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**RE-EXAMINING MEDIATOR AND JUDICIAL ROLES IN  
LARGE, COMPLEX LITIGATION: LESSONS FROM  
MICROSOFT AND OTHER MEGACASES**

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INTRODUCTION

With mediation having outgrown its origins in family, community, and small claims courts and achieved virtual ubiquity in American civil litigation over the past twenty-five years, there is an increasing effort to utilize it even in the most complex, difficult, lengthy, and high-stakes legal disputes. Mediation is now being attempted regularly in “big cases,” such as class actions, multi-district litigation, mass torts, bankruptcy, antitrust, multi-party construction, intellectual property, and financial fraud cases. These cases present huge challenges not only for the disputants and their attorneys, but also for the neutrals who must manage them, whether as judges or as mediators. It is the thesis of this Article that the dispute resolution and management challenges posed by these cases require a re-examination of the roles played by neutrals – judges and mediators – and that the traditional models requiring a passive and detached judge and a non-evaluative mediator need to be replaced by a more expansive and flexible paradigm.

Industrialization, expansion of the national and global economy, growth of corporations, amalgamation of huge pools of capital, technological, medical, and scientific advances, acceleration of information and communication, and expansion of legal rights have combined to produce fantastic legal disputes. The once-in-a-career case – millions (or billions) of dollars in dispute, dozens or hundreds of parties, simultaneous litigation in multiple jurisdictions

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including cross-border, durations threatening to reach the bar-mitzvah age, legal fees and expenses in eight or nine figures – is now common. These are not your grandfather's lawsuits. Managing and resolving these (for want of a better word) "megacases" requires a very different approach and set of tools than the typical cases with which judges and mediators deal on a daily basis. Judicial and mediator roles are now fairly well defined and understood for standard cases, although there is still a healthy range of views and a variety of approaches within the accepted continuum.<sup>1</sup> However, increasing pressures on courts to deal with megacases, and regular resort to mediation in these cases, requires reassessment of judicial and mediator roles concomitant with the special challenges these kinds of cases pose.

Every case is unique;<sup>2</sup> megacases are uniquely unique. In their variety and particularity, they tend to be extremely difficult and pose special challenges for judges and mediators for several reasons. What these different challenges have in common is that they all demand a high level of expertise, and when several of these challenges are present in the same case, as they often are, they require a high level of expertise in multiple fields. Achieving the required level of expertise in any one field is difficult enough; achieving the required level of expertise in the multiple fields required is beyond that which seems reasonably attainable for any single individual, Leonardo da Vinci, Thomas Jefferson, Benjamin Franklin, and maybe Oliver Wendell Holmes excepted. To the normal highly educated, respected, and experienced judge or mediator, megacases push one beyond known limits of competency and confidence.

What special challenges do megacases commonly present? First, the underlying subject matter often involves complicated, cutting-edge knowledge or technology, such as application programming interfaces and communications protocols for operating system software,<sup>3</sup> client/server interoperability,<sup>4</sup> unbundled network elements<sup>5</sup> and main office telecommunications switches,<sup>6</sup> or the effect of magnesium stearate excipient and a few millimeters of polymer coating on the rate of decay for time-release

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<sup>1</sup> For excellent discussions and typologies of various mediation styles and approaches, see DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES* 13-37 (1996), and Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 *ALTERNATIVES TO HIGH COST LITIG.* 111 (1994).

<sup>2</sup> Every case is also very important to the disputants, no matter what the stakes and no matter how common the subject matter. This Article's focus on megacases and on judges' and mediators' roles in such cases is by no means meant to minimize or disparage the importance of Bob's case against the moving company for breaking Aunt Mary's purple vase or Anne's case against the telephone company for constructive discharge. Every case deserves attention and a high-quality dispute resolution process.

<sup>3</sup> See *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 36 (D.D.C. 2000).

<sup>4</sup> See *id.* at 38-39.

<sup>5</sup> See *MCI v. Bell-Atlantic*, 36 F. Supp. 2d 419, 423 (D.D.C. 1999).

<sup>6</sup> See *Bell Atlantic Corp. v. AT&T Corp.*, No. 5-96CV-45 (E.D. Tex. Feb. 25, 1997) (order denying summary judgment).

pharmaceutical delivery systems,<sup>7</sup> or an understanding of off-balance-sheet special purpose entities and the web of financial arrangements supporting them,<sup>8</sup> or the carcinogenicity of specific chemicals at particular doses over a certain number of years.<sup>9</sup> Few judges or mediators are knowledgeable in the fields relevant to these issues.

Second, these cases also often involve specialized, some would say “esoteric,” legal subject matter that is beyond the normal encounter of the generalist lawyer, judge, or mediator (or even mediator/law professor), but is malleable intellectual putty in the hands of the high-powered legal experts retained by the parties who tend to dominate the particular field. These boutique legal powerhouses are all too willing to bedazzle the poor judge and mediator with finely honed discourse, sprinkled with leading cases known to the cognoscenti featuring famous oil monopolies,<sup>10</sup> shoes,<sup>11</sup> concrete blocks,<sup>12</sup> corrugated containers,<sup>13</sup> and steel,<sup>14</sup> and shorthand nicknamed statutes such as Sherman,<sup>15</sup> Clayton,<sup>16</sup> Hart-Scott-Rodino,<sup>17</sup> Hatch-Waxman,<sup>18</sup> Tunney,<sup>19</sup> and Sarbanes-Oxley,<sup>20</sup> or statutes with bewildering initials or numbers instead of names, such as ‘33 Act,<sup>21</sup> ‘34 Act,<sup>22</sup> and PSLRA,<sup>23</sup> or RCRA,<sup>24</sup> CERCLA,<sup>25</sup> and SARA,<sup>26</sup> or CAFA,<sup>27</sup> NAFTA,<sup>28</sup> and WIPO.<sup>29</sup> Few judges or mediators

<sup>7</sup> See *Bristol-Myers Squibb Co. v. Teva Pharms. USA, Inc.*, 288 F. Supp. 2d 562, 570 (S.D.N.Y. 2003).

<sup>8</sup> See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 699 n.3 (2005).

<sup>9</sup> See *infra* note 106 and accompanying text.

<sup>10</sup> *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

<sup>11</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

<sup>12</sup> *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

<sup>13</sup> *Adams Extract Co. v. Chesapeake Corp. of Va.* (*In re Corrugated Container Antitrust Litig.*), 659 F.2d 1322 (5th Cir. 1981).

<sup>14</sup> *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

<sup>15</sup> Sherman Act, 15 U.S.C. §§ 1-7 (2000).

<sup>16</sup> Clayton Act, 15 U.S.C. §§ 12-27 (2000).

<sup>17</sup> Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (2000).

<sup>18</sup> Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Act), 35 U.S.C. § 156 (2000).

<sup>19</sup> Antitrust Procedures and Penalties (Tunney) Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified in scattered sections of 15 U.S.C.).

<sup>20</sup> Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 (Supp. IV 2004).

<sup>21</sup> Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (2000).

<sup>22</sup> Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78mm (2000).

<sup>23</sup> Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

<sup>24</sup> Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k (2000).

<sup>25</sup> Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified in scattered sections of 42 U.S.C.).

<sup>26</sup> Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified in scattered sections of 42 U.S.C.).

are masters of these many different legal spheres; few can keep up with a legal mastermind specialist who wants to spin or bully the neutral parachuting into the case.

Third, in many megacases, mathematics, statistics, and economics are important; world-class (and sometimes not so world-class) economists and other technical experts are often heavily involved. The judge or mediator has to deal with these experts, which usually consists mostly of listening to them or plowing through their reports. Even if a judge or mediator can get up to third gear (or can fake it) on the underlying subject matter and governing legal doctrine, making sense of the experts is often more difficult. The attempt to understand and articulate what the case is all about, let alone evaluate it accurately, can be beyond even the most dedicated judge or mediator – even after sitting through a three-hour (or three-day!) dialogue between competing teams of econometrics experts from Stanford and MIT flashing their elasticity curves, regression analyses, and dueling stochastic disturbances. Few judges or mediators feel very comfortable one-on-one with a Nobel laureate economist in the employ of a party fighting for advantage. Of course, the parties always present these experts as objective and independent.<sup>30</sup> They are typically introduced with the sermon about being retained for their independence no matter which way the chips may fall. Rarely, if ever, do the chips fall on the other side.<sup>31</sup>

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<sup>27</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (to be codified at 28 U.S.C. §§ 1711-1715).

<sup>28</sup> North American Free Trade Agreement Implementation Act (NAFTA), Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified in scattered sections of 19 U.S.C.).

<sup>29</sup> WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998, Pub. L. No. 105-304, 112 Stat. 2861 (codified in scattered sections of 17 U.S.C.).

<sup>30</sup> The parties are, in fact, required to present their experts as objective and independent. *See* *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 597 (1993) (holding that Federal Rule of Evidence 702 bars expert testimony unless it “rests on a reliable foundation and is relevant to the task at hand”).

<sup>31</sup> The full-blown enlistment of experts into the adversarial process has corrupted one of the few remaining islands of objectivity in litigation. Notwithstanding professional standards of independence and objectivity, scientists, economists, physicians, engineers, appraisers, and other experts are becoming indistinguishable in their adversarial orientation from the lawyers who present them. As an old German saying goes, “Whose bread I eat, his song I sing.” This is a great loss for the legal system, both adjudicative and mediatory. The tendency toward advocate experts renders even greater the value of neutrally selected and compensated experts, as sometimes occurs in ADR and under Federal Rule of Evidence 706. *See* 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, *FEDERAL PRACTICE AND PROCEDURE* § 6302, at 452 (1997) (justifying Federal Rule of Evidence 706 as “a means of compensating for weaknesses in the adversary system that can undermine accurate factfinding”). *See generally* Eric Green, *The Complete Courthouse*, in *DISPUTE RESOLUTION DEVICES IN A DEMOCRATIC SOCIETY: FINAL REPORT OF THE 1985 CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES*, at 15 (A. Leo Levin ed., 1985).

