. Not surprisingly, most did not believe they have responsibility for exploring issues like the jury trial experience of counsel, the malfeasance of counsel, or the verification of legal authorities. Our data further suggested that while there is not a consensus on the issue, mediators generally consider a litigator's jury trial experience to be important to the mediation process.

Perhaps not surprisingly, an inability to make accurate jury-value predictions was one of the most oft-noted problems associated with a litigator's lack of jury trial experience. As a Texas mediator and former litigator explained, "The client seldom knows how little [jury trial] experience their attorney has. Such attorneys have advice based on anecdotes from others rather than experience. That tends to make [the client] more secure than they are and therefore less realistic."[18]

While jury-value predictions—particularly the ultimate jury-value prediction, the verdict—are certainly not the only factors that induce settlements in mediation, as a Texas mediator and former litigator pointed out, "Even though attorneys only discuss likely verdicts a small portion of the allotted time [in mediation], [these predictions are] the silent motivating presence 100 percent of the time." The final report from the American Bar Association Section of Dispute Resolution Task Force on Improving Mediation Quality confirms this connection between trial experience and mediation. For example, the report notes that 95 percent of their survey participants thought it would be helpful if the mediator would "give analysis of the case, including strengths and weaknesses," and 60 percent would like a "prediction about likely court results."[19] The report's section defining "analytical inputs or techniques" included mediator reality testing questions—such as, "How do you think a jury will evaluate your testimony?" and, "Will the court permit any testimony about the oral agreement?"—as well as mediator "opinions"—such as, "Who knows what a jury might do with this case, but based on what I have learned… ." If settlements in mediation are based in large part on jury-value predictions, then the accuracy of these predictions is critical to the client's ability to make an informed decision to settle.

Why does any of this matter? While we do not know precisely how many cases are being resolved through mediation, we suspect it is significant. With courts ordering cases to mediation, mediation becomes a de facto judicial surrogate for many clients. It would be convenient to assume that someone confirms that clients are participating voluntarily and are fully informed, that someone monitors the explicit and implicit representations of counsel, and that settlements reached are based

solely on objective case value information, accurately assessed, and free from whitewashed inflation. Unfortunately, true consent has already been compromised with lawyers and judges pushing clients into mediation and other forms of ADR.[20]

This is not to glorify trials or to ignore the real risks associated with a system of winners and losers; nor are the shortcomings of litigators and the justice system to be laid at the feet of mediators and the ADR process. To be clear, the purpose of this article is not to do away with mediators or ADR. But, the pendulum has swung so far away from trials that we should not assume that ADR is better. If a settlement achieved at mediation is "good," by what standard do we measure that success if not in comparison to the alternatives? Is it an adequate answer to simply conclude that a settlement at mediation was good because it was arrived at in a collaborative rather than adversary process? This ignores that the true test of any process is the fairness of the result achieved. Processes can be collaborative and still produce unfair results.

We are not mounting a full-bore assault on ADR. We recognize its value—in context. The problem is that the context has been steadily eroded as the alternative, jury trials, has declined. To be effective alternatives to each other, there has to be some balance. Lawyers collectively know very little about the alternative to ADR, actual trials, and, consequently, their clients know even less. An ADR advocate might claim that this is a result of the "market" having spoken against trials and in favor of ADR. But markets function best with transparency and objective data about alternatives. We detect that neither is present with the current unbalanced system.

Rather than argue or speculate about client expectations and what might happen in mediation or at the courthouse, let's look at some objective data to shine a light on just one concern arising out of the vanishing jury trial and the corresponding development of a replacement private justice system. This is only one issue, which barely scratches the surface of myriad complexities of the vanished jury trial and illustrates the need for more research, data, and creativity: Clients believe that trial experience is material and would not hire lawyers without it.

TRIAL EXPERIENCE IS MATERIAL

It is an easy rationalization for us to assume that we do not need to disclose our lack of jury trial experience because, of course, everyone already knows it. But the reality is that clients—whether public, institutional, or even other lawyers—do not know that "litigators" no longer try cases. And because they do not know, this critical fact is material to them and consequently should trigger our ethical obligations for disclosure under the rules. We surveyed three different sets of potential clients: (1) laypersons older than 18 who could potentially hire a litigator to represent them, (2) in-house counsel who could potentially hire a litigator on behalf of his or her company, and (3) other attorneys (both litigation and transactional) who could potentially hire a litigator for the same purpose as a layperson. Based on these surveys, the respondents resoundingly affirmed that information about a litigator's lack of jury trial experience would be an important factor in their hiring decision, therefore making this information material.

Not only do potential clients want lawyers with jury trial experience but they also assume that litigators have that experience. In the world of online window shopping, a prospective client's first impression of a litigator likely comes from a website or other marketing effort of the law firm. Regardless of size or prestige, nearly all firms and solo practitioners maintain websites that at least contain biographical pages to introduce the attorneys to prospective clients. These are almost always filled with recitations of big cases handled, concluded, and resolved favorably for important clients, as well as discussions of hearings, motions, and arbitrations. Firm websites typically do not, however, alert clients to the lack of trial experience of litigation associates and partners. These biographical pages are designed to attract a first date—the prospective client meeting.

