Virginia ADR

The Newsletter of the Joint Alternative Dispute Resolution Committee

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THIS PAST SPRING, the mediation field received stunning news: the Los Angeles County Superior Court, which boasted the largest no-cost ADR referral program in the country, announced the end of its program by June 18, 2013. Like Virginia's mediation statutes, the California program had existed for 20 years. As a model program, the Court referred 10,000 cases to mediation in 2012, and 70 percent of referred litigants opted to mediate their civil disputes, with most cases valued at $150,000. The program's end resulted from the court's consolidation plan to close 10 courthouses in order to save California taxpayers between $50 million to $80 million. This shut-down ended referrals for arbitrations, mediations, neutral evaluations, and voluntary settlement conferences in civil, family, and probate matters, including Spanish-language family settlement conferences.

As courts across the country, including Virginia, continue to face judge shortages and budget shortfalls, the Joint ADR Committee has considered ways in which today's mediators can best explain their value to cost-conscious taxpayers and potential clients. To that end, the following pieces feature suggestions on how to best measure the value of mediation, and proposed legislation that would expand the reach of non-profit dispute resolution centers to the benefit of the Commonwealth at large. Through these articles, the Joint ADR Committee invites you to change the conversation about our work to further the reach of conflict resolution into the next 20 years and beyond.

Metrics that Matter

By Kimberly P. Fauss

Have you ever played a game with an opponent who had mastered all the rules? In tennis, stepping on a fault line is fatal. In golf, driving into a hazard is costly. Rules are rules and in competition, a win is determined by these technicalities. But what if you want to play a new game? The rules are different. We don't judge success in the new game by the rules of the old game. We develop new skills and techniques to master a new playing field.

So why is it that we continue to measure the outcomes of mediation and collaboration by the rules we use in litigation? These processes differ from the adversarial process, yet we have not developed a common language of describing these differences and the means of evaluating the distinguishing factors. Although mediation has been authorized by statute for

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Legislative Initiative

By Megan Johnston

The Virginia Association for Community Conflict Resolution (VACCR) is seeking funding from the General Assembly to expand the capacity of its member centers to provide cost saving, early intervention dispute resolution services throughout the Commonwealth. VACCR's member centers, all 501(c)3 nonprofit dispute resolution organizations, have a combined 188 years of experience providing professional, community-based dispute resolution services for residents of 50-plus counties throughout Virginia. The centers provide cost savings to the Commonwealth by reducing overcrowded dockets, trial and clerk time in family and civil court settings.

In 2012, VACCR member centers provided a cost savings to the Courts of more than $2 million by mediating cases referred by local general district and

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20 years in Virginia and collaboration has been an option since the 1990s, practitioners still describe these processes as an "alternative" to litigation.[1] This comparison implies that litigation is the norm and another choice is somehow not the real thing. This is the paradox of a paradigm shift: We have one foot in the old way while the other foot pulls us into a new way of understanding the world.

Mediation and collaborative professionals often explain these process choices to new clients by the same measures of success used in litigation. On the one hand, a common goal of litigation is *settlement*: just get it done with as many *wins* on positions as possible. On the other hand, mediation and collaboration offer new negotiation *processes* that enable clients to learn and think creatively to achieve resolution so they may maintain meaningful relationships into the future. Still, while mediators and collaborative professionals engage a new negotiation process, they often compare it to the old rules of litigation.

This dual track of outcomes can lead to confusion for both the professional community and, significantly, our clients. Lawyers have an ethical responsibility to provide relevant comparisons so clients can be informed about their choices in legal representation.[2] Now, as we commence the next 20 years of dispute resolution — after mainstreaming mediation and collaboration — we have an opportunity to determine new and more appropriate measures of success to share with our clients when they select dispute resolution processes.

Commit to better:
Pick one thing.
Measure it.
Improve it.
Celebrate it.

A family mediation client once told me that the future focus of our work kept the couple from looping on past mistakes and blame for what had gone wrong in the marriage. When the divorce completed, the dispute was really over, and the family could begin immediately to heal. Five years later, they enjoy amicable relationships with each other and their children. Another collaborative lawyer described to me the personal significance of his new friendships with mental health professionals and financial specialists. Prior to his commitment to collaborative practice, these interdisciplinary professionals were accessible only as witnesses or consultants to provide one-sided evidence. In collaborative teams and practice groups, they now work with lawyers to give depth and perspective to family systems and the dynamics impacting the professional team. Just this year, Virginia's growing professional negotiation community featured national teachers of negotiation theory and practice to enhance the skills and civility of all Virginia professionals.[3] In my view, compared to traditional "metrics" of litigation, these anecdotal shifts can have a broad impact when they are repeated for clients, professionals, and our community.

"Metrics" are specific measurable objectives to track the expectations, execution and consequences of a business or practice. In the early 1990s Robert Kaplan and David Norton developed the "balanced scorecard" for performance management using financial and non-financial criteria.[4] This tool utilizes an organization's goals and objectives to identify data and to track and measure the value of the organization's product or service. Primary concerns are customer satisfaction, motivation and productivity of employees, and business reputation in the marketplace. The scorecard can identify unmet human needs by juxtaposing the value of the new way with the potential harm of the existing system. The quantitative is supplanted by the

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Share Your News

Have news to share about your dispute resolution practice? Planning to speak at or attend an exciting conference? Email the Communications Committee with your professional news to share with our membership in ADR Advisory, the Joint ADR's monthly alert.

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qualitative. Satisfaction is measured by product, process, and personal terms. The strategic goal behind utilizing metrics is to integrate the new vision into planning, learning, and performance by linking cause to effect.[5] The metrics that matter to a values-driven profession like mediation and collaboration are intended to engage the greater community in the individual and social benefits of the service. While our livelihood and business depends on selling this service, we can elevate our practice priorities to align with personal values for the benefit of our clients. Mediators and collaborative professionals can develop a balanced scorecard to monitor our most relevant purposes and to differentiate these services *without* comparison to litigation.