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Fourth, the stakes are gigantic, often in the hundreds of millions of dollars. Indeed, “billions” is the quantifier one has to get comfortable with in these cases. Sometimes, however, the stakes are virtually unquantifiable, as when major structural or conduct remedies are at issue in public actions or even private cases. This means that cases often take on a “bet the business” intensity that changes all of the normal disputing and settlement dynamics. For one thing, the heavy hitters of each party come to bat, with judicial outcomes and settlement possibilities influenced and handicapped by their big reputations and commensurately big egos, which can be a handful for even the most experienced and confident judge or mediator.

Fifth, most megacases involve multiple parties with very complicated and diverse interests, even among the participants nominally on the same side. For example, consider an antitrust mediation involving many separate cases consolidated before a multi-district litigation (MDL) judge. The plaintiffs may consist of a class of direct purchasers, individual direct purchasers who opted out of the class, a class of indirect purchasers, and individual indirect purchasers or opt-outs commonly including an assortment of state Attorneys General. On the other side of the “v.” are the various alleged conspirators in their spun-off, resold, acquired, and combined afterlives. Further, it is not uncommon for there to be differences of opinion even within the individual parties, or among their representatives for that matter. Coalition breakdown on one or both sides of the case is hardly unknown in antitrust, securities class-action, insurance coverage, construction, and fraud cases, and it can create particularly sensitive problems when it occurs among plaintiffs’ lawyers, Fortune 100 companies, or worse, sovereigns.<sup>32</sup>

In addition to the extra challenges unique to megacases, the mediator must recognize and overcome all of the usual barriers to settlement present in the typical simple bilateral mediation. These obstacles can include communication failures, wrong participants, lack of necessary information, extrinsic linkages, bad timing, inaccurate assessment of the likely legal outcome, lack of resources, and poor negotiation skills.

Judges do not have much choice in taking megacases. If the case is filed and assigned, the judge has to deal with it, usually on top of an already full docket. But how do these complex cases get to mediation, and why do lawyers, parties, and judges believe that mediation could possibly help in these monster cases? The megacases seem impossible to mediate, but increasingly often these cases are resolved – sometimes partially, sometimes completely – through successful mediation. Experience with several of these cases suggests that the key to successful mediation of the megacase is a deep respect for, and

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(advocating more frequent use of Federal Rule of Evidence 706 as both a dispute resolution device and a beneficial trial technique).

<sup>32</sup> *Microsoft*, of course, is a notorious case of coalition breakdown involving sovereigns. See discussion *infra* Part I. For another case of coalition breakdown, involving plaintiffs’ lawyers, see *Smith v. Sprint Communications Co.*, 387 F.3d 612 (7th Cir. 2004).

understanding of, the *roles* that those present at and absent from the table must take on, and a willingness to adapt those roles to the specific demands of the case, even if it means departing from conventional mediation wisdom. Fortunately, mediation is a wonderfully flexible process that can be adapted to almost any situation, including the mega, complex, technical, multi-party case.<sup>33</sup> However, structuring a mediation for these cases requires an appreciation by the parties, their counsel, and the mediator of the roles that each of them (and the judge, the experts, and others) has to play.

To be successful, it is crucial that the mediation process permit each participant to properly play his or her role. At the same time, each participant must be willing and able to do so. Many different pieces have to be brought together in the right sequence, at the right time, and with the right level of intensity. If any participant – especially the mediator – is not highly sensitive to the requirements of (and limitations on) his or her role, the process will break down. For the mediator, this means that he or she must be prepared to step back and intensely assess the case from a process perspective. This perspective recognizes the possibility of a very deferential mediator role, a highly active and evaluative mediator role, and every point in between on a vast continuum of roles. The appropriate role may require the mediator to become comfortable with his or her relative ignorance of the underlying subject matter, the economics, or the legal concepts at issue in a dispute. The mediator must then decide how to let the analyses of these elements emerge through the various experts, counsel, and principals, pulling the best from each so that the necessary understanding emerges from the adversarial give-and-take between lawyers and a reasoned dialogue between experts and principals.

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<sup>33</sup> As mediation and other forms of ADR mature, are brought within official institutions, and are added to more formalized processes (as occurs in court-connected mediation), there is a danger that mediation will lose some of the flexibility that is responsible for its success. As more and more rules are applied to mediation, and as licensing requirements are imposed on practitioners, mediation approaches and styles may become standardized and limited. While the objective of these rules and standards is good – to inform and protect consumers of mediation and increase the quality of service – applying rules to such an improvisational and problem-solving oriented process can have costs in loss of flexibility and creativity. The pros and cons of licensing and standardization have been debated for years. See STEPHEN B. GOLDBERG, ERIC D. GREEN & FRANK E.A. SANDER, *DISPUTE RESOLUTION* 517-21 (1st ed. 1985) (evaluating various proposals for licensing, certification, and standardization of professional mediators). Sometimes the debate crosses over from the harmless but inane theoretical battle over typology, *see, e.g.*, Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation Is an Oxymoron, 14 *ALTERNATIVES TO HIGH COST LITIG.* 31 (1996); John Bickerman, *Evaluative Mediator Responds*, 14 *ALTERNATIVES TO HIGH COST LITIG.* 70 (1996), to the potentially dangerous terrain of official restrictions on good, accepted practices, such as when attempts are made to draft uniform rules that define the practice of mediation in a limiting way.

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However, sometimes too much deference to the various players at the wrong time can be fatal to resolution. The mediator must be the expert on dispute resolution process issues and must exercise process leadership throughout this multidimensional task. Therefore, the mediator must be alert and ready to step in to help out in unfamiliar terrain when the mediator senses that the experts, lawyers, or parties, despite their superior technical, factual, or legal expertise, are on the wrong track for settlement and need to be led back to the right path. Further, a central premise of this Article is that in megacases the mediator must be sensitive to the possibility of a much more active role for the judge in the mediation/settlement process than is normally thought to be appropriate. In particular situations, the mediator must recognize the potential need for judicial involvement, the appropriate level of judicial involvement, the timing of judicial involvement, the risk of judicial involvement, the strategy and tactics of involving the judge, and the means and methods of actually using the judge so as to obtain the greatest benefit at the least risk to the judicial process.

In other words, mediation of megacases is a three-ring circus. The mediator needs the balance of the tightrope walker to tiptoe a fine line between each party's limits; the forcefulness of the strongman to wrest the settlement process back from fruitless debate to productive discussion; the mystique of the bearded lady to impress the parties with a magical ability to solve an irresolvable dispute; the fearless idiocy of the lion tamer to believe that the case can be settled; and, sometimes, the salesmanship of the carnival barker to manage the parties' expectations so that each comes to accept a reasonable compromise as a victory for its side.

As difficult as these cases are to mediate, they present the most sublime opportunities for mediators to contribute to solving important problems at the most challenging level. For dedicated professional mediators willing to test themselves in the "glass bead game"<sup>34</sup> of dispute resolution, this challenge is what being a mediator is all about.

Opportunities for an aspiring "master mediator" abound. For example, in the telephone equipment Sherman antitrust cases,<sup>35</sup> the mediator had an opportunity to work alongside some of the most creative and skilled businesspeople and negotiators in crafting hugely significant "win/win" commercial deals. Mediation facilitated the creation of enormous joint gains that would continue to flow both to the parties and to the consuming public for many years. Mediation was necessary to help the negotiations get unstuck when they got bogged down (proving that even super-negotiators can fall into the most basic communications traps). The challenge was then to push the parties toward Pareto-optimal outcomes ("enhancements" or "post-settlement

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<sup>34</sup> HERMANN HESSE, *THE GLASS BEAD GAME* (Richard Winston & Clara Winston trans., Henry Holt & Co. 1990) (1943).

<sup>35</sup> See *Bell Atlantic Corp. v. AT&T Corp.*, No. 5-96CV-45 (E.D. Tex. Feb. 25, 1997) (order denying summary judgment).

settlements” to use Raiffa’s terms)<sup>36</sup> when, for one reason or another, the super-negotiators and their teams of over fifty subject matter experts “satisficed out”<sup>37</sup> too early, just as beginning negotiation students sometimes do. In the same case, the parties were represented by outstanding counsel who were able to engage in the highest level of legal dialogue with no trace of defensiveness or false advocacy. This openness and legal excellence created an environment in which each side’s ideas – and the mediator’s – could be heard and fully assessed on the merits, not on rhetoric, creating the perfect marriage of “interest-based” and merits-based, “no-agreement alternative” settlement analysis. This is the mediation ideal – the Fisher<sup>38</sup>-Ury<sup>39</sup>-Raiffa<sup>40</sup>-Lax-Sebenius<sup>41</sup> vision fully realized. The end result was one that even the most evangelical proponent of mediation would have a hard time over-praising.<sup>42</sup>

Unfortunately, not all complex cases lend themselves to this kind of joint gains, problem-solving, facilitative mediation resulting in textbook outcomes, even in the antitrust area.<sup>43</sup> There is a great deal of variance in antitrust mediation issues, structure, and dynamics. For example, the vitamins price-

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<sup>36</sup> Howard Raiffa, *Post-Settlement Settlements*, 1 NEGOTIATION J. 9, 9 (1985) (defining “post-settlement settlement” as an agreement “that would replace the original settlement only on the condition that both parties agree to the change” because it makes both of them better off than they were under the original settlement).