We surveyed both individual and institutional clients to estimate the number of jury trials they believed a civil litigator would have tried in his or her first five years of practice. The individual participants were shown a standard Web page biography for a five-year litigator at a fictitious law firm. The biography page was deliberately "average" in describing the lawyer's credentials, based upon an examination of similar Web pages across the country. For potential individual clients, the median response was 16 trials with 10 trials being the most frequent estimation. The institutional clients were not shown a Web page and were asked simply to estimate the number of jury trials of a five-year litigator. The median response was eight trials with five trials being the most frequent estimation. Both groups' estimates were far in excess of the actual jury trial experience of responding litigators with five years of experience, 96.7 percent of whom had tried less than five cases to a jury and none more than six.

The disconnect between the popular conception of a litigator and the reality of the 21st-century litigator may explain why a prospective client, individual or institutional, would not ask the litigator about his or her jury trial experience before making a hiring decision. If a prospective client reasonably believes that an answer is so obvious that the question need not be asked—a belief that litigators actually try cases to a jury is certainly reasonable—the prospective client can hardly share much blame for not making the inquiry, especially within a fiduciary relationship.

Imagine what a simple "reverse board-certification asterisk" would do to the litigation world? What if lawyers with no jury trial experience were required to place that asterisk beside their name on their website and any other materials? We can't have it both ways. We cannot claim that jury trial experience is irrelevant in our more modern world of dispute resolution and yet refuse to disclose it. Whether we like it or not, it matters to our clients and our honesty in disclosing it will likely have negative economic consequences.

CONCLUSION

Honesty is a virtue easy to extol, easy to rationalize, and hard to practice. The near extinction of the jury trial has happened without true recognition, and the creation of a replacement system has occurred without true design. We stand at the tipping point to salvage both, but only if we are willing to be honest with ourselves and appeal to our better nature as guardians of democracy and the justice system. Because we are a self-regulating industry, we must be willing to confront our own problems and call fouls when we see them. **TBJ**

NOTES

1. John H. Grady, *Trial Lawyers, Litigators and Clients' Costs*, 4 Litg. 5, 6 (1978) (noting that by 1970, lawyers described themselves as "litigators" in contradiction to trial lawyer).
2. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Studies 459, 459-61 (2004).
3. Five nationwide surveys were conducted. Our primary surveys were the *Litigation Survey*, which generated 1,358 responses from litigators in 45 states and the District of Columbia, and our *Mediation Survey*, which generated 488 responses from mediators in 42 states and the District of Columbia. We also conducted three surveys of potential clients—individual lay clients, institutional clients, and other attorneys as clients. Respondents to our survey were promised anonymity besides basic demographic information. Some comments have been very lightly edited to correct spelling or grammar mistakes.
4. Kimberlee Kovach, *The Lawyer as Teacher: The Role of Education in Lawyering*, 4 Clinical L. Rev. 359, 361-362 (1998).
5. *See* Galanter, *The Vanishing Trial*, *supra* note __, at 461, 466.
6. 87 percent of the respondents in the *Litigation Survey* indicated that their clients follow their advice regarding the appropriate dispute resolution method for the client's matter at least three-fourths of the time.
7. *See, e.g.*, Theodore Eisenberg, et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J.L. Reform 871, 879-80 (2008) (noting that "some tort reform proponents regard jury trials as a distinct source of problems with the U.S. legal system," that arbitration clauses "constitute a way of effectively avoiding jury trials," and that "By agreeing ex ante to avoiding jury trials, business can avoid the perceived risk of a runaway jury").
8. *See e.g.*, Thomas A. Eaton, *Of Frivolous Litigation and Runaway Juries: A View from the Bench*, 41 Ga. L. Rev. 431, 447 (2008) (empirical data indicates that "it is clear that Georgia trial judges observe few signs of runaway juries"); Larry Lyon, et. al *Straight from the Horse's* Mouth, *supra* note __ at 428-29 (noting that more than 83 percent of Texas district court judges had not observed a single instance of a runaway jury verdict during the 48 months preceding their survey); John T. Nockleby, *How to Manufacture a Crisis: Evaluating Empirical Claims Behind "Tort Reform,"* 86 Or. L. Rev. 533, 552-58 (2007) (debunking the popular misconceptions regarding "runaway juries").
9. Larry Lyon, et. al, *Straight from the Horse's* Mouth, *supra* note __ at 422.
10. *See* McMunigal, *The Costs of Settlement*, *supra* note __, at 856-61.
11. 37 UCLA L. Rev. 833 (1990).
12. Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. Empirical Legal Studies 973, 978 (2004).
13. *See* McCormack, *Privatizing the Justice System*, *supra* note __, at 741-42 (discussing the "repeat player effect").
14. McMunigal, *The Costs of Settlement*, *supra* note __, at 859.
15. *Id.*
16. *See* Model Rule of Professional Conduct 1.7 (b)(4).
17. Not all conflicts of interest can be waived under many professional responsibility codes. A typical test is whether a disinterested lawyer would conclude that a waiver of a conflict is in the client's best interest. The best interest of the lawyer seeking the waiver is irrelevant. Retaining a particular lawyer may appear to be an advantage, but that advantage, if true, does not necessarily justify a conflicts waiver in itself and may easily be outweighed by a single disadvantage.
18. Responses to the *Mediation Survey*.
19. ABA Section of Dispute Resolution, Task Force on Improving Mediation Quality, *Final Report* 14 (Apr. 2006-Feb. 2008).
20. Jacqueline Nolan-Haley, *Consent in Mediation*, Dispute Res. Mag. Vol 14 #2 (Winter 2007).

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