A simplified approach to metrics — the "dashboard approach"— links strategies for growing services to a few key metrics in no more than three categories: (i) improving core processes, (ii) enhancing performance, and (iii) improving satisfaction with service.[6] As a starting point for our new dashboard, consider these categories as follows: (i) the social system of justice as the core process, (ii) the skill level of trained professionals as performance, (iii) and the durability of client outcomes as client satisfaction. Rather than focus on court dockets for divorces and revolving doors for custody and visitation issues, this new metric can address the availability of interdisciplinary professional support in a locality. Rather than focus on competency as defined by a certain number of continuing legal education hours, we can redirect attention to the continuing skills training and case conferencing of practice group networks. Rather than focus on settlement, the goal can become durable resolution through agreements developed together with clients based on their unique situation.

About the author

Kimberly P. Fauss, JD, practices collaborative law and mediation in Richmond for her firm, New Growth Ventures. She attended Oberlin College, University of Virginia Law School, and more recently, seminary to study theology.

Kimberly has been a longtime student of neuropsychology and has written and trained throughout the U.S. and in Israel on the connections between these disciplines. She is a founding member of CPTI in 2007 and has conducted numerous basic, interest-based and advanced trainings, including workshops at IACP Forums, VaCP and VMN.

She is a founding member of the boards of both the statewide VaCP and her two local Richmond practice groups and is active in the IACP and its committees. She has been selected by her peers for inclusion in Best Lawyers for family collaborative law as well as mediation. You will find her articles on her website: www.newgrowthventures.com.

Kimberly serves on the Programs Committee for the Joint ADR Committee.

The positive outcomes that distinguish a negotiation practice arise from the clear vision and mission of our foundational organizations. Indeed, their next strategic task is to develop a dashboard for metrics that matter to our professional community and clients. Then we can report transparently to clients the achievement of goals and improvement of services. We can use this approach at the macro-organizational level and in our individual practices.

I invite you to continue this conversation about how we name what we do and demonstrate that we are doing it. Any professional who has witnessed the transformation of a family through these client-centered processes during divorce knows that what we do is *not* an alternative to litigation. It is a "new game," motivated by our values and measured not by statistics, but by sufficiency for and well-being of the clients. The importance of our practice is the commitment to a new social contract of personal responsibility with clients to achieve acceptable solutions to problems and flexibility to engender civility and positive future relationships. Mediation and collaborative professionals must engage their shared expertise to establish metrics that move us more fully into this grounded dispute resolution paradigm.

Endnotes

1 Professionals have been searching for new terminology for non-litigation processes for many years. Suggestions have included variations on a theme such as *appropriate* dispute resolution. It is time, however, to promote a common terminology of clarity for clients. With 90 percent of cases settling outside of court,

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Past chairs of the Joint ADR Committee were recognized.

Participants enjoyed lunch outside the Richmond law school.

Brave New World

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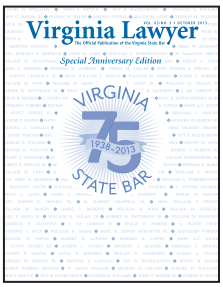
a scenario in which divorcing parents made a decision regarding their child, which could have negative effects. Because of deference to the fairness of the process, the problem was designed to show that in personal matters, it is probably better for mediators to let sleeping dogs lie. Overall, this presentation highlighted the issues that result from a mediator's need to convey offers and their ethical duty not to relay everything discussed in caucus.

The second interactive presentation, led by Tracey Cairnie and Marshall Yoder, also pertained to questioning; however, they focused on the way in which better questions can lead to durable results. The exercises performed encouraged participants to think about questions differently from the way examinations are taught in law school. The program differentiated between the "judger" mind-set and the "learner" mind-set. The former has a tendency to get trapped in the past and assign blame and typically results from situations in which one is in a position of power or forced to make a decision. While the "judger" mind-set has its place, the latter "learner" mind-set can be more beneficial to the mediation process because it fosters a better relationship with participants.

The Joint ADR Committee thanks the presenters and the many participants who attended this informative event celebrating twenty years of court-referred mediation in the Commonwealth.

Have you seen them?

In celebration of 20 years of court-referrred mediation in the Commonwealth, the Joint ADR Committee published featured articles in the spring 2013 *VBA Journal* and the October 2013 *VSB Virginia Lawyer* magazines. Check them out by clicking the link on each cover!



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negotiation is the common denominator among all dispute resolution professionals, and the different approaches to negotiation should be the focus of information provided to clients rather than litigation and its "alternatives." *See* Va. R. of Prof'l Conduct R. 1.1 *Competence* cmts., R. 1.4 *Communication*, cmts.

2 Va. R. Prof'l Conduct R. 1.2 *Scope of Representation*.

3 *See, e.g.,* University of Richmond Symposium, *The Divorcing Brain*; Joint ADR Committee, *Celebration of the Next 25 Years*; VaCP Annual Meeting, *Overcoming Barriers to Settlement* (Fall 2013).

4 Robert Kaplan & David Norton, *The Balanced Scorecard: Translating Strategy into Action* (Harvard Business School Press 1996).

5 A significant challenge in the balanced scorecard approach is data collection methods for each metric. Direct contact through emails, phone calls, or simple software are often most successful.

6 Tyler Dawson, *Meaningful Metrics for the Nonprofit Organization: Simplify Your Process with a Dashboard Approach*, Texas CEO Magazine (2013).

7 *E.g.* Virginia Collaborative Professionals, Virginia Mediation Network, and the Joint ADR Committee.