<sup>37</sup> “Satisficing out” occurs when two sides accept a resolution that is acceptable, but barely so, because it is slightly better than their reservation prices (as set by their “no-agreement alternatives”), and do not try to do better, either individually or jointly, such as by finding a Pareto-optimal result.

<sup>38</sup> See generally ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991).

<sup>39</sup> See generally WILLIAM URY, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION (1993).

<sup>40</sup> See generally HOWARD RAIFFA WITH JOHN RICHARDSON & DAVID METCALFE, NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING (2003); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982).

<sup>41</sup> See generally DAVID A. LAX & JAMES K. SEBENIUS, 3-D NEGOTIATION: POWERFUL TOOLS TO CHANGE THE GAME IN YOUR MOST IMPORTANT DEALS (2006); DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN (1986).

<sup>42</sup> Perhaps adherents of “transformative mediation” and “restorative justice,” see, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT (2005); HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE (2002), still would not be satisfied. The adversaries, after all, didn’t hug each other afterwards. But they did do a lot of business with each other.

<sup>43</sup> Professor Dwight Golann, in an important study empirically testing the “joint gains” hypothesis in mediated settlements of legal cases, has found that integrative “win-win” solutions happen rather infrequently. See Dwight Golann, *Is Legal Mediation a Process of Repair – or Separation? An Empirical Study, and Its Implications*, 7 HARV. NEGOT. L. REV. 301, 331 (2002).

fixing cases involved purely dollars, and the mediation challenge in those cases was handling the problems created by having a multitude of parties, on both sides of the case, with different viewpoints and sharply differing damages analyses.<sup>44</sup> In contrast, the telephone equipment antitrust cases were not purely about dollars; they cried out for a settlement that dealt with the manner in which the equipment suppliers and the phone companies would do business in the future.<sup>45</sup> The generic/branded pharmaceutical cases involved a mix of dollars and behavioral issues.<sup>46</sup> The credit card merchants' antitrust cases involved billions of dollars but even more significant behavioral issues.<sup>47</sup> On the other hand, *United States v. Microsoft Corp.* involved no dollars but immense structural and behavioral issues, while the follow-up private actions against Microsoft involved both dollars and commercial arrangements. These case variances, among others, require a great deal of mediation flexibility and adaptability. It is useful to understand the specific obstacles to settlement that these cases posed, in order to better understand the importance of structuring the roles of the participants in each mediation to meet the particular needs of each specific case.

#### I. MICROSOFT

The Microsoft antitrust enforcement action brought by the Department of Justice (DOJ) and joined by over twenty states is a good example of how careful attention to roles in complex mediation is critical to success.<sup>48</sup>

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<sup>44</sup> See *F. Hoffman-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155 (2004); *In re Vitamins Antitrust Class Actions*, 327 F.3d 1207 (D.C. Cir. 2003).

<sup>45</sup> See *Bell Atlantic Corp. v. AT&T Corp.*, No. 5-96CV-45 (E.D. Tex. Feb. 25, 1997) (order denying summary judgment).

<sup>46</sup> See *Bristol-Myers Squibb Co. v. Teva Pharms. USA, Inc.*, 288 F. Supp. 2d 562, 570 (S.D.N.Y. 2003).

<sup>47</sup> See *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96 (2d Cir. 2005).

<sup>48</sup> The information presented in this section is based on personal experience and the following sources: *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144 (D.D.C. 2002); *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004); Complaint, *Microsoft*, 87 F. Supp. 2d 30 (Civ. No. 98-1232), available at <http://www.usdoj.gov/atr/cases/f1700/1763.htm>; Motion of Defendant Microsoft Corp. To Consolidate, *Microsoft*, 87 F. Supp. 2d 30 (Civ. No. 98-1232), 1998 WL 34201999; Proposed Final Judgment, *Microsoft*, 231 F. Supp. 2d 144 (Civ. No. 98-1232), available at <http://www.usdoj.gov/atr/cases/f9400/9462.htm>; Revised Proposed Final Judgment, *Microsoft*, 231 F. Supp. 2d 144 (Civ. No. 98-1232), available at <http://www.usdoj.gov/atr/cases/f9400/9495.htm>; and Competitive Impact Statement, *Microsoft*, 231 F. Supp. 2d 144 (Civ. No. 98-1232), available at <http://www.usdoj.gov/atr/cases/f9500/9549.htm>. No confidential mediation information is disclosed here.

For additional treatment of the events discussed in this section, see generally Charles A. James, *The Real Microsoft Case and Settlement*, ANTITRUST, Fall 2001, at 58; John E. Lopatka & William H. Page, *Devising a Microsoft Remedy That Serves Consumers*, 9 GEO.

On May 18, 1998, the United States filed a civil antitrust case against Microsoft alleging that the company restrained competition in violation of the Sherman Act.<sup>49</sup> On the same day, twenty states and the District of Columbia filed a similar complaint, and the court consolidated the cases at Microsoft's request.<sup>50</sup> As it turned out, the consolidation of plaintiffs' claims sowed the seeds of difficulty for settlement on the back-end.

Microsoft was and is the world's largest supplier of computer software for personal computers; its Windows operating system has overwhelming monopoly power in the market for Intel-compatible personal computer operating systems. Microsoft also dominates the market for many software applications, most notably with its Office suite of products, which includes Word, Excel, and PowerPoint. In the mid 1990s, as the Internet became more and more important, Microsoft engaged in robust competition (to say the least) over control of this critical technology, heavily promoting its Internet Explorer browser against Netscape Navigator and other products. Competitors and some public officials believed that Microsoft crossed the line between lawful and unlawful competitive behavior in many ways, but mostly by taking actions designed to crush Sun Microsystem's JAVA programming language and the threat that its browser, Netscape, posed to Microsoft's operating system market dominance. However, the lawsuit was controversial from the start; some antitrust experts contended that it should never have been brought in the first place, because it penalized the most successful innovator of the silicon age for its success while ultimately hurting consumers.<sup>51</sup> Others maintained that the case was the most important antitrust enforcement action since the original telephone system cases.<sup>52</sup>

The essence of the complaint was that Microsoft unlawfully maintained its operating system monopoly by engaging in a variety of exclusionary, anticompetitive, and predatory acts in violation of section 2 of the Sherman Act.<sup>53</sup> The plaintiffs further alleged that Microsoft unlawfully attempted to monopolize the market for web browsers in violation of section 2.<sup>54</sup> They also argued that some actions taken by Microsoft as part of its attempt to protect its operating system monopoly, such as tying Internet Explorer to its operating

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MASON L. REV. 691 (2001); Joel Garreau, *Death and Microsoft*, WASH. POST, June 29, 2001, at C1; Jonathan Krim & Ariana Eunjung Cha, *9 States, D.C. Reject Microsoft Settlement*, WASH. POST, Nov. 7, 2001, at E1; Stephen LaBaton, *States Biding for Time To Study Microsoft Settlement Plan*, N.Y. TIMES, Nov. 2, 2001, at C1; Andrew Marshall, *Microsoft Faces Prospect of Death by Lawyer*, INDEPENDENT (London), Apr. 3, 2000, at 15; and John R. Wilke, *Judge Orders Urgent Talks on Microsoft*, WALL ST. J., Oct. 1, 2001, at B6.

<sup>49</sup> Complaint, *supra* note 48, at 1-2.

<sup>50</sup> Motion of Defendant Microsoft Corp. To Consolidate, *supra* note 48, at 1.

<sup>51</sup> See, e.g., Lopatka & Page, *supra* note 48, at 707-15.

<sup>52</sup> See, e.g., Garreau, *supra* note 48.

<sup>53</sup> Complaint, *supra* note 48, at 1.

<sup>54</sup> *Id.* at 2-3.

system and entering into exclusive dealing arrangements, constituted unreasonable restraints on competition in violation of section 1.<sup>55</sup> The original complaint also raised allegations of attempted monopoly leveraging.<sup>56</sup>

The case was first tried in the District Court for the District of Columbia before Judge Penfield Jackson. After the district court entered its findings of fact, but before it entered its conclusions of law, a four-month attempt at court-ordered mediation before Judge Richard Posner (unquestionably the country's preeminent antitrust jurist) failed to produce a settlement.<sup>57</sup> The district court ultimately concluded that Microsoft had violated both sections 1 and 2 of the Sherman Act.<sup>58</sup> However, the appellate court affirmed in part, reversed in part, and vacated the Final Judgment against Microsoft that had been entered below. In addition, Judge Jackson was disqualified for serious judicial misconduct during the trial, and the case was remanded to the district court, where it was reassigned to Judge Colleen Kollar-Kotelly for further proceedings.<sup>59</sup>

The decision of the appellate court had a profound impact on the case that was never completely appreciated by the anti-Microsoft crowd clamoring for a Judge Jackson supervised dismemberment of the firm. The appellate court affirmed the district court's finding that Microsoft had monopoly power in the operating system market, as well as the district court's conclusion that Microsoft had illegally maintained its operating system monopoly in violation of section 2 of the Sherman Act.<sup>60</sup> The appellate court also agreed with the district court that Microsoft had engaged in a variety of exclusionary acts designed to protect its operating system monopoly from the threat posed by software known as "middleware."<sup>61</sup> Microsoft undertook a variety of restrictions on Original Equipment Manufacturers (OEMs), tied Internet Explorer into Windows in a non-removable way while excluding competitors,

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<sup>55</sup> *Id.* at 6-7.

<sup>56</sup> *Id.* at 10.

<sup>57</sup> See Marshall, *supra* note 48 (reporting that Judge Posner described the differences between the parties as "too deep-seated to be bridged").

<sup>58</sup> *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 56 (D.D.C. 2000).

<sup>59</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 118-19 (D.C. Cir. 2001).

<sup>60</sup> *Id.* at 51.

<sup>61</sup> A slight technical diversion is necessary at this point. "Middleware" is software that sits on top of operating system software; various consumer applications can be designed to interact with the middleware regardless of what kind of operating system software is used. This is important to Microsoft's operating system market power because, absent middleware, the operating system serves as a platform for applications programs such as word-processing and spreadsheets. This creates a powerful "applications barrier to entry" to operating system competition: users do not want to invest in an operating system unless it is clear that it will support generations of many applications, and developers do not want to write or "port" applications for an operating system until there is a sizable market for it. On the other hand, if applications could be made to run on Netscape no matter what the operating system might be, applications developers would no longer be tied to a particular operating system (such as Windows). See *id.* at 53.

engaged in restrictive and exclusionary dealings with Internet Access Providers (IAPs), Independent Software Vendors (ISVs), and Apple Computer, and attempted to mislead and injure “JAVA” middleware that threatened Windows, all in violation of section 2.<sup>62</sup>

However, more importantly, the appellate court reversed and remanded the section 1 tying claim for reconsideration under the “rule of reason” standard (but with a discussion impenetrable to most people I have talked with, including antitrust experts).<sup>63</sup> The appellate court also reversed the section 2 charge of attempted monopolization directed at web browsers.<sup>64</sup>

Most significantly, the appellate court vacated the district court’s Final Judgment breaking up Microsoft into an operating systems company and an applications software company and imposing additional conduct restrictions, and remanded the case for further proceedings after concluding that the district court’s conclusions may have rested on liability determinations that had not survived appellate review, and in light of the fact that an evidentiary hearing on remedy was necessary in any event.<sup>65</sup> This ruling dramatically changed the posture of the case.

Consequently, upon remand, all the plaintiffs (federal and state) dropped their section 1 tying claim altogether and stated that they no longer intended to pursue a structural remedy – i.e., breaking Microsoft up into separate operating system and applications businesses as had previously been ordered by the district court.

The appellate court’s decision, and the reconfiguration of the case by the plaintiffs in response to that decision, significantly changed the nature of the proceedings. At this point in the case, of the various theories advanced at one time or another by the plaintiffs against Microsoft – monopolization of the Office suite of products, exclusive dealing, monopoly leveraging, attempted monopolization of the browser market, tying, and monopoly maintenance – only the last remained. Moreover, of the specific conduct related to the monopoly maintenance claim, the appellate court had rejected the plaintiffs’ arguments related to “course of conduct,” user interface, default browser, free Internet Explorer, customer bounty, free Internet access kit, exclusive dealings, and incompatible Microsoft JAVA. This holding left a narrower range of illegal conduct for a trial’s remedies phase.<sup>66</sup>

In late September 2001, Judge Kollar-Kotelly met with the parties and entered a scheduling order that strongly encouraged them to try to settle the

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<sup>62</sup> *Id.* at 59-78.

<sup>63</sup> *Id.* at 84.

<sup>64</sup> *Id.* at 81.

<sup>65</sup> *Id.* at 105.

<sup>66</sup> See James, *supra* note 48, at 58 (“[T]he *Microsoft* litigation that emerged from the court of appeals was a far narrower antitrust case than was originally brought . . .”).

case.<sup>67</sup> The original scheduling conference had been set for September 11, 2001, but had been postponed because of the terrorist attacks on the United States that day. Judge Kollar-Kotelly referred to the events of September 11 as making the benefits that would be derived from a quick resolution of the case “increasingly significant.”<sup>68</sup> However, the parties did not think that more mediation would be particularly helpful in light of their prior unsuccessful mediation experience with Judge Posner. Instead, they requested an opportunity to explore settlement through face-to-face negotiations. Judge Kollar-Kotelly acquiesced to this request and gave the parties two weeks to try to reach a negotiated resolution. Despite their intense efforts, the parties could not make much progress toward a negotiated agreement in the time allotted. Accordingly, on October 12, 2001, the parties reported to the court that their own negotiation attempts had failed and asked the court to appoint me as the mediator. After some due diligence by Judge Kollar-Kotelly regarding qualifications and conflicts of interest, the judge entered an order appointing me as mediator and giving us until November 2, 2001, to try to reach a settlement, after which she would move the case forward along the litigation track. A mere three weeks to settle such a complex case struck me as a nearly impossible task and posed the question: how does one begin an apparently gargantuan, seemingly hopeless mediation process?

I started the mediation process by reviewing the most pertinent court documents in the case, especially the appellate court’s decision reshaping the case and confidential submissions by the parties summarizing their settlement efforts and positions up to that point. These submissions were very helpful, but sobering at the same time. It was immediately clear to me that I needed help to settle this case. After some discussion, I persuaded the parties and the court to add my former law school classmate, law firm partner, and EnDispute co-founder, Jonathan Marks, to the mediation team.<sup>69</sup> From October 12 to November 2, Marks and I engaged in virtually nonstop mediation with the parties.

The mediation sessions were intense, protracted, detailed, and difficult. All three parties (Microsoft, the DOJ, and the states) participated fully. The mediation consisted of joint facilitated negotiation and drafting sessions, usually with four or five representatives from each side at the table; some ex parte caucuses between mediators and party representatives; some direct

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<sup>67</sup> For a discussion of the appropriateness of “vacatur on consent” in cases where the judge vocally encourages settlement, see Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994). For an interesting debate among prominent ADR scholars, see Frank E.A. Sander, H. William Allen & Debra Hensler, *Judicial (Mis)use of ADR? A Debate*, 27 U. TOL. L. REV. 885 (1996).

<sup>68</sup> See Wilke, *supra* note 48.

<sup>69</sup> EnDispute was the nation’s first provider of a full range of dispute resolution and management services. Marks is now a principal for MarksADR, LLC, located in Bethesda, Maryland. See MarksADR, <http://marksadr.com> (last visited Dec. 1, 2006).

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discussions between representatives of some or all of the parties (with and without the mediators); and time-outs for frequent consultations between the parties' mediation representatives and other members of their organizations.

Like all tough mediations, the process had its ups and downs – two steps forward, one step back. Tenacity should be one of the seven virtues if it isn't already.<sup>70</sup> The issues to be negotiated were so technical, the legal issues still so clouded, the future direction of the industry so unpredictable, and the stakes so high, that every sentence, word, comma, and parenthetical of a potential settlement stimulated excruciatingly detailed and concentrated discussion.

Slow progress was made until a crucial compromise was reached on a critical issue over which the parties had been at impasse. Ironically, this key issue was not even in the original case that had been brought by the government, tried, and appealed. It emerged much later in the case, because the ways in which people used computers and software changed over the course of the litigation. The mediation problem was that Microsoft's actions with respect to these key issues were not in the case that had been filed. Microsoft, not surprisingly, took the position that any settlement should not concern itself with issues that were not formally in the case. However, as a very practical matter, considering how technology had evolved, this issue had become an important interest for the governmental parties to address in any settlement. Some of the governmental parties viewed failure to obtain any relief on this issue as a major stumbling block. Finally, two days before the court-imposed deadline for mediation to conclude, the parties agreed that the settlement would address this issue. Some of the governmental parties saw Microsoft's concession on this issue as a major achievement. With this issue now resolved, the pace of negotiations on the remaining open issues rapidly accelerated. Settlement became imminent: each side now felt that it had achieved more than it might possibly obtain if the case went to judgment.

On the last day allowed for mediation, November 2nd, the mediators reported to the court that Microsoft, the United States, and most of the states had reached a settlement, which they presented to the court in the form of a Proposed Final Judgment.<sup>71</sup> Some of the states asked for and received additional time to review the Proposed Final Judgment, which had been reduced to final written form only in the early morning hours. It has been widely reported in the press that over the next few days, a furious lobbying effort ensued, with Microsoft and the other settling parties attempting to persuade all the states to join the settlement, while Microsoft's competitors, critics, and some state Attorneys General rallied their supporters against it.<sup>72</sup> Whatever occurred that weekend, on November 6th, a (slightly) revised

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<sup>70</sup> It isn't. The seven heavenly virtues (faith, hope, charity, fortitude, justice, temperance, and prudence) are also excellent guidelines for good mediation practice. I would still add tenacity.

<sup>71</sup> Proposed Final Judgment, *supra* note 48.

<sup>72</sup> *See, e.g.,* LaBaton, *supra* note 48.

Proposed Final Judgment was presented to the court.<sup>73</sup> Nine states and the District of Columbia indicated that they did not agree to the Revised Proposed Final Judgment and would continue to litigate.

According to the settling parties, the Revised Proposed Final Judgment addressed each of the illegal acts and practices found by the district court and upheld by the appellate court, and thus provided “prompt, certain and effective remedies for consumers.”<sup>74</sup> In their view, the Revised Proposed Final Judgment achieved the three key purposes of antitrust enforcement by:

- (1) *eliminating* Microsoft’s illegal practices;<sup>75</sup>
- (2) *preventing recurrence* of the same or similar practices;<sup>76</sup> and
- (3) *restoring* the competitive threat that middleware posed prior to Microsoft’s illegal acts.<sup>77</sup>

According to the settling parties, the Revised Proposed Final Judgment contained provisions addressing all the illegal conduct recognized by the appellate court – illegal agreements with OEMs, binding Internet Explorer to the operating system and thereby defeating end user choice, exclusive agreements with IAPs, illegal agreements with ICPs, ISVs, and Apple, and actions taken to exclude JAVA. More specifically, the Revised Proposed Final Judgment:

- (1) prevents coercion or retaliation by Microsoft against OEMs by assuring that they have contractual and economic freedom to decide whether to support or distribute non-Microsoft middleware products;<sup>78</sup>
- (2) assures that OEMs will make independent decisions about middleware and other software by requiring that Microsoft provide uniform licensing terms, including price, to the twenty largest OEMs;<sup>79</sup>
- (3) gives OEMs the freedom to configure PCs to feature and promote non-Microsoft middleware, including web browsers, in a variety of ways and places, including the desktop, and restricts Microsoft’s power to frustrate these desires;<sup>80</sup>

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<sup>73</sup> Revised Proposed Final Judgment, *supra* note 48.

<sup>74</sup> Competitive Impact Statement, *supra* note 48, at 3.

<sup>75</sup> See Revised Proposed Final Judgment, *supra* note 48, at 1-7.

<sup>76</sup> See *id.* at 7-9.

<sup>77</sup> See *id.* at 5.

<sup>78</sup> See *id.* at 1.

<sup>79</sup> See *id.* at 2.

<sup>80</sup> See *id.* at 2-3.

- (4) requires Microsoft to enable OEMs and consumers to customize their PCs with middleware of their choice, without interference or reversal, and in a manner in which the non-Microsoft middleware will be automatically launched;<sup>81</sup>
- (5) prevents Microsoft from withholding or providing in a discriminatory fashion its intellectual property licenses to thwart the remedies in the Revised Proposed Final Judgment;<sup>82</sup>
- (6) requires Microsoft to disclose all Application Programming Interfaces (APIs) needed by software developers and others in the computer industry to develop new middleware products to compete with Microsoft;<sup>83</sup>
- (7) prevents Microsoft from incorporating into Windows any features or functionality with which only its own servers can interoperate by requiring Microsoft to disclose the necessary communications protocols for client-server interop;<sup>84</sup>
- (8) prevents Microsoft from retaliating against software and hardware developers who use or promote competing middleware;<sup>85</sup>
- (9) prohibits Microsoft from entering into agreements that require parties to promote Microsoft products exclusively or in a fixed percentage;<sup>86</sup>
- (10) provides for strong, continuing enforcement of the Revised Proposed Final Judgment, including the power to seek criminal and civil contempt sanctions, and the imposition of three full-time, on-site, independent enforcement monitors;<sup>87</sup> and
- (11) extends the operation of the Revised Proposed Final Judgment from five years to seven years if Microsoft is found to have engaged in willful and systematic violations, in addition to any other relief the court deems appropriate.<sup>88</sup>

Needless to say, the non-settling parties found the Revised Proposed Final Judgment inadequate and full of limitations and loopholes that they believed would enable Microsoft to continue its anticompetitive behavior. Nine of the

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<sup>81</sup> *See id.* at 3.

<sup>82</sup> *See id.* at 6.

<sup>83</sup> *See id.* at 3.

<sup>84</sup> *See id.* at 3-4.

<sup>85</sup> *See id.* at 4.

<sup>86</sup> *See id.*

<sup>87</sup> *See id.* at 7-14.

<sup>88</sup> *See id.* at 14.

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non-settling states announced that they would proceed to trial on the remedies phase rather than join the settlement.<sup>89</sup>

Shortly after the Revised Proposed Final Judgment was filed, the DOJ filed its Competitive Impact Statement and published the Revised Proposed Final Judgment in the Federal Register, newspapers, and online pursuant to a provision of the Tunney Act.<sup>90</sup> During the sixty-day comment period that followed, the DOJ received over thirty thousand comments (many of them forwarded directly from competitors' websites).<sup>91</sup> Meanwhile, the states that did not join the settlement geared up for the trial on the remanded remedies phase. These states engaged Brendan Sullivan, a renowned Washington trial lawyer, to represent them, requested and received intensive discovery, and filed their own version of a Proposed Final Judgment seeking structural and conduct relief far beyond that contained in the Revised Proposed Final Judgment reached by the settling parties. The district court thus conducted a two-track process – review of the mediated settlement on one track and trial of the remedies phase with the non-settling parties on the other – affording full due process protections to both groups.

The district court held a Tunney Act hearing on the settlement as required, and conducted the separate trial sought by the non-settling parties. In the end, in a detailed and elaborate opinion, the court approved the mediated settlement virtually in its entirety, and denied almost all the additional relief sought by the non-settling parties.<sup>92</sup> Subsequently, Microsoft reached settlements with all of the remaining states except Massachusetts, which pursued its appeal of the settlement and the remand trial outcome. The appeal was argued in November 2003 and eventually denied in 2004 in an opinion that resoundingly affirmed the district court's decision and the fairness and adequacy of the mediated settlement. The appellate court took the extraordinary step of not only affirming the mediated settlement in its entirety, but also figuratively standing up and applauding: "Far from abusing its discretion, therefore, the district court, by remedying the anticompetitive effect of commingling, went to the heart of the problem Microsoft had created, and it did so without intruding itself into the design and engineering of the Windows operating system. We say, Well done!"<sup>93</sup>

Notwithstanding the appellate court's standing ovation for the solution achieved in the judicially supervised mediation process, the controversy that marked this case from before its filing continues to this day, albeit in somewhat muted tones. Microsoft, the DOJ, the settling states, and many commentators regard the Final Judgment as an appropriate outcome for a case

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<sup>89</sup> See Krim & Cha, *supra* note 48.

<sup>90</sup> See 15 U.S.C. § 16(b)-(h) (2000).

<sup>91</sup> These comments are available online at [http://www.access.gpo.gov/su\\_docs/aces/usvms/msfr.html](http://www.access.gpo.gov/su_docs/aces/usvms/msfr.html).

<sup>92</sup> See *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 202 (D.D.C. 2002).

<sup>93</sup> *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1210 (D.C. Cir. 2004).

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that was problematic from the beginning. Some of Microsoft's competitors, critics of the current administration, some of the Attorneys General from the initially non-settling states, and many commentators still regard the Final Judgment as inadequate.

Reflecting on the Microsoft mediation from a distance, one essential element of the mediation process, recognizable from the start, was that mediation would only succeed if the mediators focused on facilitating solutions to negotiating barriers and resisted the temptation to control everything and impress their own evaluation or solution on the parties. Even for two mediators known for their willingness to engage in highly evaluative mediation, this was easier than it seems. At the time of this mediation, nearly every academic and industry commentator had a view on the case, and sometimes it seemed as if they all published them. It would be unrealistic for the mediators not to have formed some substantive opinions on the case and perhaps some views on how it should be resolved. But the Microsoft antitrust mediation called for a much more complicated and nuanced facilitative role, in which the key to success was orchestrating the talents, interests, influences, and decisions of the many others involved in the case, rather than an evaluative, highly directive role. Stepping back from control of the mediation process in order to move forward with the process – renouncing power to have more power – was critical to the success of the process. For mediators who had dedicated most of their professional careers to the development and refinement of mediation practice, obviously this was “The Big One,” and both mediators were highly motivated to be successful, as measured by getting a settlement. But to get a settlement, each participant in the process had to be respected and permitted to fulfill his proper role, regardless of whether doing so was consistent with what the mediators may have had in mind.

The Microsoft assignment thrust the process of mediation and the mediators into the spotlight, and raised numerous challenging problems and questions that bear on several different aspects of law – antitrust law and policy, federal courts, civil procedure, evidence, and alternative dispute resolution (ADR) – as well as high technology, communications, and politics. The issues that the case raises for ADR, antitrust, and the judicial system are numerous and fascinating. However, perhaps the most important challenge for these mediators was to demonstrate, on behalf of all professional mediators, what non-judicial, non-celebrity, professionally trained mediators could add to a case in which settlement had eluded the esteemed judge/mediator/antitrust expert Richard Posner and a large cast of high-priced legal and business talent.

Naturally, as the mediator I express no opinion on the substantive merits of the case or the settlement. However, as Jonathan Marks and I wrote in an Op-Ed. piece in the *Boston Globe* shortly after the mediation, we regard the mediation as a success for substance-neutral reasons: all of the necessary information relevant to the dispute was presented and before the parties, all of the parties had an opportunity to participate fully, and all of the parties made

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an informed choice about whether to settle and on what terms.<sup>94</sup> This is all that can be expected from a voluntary, non-binding process. The fact that some states chose not to accept the settlement initially, and that Massachusetts chose to contest the settlement all the way through the judicial process, is a *positive* rather than a negative aspect of the mediation. It underscores the voluntary, non-binding nature of mediation that very carefully preserves the litigants' legal rights while giving them the opportunity to pursue consensual relief. Massachusetts' appeal served the very important and valuable function of testing the fairness of both the judicial rulings on the settlement and Massachusetts' request for additional remedies, as well as the legitimacy of the mediation process. In the end, Massachusetts' appeal strengthened the settlement by subjecting it to full judicial scrutiny. Since the implementation of the settlement, the district court has exercised continuing jurisdiction over the case and has conducted regular status conferences to ensure that the Final Judgment is being implemented effectively. While there have been some relatively minor implementation issues for the court, the settlement appears to be working as planned, with the innovative Technical Committee role receiving especially positive reviews.

When high-profile mediations succeed, the mediator gets a lot of credit. But the real explanation for the success of the Microsoft mediation is that each participant in the process played his or her proper role.

The *lawyers* in the mediation were focused exclusively on trying to negotiate a fair and effective settlement. For the most part, the lawyers in the mediation were not the courtroom lawyers. This separation of roles allowed the trial lawyers to focus on the litigation process while the mediation lawyers focused on settlement; it eliminated the tensions and confusions that might exist if the same lawyers tried to fill both roles. However, the mediation team lawyers were very well versed in the applicable law and had participated in the case since its inception. The mediation teams could appreciate the ebb and flow of the relevant legal standards as the district court, and subsequently the appellate court, struggled to apply existing antitrust doctrine to uncharted factual situations. The mediation teams advised their clients, as well as negotiated for them, without saber rattling or posturing, and were prepared to tackle the difficult, sometimes seemingly impossible task of putting down in words technical and commercial concepts that defied simple explication.

The *technical experts* – “software geeks” to most of us – with whom every nuance of the settlement discussions had to be vetted before even the technically savvy legal teams would sign off on a provision helped ensure that contemplated solutions were feasible, and promoted the technical interests important to their party. There were actual rocket scientists involved, but the technical wizards understood that to some extent we were all making sausage. In other words, the experts accepted that they were working in a technical

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<sup>94</sup> Eric D. Green & Jonathan B. Marks, Op-Ed., *How We Mediated the Microsoft Case*, BOSTON GLOBE, Nov. 15, 2001, at A23.

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environment constrained by the need to find a legal settlement that could be practically implemented and overseen by the court.

The *principals* understood that they needed input from their legal and technical experts, and that they had to recognize the reality created by the appellate court's decision and the urgings of the new district court judge on the case. While striving to achieve the bottom line necessities of the shareholders, managers, and citizens they represented, the principals knew that they also needed to maintain a process of discussion, accommodation, persuasion, and compromise with "adversaries" whom they would rather have beaten than settled with. Principled, informed, unemotional leadership from the top is almost always essential in this type of mediation.

The *court* understood that settlement was at best "iffy" and that there were high-stakes legal issues that would probably require the judge to hear evidence, consider legal arguments, and make difficult rulings on the merits, but that settlement, if it could be found, was ultimately in the parties' and the country's best interest. Ensuring that mediation fit a "procedural justice paradigm" would serve some of the court's most important goals: "delivering justice, delivering resolution, and fostering respect for the important public institution of the judiciary."<sup>95</sup> Judge Kollar-Kotelly knew that she had to balance these competing considerations by first allowing direct negotiations and then, only if negotiations were unsuccessful, intervening to appoint a mediator, while maintaining the purity of the judicial process in the event that she had to conduct a trial and make rulings. She managed this tightrope act by (a) permitting a period of direct negotiation, (b) appointing a mediator when negotiations failed to produce a settlement, (c) encouraging the mediation effort and monitoring its progress, and (d) remaining completely separate and apart from any of the substantive negotiation and mediation efforts. Indeed, the Microsoft case is an example of the classic paradigm of total separation of court-appointed mediation from the adjudication of the case. There was no active judicial involvement in the actual settlement process. The court initiated mediation, ensured that mediation would happen, and then stood back; Judge Kollar-Kotelly let the mediators mediate while she maintained control over the adjudication. Never the twain did meet.

In the unique context of the Microsoft case, this was the correct approach and, from a dispute resolution point of view, the great genius of Judge Kollar-Kotelly. She recognized the advantages of a settlement worked out between the warring behemoths of the United States and the twenty or more states on the one hand, and Microsoft on the other. Any agreement would have to constrain Microsoft's use of its monopoly power over operating systems in an extremely fast-moving and innovative technological arena. Fashioning a remedy that could achieve the objectives of antitrust enforcement while not injuring consumers and innovation would be extremely difficult for a court.

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<sup>95</sup> Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do with It?*, 79 WASH. U. L.Q. 787, 792 (2001).

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Judge Kollar-Kotelly recognized that a settlement worked out between the parties could maximize benefits to the public by better balancing controls with freedom to innovate. However, the court also realized the need to remain purer than Caesar's wife in the public eye, given the immense public interest in the case and the disqualification of the initial district court judge. If the case had to be tried on remedies or retried on any of the underlying liability issues, it would be important for the court to be perceived as uninvolved and uninfluenced by settlement negotiations. Further, any settlement would have to be approved by the district court; any involvement by the judge in fashioning a settlement that she would have to review would frustrate the purposes of the review process and probably disqualify the judge.

The Microsoft case, from its inception through the 2000 presidential campaign, the court's initial decision, the settlement, and even now, has raised political as well as legal issues. As evidenced by the recent public hullabaloo over rumored attempts to mediate and settle the government's lawsuit against the tobacco companies,<sup>96</sup> the line between the legal process and the political process is often blurred – if not by the parties, then perhaps by the very groups that accuse the parties (rightly or wrongly) of doing so. When this happens, a mediator has no choice but to accept the political pressure as a fact and deal with it, without letting it influence the mediator's neutral role. However, political pressure can be a major mediation obstacle relatively impervious to mediative solutions, demanding outcomes that satisfy the major political players involved in the mediation. Therefore, in the Microsoft case it was especially important that the *mediators* were flexible and humble enough to know that in the three weeks they had to mediate the case, they couldn't possibly contribute more than a tiny thimble of substance to the content of a settlement. Despite our reputation as highly evaluative mediators, Jonathan Marks and I instantly understood how truly ignorant we were when it came to the technical, legal, and political break points in the case. Not for a second did we think that we would simply figure out the correct solution (which for some reason had eluded everyone else), and then tell the parties where and how the case should be settled. Instead, we knew that we would have to put away our evaluative skills, tools, and tricks, and bring out the facilitative faculties in full force. Meeting management, agenda making, communication clearing, and fair presiding took priority over steering, evaluating, manipulating, and persuading. Most of all, Marks and I understood that the only way this case would settle was if everyone played their proper role; only in that way could the barriers that had prevented settlement be overcome. In this respect, the mediators were fortunate to come into the case at a time when all of the other players necessary to reach a settlement were prepared to play their necessary roles. Timing is everything in mediation.

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<sup>96</sup> See Myron Levin, *Judge May Pursue Tobacco Settlement*, L.A. TIMES, June 18, 2005, at C1.

## II. ENRON/ANDERSEN

At the end of the first week of the non-settling states' remedies trial in the Microsoft case, as I pondered whether and how the nine states and Microsoft would find a way back to the negotiating table or the mediation room, I received a telephone call from two judges asking me to mediate the claims against Enron's auditor, Arthur Andersen.<sup>97</sup>

The Enron/Andersen case, in some ways, was even more of a challenge to mediate than the Microsoft case, but for different reasons. As was later reported, Jonathan Marks and I ultimately had to inform the court that, except for a settlement between the plaintiffs and Andersen Worldwide (Arthur Andersen's Swiss parent), the parties were at an impasse.<sup>98</sup> The impasse was largely caused by the parties' inability to resolve some important issues created by the proportionate liability provision of the 1995 Private Securities Litigation Reform Act (PSLRA).<sup>99</sup> In addition, by the time mediation started, Arthur Andersen had been indicted for obstruction of justice and was facing a criminal trial that clearly threatened its continued existence as a "Big Five" international accounting firm, as well as massive claims from many quarters for its audits of Enron and others. At the same time, its international components, tax, and consulting practices were either up for sale or withdrawing and making separate deals while its captive insurance program itself faced insolvency. If timing is everything in mediation, for Enron/Andersen the mediation effort was both too late and too early. The mediation effort was too late for Arthur Andersen, which was already fatally wounded by the government's indictment of the firm, and too early for the shareholder plaintiffs class – the class action attorneys' focus on the billions of dollars worth of claims against the investment banks virtually precluded a front-end settlement with Arthur Andersen, because it would be too risky under the PSLRA's proportionate fault, judgment reduction provision.

Enron/Andersen is an example of a situation where legal and economic obstacles created a settlement barrier based on sequence or timing problems.

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<sup>97</sup> The two judges were U.S. District Judge Harmon of Houston, who presided over *Newby v. Enron Corp.* (*In re Enron Corp. Sec.*), Civ. No. H-04-0087, 2005 U.S. Dist. LEXIS 41240 (S.D. Tex. Dec. 22, 2005), and U.S. Bankruptcy Judge Gonzalez of New York, who presided over *Enron Corp. v. Arthur Andersen LLP* (*In re Enron Corp.*), No. 01-B-16034, 2004 Bankr. LEXIS 2261 (Bankr. S.D.N.Y. Oct. 28, 2004). The information presented in this section is based on their written opinions and on my personal experience. No confidential mediation information is disclosed here.

For further treatment of the events described in this section, see Kurt Eichenwald, *Enron's Many Strands: The Investigation; Andersen Charged with Obstruction in Enron Inquiry*, N.Y. TIMES, Mar. 15, 2002, at A1; Jonathan D. Glater, *Banks Balked as Andersen Tried To Get a Settlement*, N.Y. TIMES, May 3, 2002, at C1; Jonathan Weil, *Mediator Tells Court of Impasse in Andersen Class-Action Talks*, WALL ST. J., May 2, 2002, at A6; and *\$168 Million Gets Closer to Enron Investors*, CHI. TRIB., Apr. 12, 2005, at C3.

<sup>98</sup> See Weil, *supra* note 97.

<sup>99</sup> 15 U.S.C. § 78u-4(f) (2000).

These problems can be severe to the point of unsolvable. In this case, these problems were partially overcome through a relatively minor settlement covering only the offshore Andersen Worldwide component.<sup>100</sup> Unfortunately, the opportunity to resolve more of the Enron/Andersen case was lost. To those who practice in the securities fraud litigation arena, it was indeed ironic that the judgment reduction provision of the PSLRA, passed at the behest of the accounting industry to insulate itself from excessive liability for securities fraud lawsuits, actually prevented Andersen from being able to settle its Enron-related liabilities at a crucial time. The law of unintended consequences strikes again!

More recently, and with great difficulty, we were able to find a potential solution to the PSLRA judgment reduction problem in mediating a settlement between the Enron creditors and shareholders on the one hand and the outside Enron officers and directors on the other hand.<sup>101</sup> This settlement managed to preserve for settlement what remained of Enron's officers' and directors' liability insurance while at the same time providing for some personal contributions from defendants based on their sales of Enron stock – a fairly unusual attribute of securities class action outcomes. The lesson from this later settlement is that given enough and the right time, mediation can find a solution to nearly any problem.

The judge's role in the Enron mediation was to push hard for the appointment of a mediator, to keep as much pressure on the parties to settle as was consistent with a separate and detached judicial role, and to accommodate, where possible, the settlement process over an extended period of time.<sup>102</sup> Sometimes, however, the judge's role has to be larger than it was in the Microsoft and Enron cases.

### III. MASTERCARD/VISA

The MasterCard/Visa antitrust case, which settled in May 2003, presents an interesting contrast to the mediation of the Microsoft and Enron cases.<sup>103</sup> In many respects, the MasterCard/Visa case was even bigger, more complex, and more difficult to settle. The issues at stake arguably affected even more people

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<sup>100</sup> See *Newby v. Enron Corp.*, 394 F.3d 296, 302 (5th Cir. 2004) (approving a settlement between plaintiffs and Andersen Worldwide Societe Cooperative).

<sup>101</sup> See *\$168 Million Gets Closer to Enron Investors*, *supra* note 97.

<sup>102</sup> This accommodation included, for example, opening the courthouse and making judicial chambers available for mediation even on the weekends.

<sup>103</sup> The May 2003 settlement was approved by Judge Gleeson in *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96 (2d Cir. 2005). The information presented in this section is based on that opinion and on personal experience. No confidential mediation information is disclosed here. For additional treatment of the events discussed in this section, see Jennifer Bayot, *Final Pact Approved in Long-Running Debit Card Litigation*, N.Y. TIMES, Dec. 20, 2003, at C4.

than those in the Microsoft case – everyone who uses a credit card or a debit card, the thousands of banks that issue them, and the millions of merchants that accept them. It involved a class action of five to seven million merchants, big and small, such as Wal-Mart, Sears, Safeway, Circuit City, The Limited, and Bernie’s Army-Navy Store, suing the credit card behemoths MasterCard International and Visa U.S.A. for allegedly violating antitrust laws by forcing retailers to accept their debit cards as a condition of being able to accept their credit cards – a classic tying arrangement according to the plaintiff class, with attempted monopolization counts thrown in for good measure. According to press reports and official filings, the eventual settlement of this case resulted in three *billion* dollars in payment by MasterCard and Visa to the plaintiff class – a record-shattering amount for any antitrust settlement – as well as fundamental structural changes in the way the credit card companies do business, with potential economic ramifications for merchants and the bank members of the credit card companies far in excess of the amounts paid in monetary compensation.<sup>104</sup>

The case was in litigation for years, one theater of battle in a world war waged between consumers’ and merchants’ lawyers, public officials, and the banks and credit card companies over a little-understood but critical component of our economic system. The federal district judge in charge of the case, Judge John Gleeson, encouraged the parties to discuss settlement and to consider mediation, but the parties remained so far apart in their assessments of the merits of the case that no significant settlement dialogue ensued until the final stages of pretrial preparation. At that point, the parties privately engaged in mediation. However, the legal differences were still so extreme and the stakes so huge that settlement seemed unlikely until the Court ruled on a critical motion for partial summary judgment, dealing with market definition and monopoly power, three weeks before the case was set to start trial.<sup>105</sup> This judicial ruling was the necessary spark that ignited serious and intense mediated settlement efforts, which continued almost uninterruptedly through jury selection and into the first week set for trial, eventually culminating in a settlement with MasterCard and, soon thereafter, with Visa. But the decision on the summary judgment motion alone was not enough to produce a settlement. The parties were still far apart even after the court’s ruling, primarily because of differing assessments of likely jury trial outcomes.

Unlike the Microsoft case, the trial judge in the MasterCard/Visa case, at the mediators’ suggestion and with the parties’ explicit consent, played a role in the subsequent mediated settlement discussions by hosting and participating in mediation sessions in the courthouse on weekends and in the evenings. Given that there were no prior findings of fact or appellate opinions on the issues in

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<sup>104</sup> See Bayot, *supra* note 103.

<sup>105</sup> See *In re Visa Check/MasterMoney Antitrust Litigation*, No. 96-CV-5238, 2003 WL 1712568 (E.D.N.Y. Apr. 1, 2003) (order granting plaintiffs’ motion for summary judgment in part, denying it in part, and denying defendants’ motions for summary judgment).

the case, as there had been in the Microsoft case, the mediators understood that the impressions of the trial judge as a kind of “thirteenth juror,” though tentative and subject to change after hearing the evidence, could be extremely valuable to the parties in assessing their “no agreement alternatives” and hence their settlement positions. This was a role that no one, not even objective, experienced neutrals such as the mediators, could fill as well as the actual trial judge. It was the mediators’ challenge to recognize this ingredient as the necessary catalyst to settlement and then to bring together the remaining parts of the mixture – the parties’ legal advisors and trial lawyers, economics experts on damages, and the key principals necessary to make the hard settlement decisions on both sides. Critically, the parties were willing to allow the trial judge to participate in the mediation in this manner and the trial judge was willing to do so.

The MasterCard/Visa case lies at the opposite end of the spectrum from the Microsoft case in terms of judicial involvement in the mediation process. Microsoft and MasterCard/Visa were both successful mediations, but the judges played very different roles. Of course, no sovereigns were involved in the MasterCard/Visa case, which may partially explain some of the differences in judicial involvement, but the public policy and structural reform issues were just as significant as those in the Microsoft case. The different approaches leading to similar success are most likely attributable to, first, an understanding by the mediators and the parties’ representatives of the subtle but critical contextual attributes of the cases and the barriers to settlement, and, second, the fashioning of a mediation process that directly addressed those barriers without compromising critical system or party interests. In Microsoft, this meant keeping the judge out of the mediation process; in MasterCard/Visa, it meant bringing the judge into the mediation process. In both cases, it meant having a judge who encouraged and supported mediation and recognized the appropriate judicial role, and also having parties, lawyers, and experts who played their proper roles appropriately and with skill. When mediation works, as it did in these cases, the mediators are more like conductors of a symphony, and the music is the result of the harmonious instruments from the many musicians in the pit. When the judge comes on stage, as in MasterCard/Visa, it is as the soloist; when the judge stands off stage, it is as the impresario of the concert hall. In either case, the judge plays a highly important role in the mediation process.

The contrast in judicial involvement in arguably two of the most successful multi-party, complex mediations shows that judicial involvement in mediation should not be constrained by a hard and fast rule dictating either no involvement or intense involvement, but rather should be dictated by the needs of the case, the parties involved, and, to a certain extent, the likelihood of success, preserving the judge for trial in especially contentious cases.

## IV. TOXIC TORTS

Two quite different examples of the importance of role recognition in mediating “impossible” megacases are the Toms River, New Jersey childhood cancer cases and the Anniston, Alabama Polychlorinated Biphenyls (PCB) cases.<sup>106</sup>

The Microsoft case may have been “The Big One” in terms of public profile, but the Toms River childhood cancer mediation was in many respects a more significant mediation breakthrough and achievement. The residents of Toms River had waged a lengthy and contentious battle against several corporations that allegedly had contaminated the groundwater (and hence the drinking water) and the air by releasing various chemicals from manufacturing facilities located in the town. Mass tort litigation ensued, involving thousands of plaintiffs seeking damages for personal injuries, medical monitoring, and property damage; there were also regulatory actions by state and federal environmental agencies. In the midst of this ferocious battle, sixty-nine families with children who allegedly contracted cancer from chemical exposure banded together to find answers and seek redress. It would have been easy and conventional for the families to join one of the many lawsuits threatened (and later filed), or, for that matter, to start their own lawsuit. But despite their pain and anger and the ready availability of professional gladiators, they did not. Guided by an extraordinary team of highly capable and experienced plaintiffs’ lawyers, including Jan Schlichtmann of *A Civil Action* fame,<sup>107</sup> the families instead decided that it was more important to try to find out what was really happening to their children and why, and that some process other than litigation would be more likely to provide those answers.

In the Toms River case, the families and the companies did not litigate, but they also did not enter into “mediation,” at least not at first. Rather, the families and the companies decided to engage a neutral mediator with experience and expertise in process design to help them think through what

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<sup>106</sup> The information presented in this section is based on personal experience. No confidential information is disclosed here. For more details on the Toms River mediation, see Tom Avril & Jennifer Moroz, *Toms River Families Settle Cancer Claims*, PHILA. INQUIRER, Dec. 14, 2001, at A1; Iver Peterson, *Firms Settle with Parents of Ill Children*, N.Y. TIMES, Dec. 14, 2001, at D5; and *Families and Companies Settle Toms River Cancer Cluster Case*, ANDREWS HAZARDOUS WASTE LITIG. REP., Jan. 4, 2002, at 10, available at Westlaw, 22 No. 7 ANHWLR 10.

For more on the PCB mediation, see *Owens v. Monsanto Co.*, 161 F. App’x 875 (11th Cir. 2006); *Ex parte Monsanto Co.*, 794 So. 2d 350 (Ala. 2001); Rachel Melcer, *Solutia Settlement*, ST. LOUIS POST-DISPATCH, Aug. 24, 2003, at A15; Val Walton, *State’s PCB Case Settled: Tentative \$600 Million Deal Involves 21,000*, BIRMINGHAM NEWS, Aug. 21, 2003, at A1; *\$700 Million Settlement in Alabama PCB Lawsuit*, N.Y. TIMES, Aug. 21, 2003, at C4; and *The Inside Story: Anniston, Alabama*, <http://www.chemicalindustryarchives.org/dirtysecrets/annistonindepth/intro.asp> (last visited Dec. 1, 2006).

<sup>107</sup> JONATHAN HARR, *A CIVIL ACTION* (1995); *A CIVIL ACTION* (Touchstone Pictures 1998).

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kind of process they should follow. The result of those discussions, again, was not mediation. Instead, the families and the companies decided to engage in a moderated scientific dialogue in which they each would bring the best scientific knowledge they could obtain on subjects such as hydrology, drinking water distribution modeling, toxicology, epidemiology, occupational hygiene, childhood medicine, and public health. They agreed to conduct this scientific dialogue in a non-adversarial manner and to table any litigation that might throw the process off track. They also agreed to have the process moderated by the mediator who, for these purposes, was described not as a “mediator” but as the “Institutional Memory.”

The scientific dialogue took place for about twelve total days spread out over several months. While the presentations by, and questioning of, various experts focused on tough scientific and factual issues, and exposed expected sharp differences of opinion on transport, toxicity, and causation, the participants still managed to implement the scientific dialogue in the spirit in which it was conceived. In fact, the parties and lawyers who designed and engaged in the Toms River scientific dialogue were able to reverse the proportion of “heat” and “light” that usually obtains in such mass tort cases. Much was learned, much was acknowledged, and even though many differences remained, a much greater appreciation of the fundamental scientific and factual issues was obtained by all participants through a civil and respectful process.

But what then? This question obviously nagged at the mind of the mediator, more and more so as the scientific dialogue process neared its completion. What would this process produce beyond information and perhaps greater understanding? What would be the result for the families and the companies? How could the process be advanced to produce something that would feel like closure? What was the Institutional Memory’s responsibility as far as guiding the participants to the next phase? The participants had not asked for mediation and had not agreed to engage in it. Did this mean they did not want it? Did this mean they did not need it? These questions needed answers. There was no judge to goad the parties toward settlement or mediation. At the very least, the neutral serving as the Institutional Memory had to ask the questions and help the participants find the answers.

As the scientific dialogue entered its final sessions and neared conclusion, there was a slow turning of the wheel by the parties toward the possibility of a facilitated resolution under the auspices of the neutral, now finally shifting in his role from Institutional Memory to mediator. This move also required the participants to shift their roles. Finding and playing the right role in mediation in the first place is hard enough; changing roles in midstream is immeasurably more difficult. It risks upsetting fixed expectations at every turn. It requires overcoming the inertia that stymies change of any kind. It constantly demands that old dogs learn new tricks. The chance of success seemed small.

Somewhat surprisingly, however, settlement of the Toms River childhood cancer cases was reached relatively easily through mediation, with no judicial

involvement whatsoever. The reason for the success of the Toms River mediation process was that it was grounded in the scientific information exchange that preceded actual mediation. When mediation came, the parties' first settlement proposals were based so much on the scientific exchange that they were immediately perceived as reasonable, legitimate, coherent, and even elegant. When it became clear that both sides were operating with reciprocal reasonableness based on the scientific and technical information exchanged by the experts, the remaining differences between the parties were bridgeable through the use of conventional mediatory processes. The only judicial involvement in the Toms River childhood cancer cases was the shadow of law.<sup>108</sup>

In the Toms River childhood cancer cases, the participants overcame the low odds of success because the initial conceptual design of the scientific process was so well conceived and then implemented by the many people who played key roles in the scientific dialogue that it created huge positive momentum and good will, which carried the participants through the transition from dialogue to resolution. Incrementally, the mediator introduced suggestions and steps that might lead to a resolution growing integrally out of the scientific process. When these suggestions were positively received, the foundation was laid for more conventional mediatory procedures that ultimately led to a complete global resolution of all the childhood cancer cases, utilizing a methodology founded on the scientific dialogue in which the participants had so strongly invested. Once the parties entered the conventional mediation phase of the process, resolution was almost inevitable. The process had begun so well, and had been so thorough in its execution, that it did what litigation could never do; it produced knowledge, if not final answers, that a trial was unlikely to provide. All of the participants played their assigned roles – parents, plaintiffs' lawyers, experts, defense lawyers, company representatives, and the Institutional Memory turned mediator. Omitting any of these roles would probably have doomed the process. Unlike the Microsoft, Enron, and MasterCard/Visa mediations, there was no judicial role of any kind; litigation had not even been instituted in the childhood cancer cases (as opposed to the litigation involving thousands of adult claims). Instead, scientific discussion and party participation provided a framework for voluntary resolution outside of court.

In contrast to the complete lack of judicial involvement in the Toms River childhood cancer cases, litigation over alleged chemical contamination has raged in the Anniston, Alabama community at least as fiercely, if not for quite as long, as in Toms River, actively involving several judges in mediated settlement efforts. The chemical plant on the western side of town had manufactured nearly all of the PCBs made in the United States for over

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<sup>108</sup> See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). Ultimately, the minors' settlements required court approval.

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seventy years, most of the time while part of the Monsanto Company. In good times, the plant provided employment for hundreds of workers and a living for their families. However, the allegedly harmful effects of PCBs became known with advances in medicine and public health, and eventually, in the 1970s, manufacture and distribution of these chemicals ceased. According to the residents of Anniston, the harm created by the discharge of PCBs into the community for those many years remained. Community leaders concluded that what appeared to be an unnaturally high incidence of health problems was related to the PCB-laden waters released into the ditches leading from the plant and flowing into the creeks and rivers of the area, as well as to PCB particles in the dirt and dust blown from the plant and landfill overlooking the town.

Different groups of lawyers competed to represent the citizens of Anniston. The first wave of cases consisted of three different groups: downstream riparian landowners complaining of damage to their fishing grounds, who were the first to settle; about 2000 residents on one side of the plant complaining of property damage and seeking medical monitoring but not alleging any present personal injuries, who sued in federal court; and about 3500 residents, mostly on the other side of the plant, complaining of property damage, nuisance, and personal injuries and also seeking medical monitoring and an injunction requiring remediation, who sued in state court. At the same time, state and federal environmental agencies were pursuing regulatory remedies and a consent decree in federal court. The tensions between these various groups, all fighting the company, were often as great as the tensions between them and the company. Further, by the time the litigation matured, the old Monsanto Company had essentially split into three pieces, with the potential for tensions as great as those among the groups of plaintiffs.

After settling with the downstream property owners, the companies attempted to resolve the state and federal court property damage/personal injury cases. Separate mediations were attempted with different mediators but, for a variety of reasons, mediation was unsuccessful in the state cases. However, after a very difficult mediation effort, the federal cases settled. To the plaintiffs in the state cases, this settlement obviously set a benchmark that could be relevant in the future. Indeed, as reported in court decisions, this settlement contained an explicit most-favored-nation provision tied to the average payment to plaintiffs, which could be triggered as a result of future settlements. Meanwhile, the state court cases went to trial, resulting in a liability verdict against the companies and a string of individual verdicts for plaintiffs in individual cases tried to the same jury under agreed, drastically streamlined procedures. The individual verdicts in these cases averaged many times more than the average of the federal court settlements, but were potentially vulnerable to appeal and reversal and were certain to be considerably delayed before they would ever become final.

Into this incendiary scenario arrived Johnnie Cochran (of O.J. Simpson criminal defense fame), Jere Beasley (arguably the real "King of Torts" in Alabama), and a posse of other formidable personal injury lawyers. In the

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aftermath of a large public meeting, moved by what they perceived as a community crying out for justice, the Cochran-Beasley group filed nearly eighteen thousand new cases in federal court. This second wave of cases threatened to drown the Monsanto spin-off company that had inherited the first line of responsibility for the Anniston liabilities; it now found itself unable to obtain financing in the capital markets with the overhang of this massive litigation. Chapter 11 was a real possibility (and ultimately a reality). A bankruptcy filing would result in an automatic stay of all the Anniston cases, state and federal, at least against the entity that filed for protection, if not against all the defendants. Delay, uncertainty, and chaos loomed, creating some common ground for settlement.

One problem for the companies and the federal court plaintiffs was the conflicting benchmarks produced by the first federal court mediated settlement and the trial verdicts being handed down weekly in the streamlined state court trials. The disparity in the values produced by these arguably competing precedents made it extremely difficult to value the eighteen thousand new federal cases for settlement. This difficulty was increased by the relative lack of information about many of the eighteen thousand new plaintiffs, disagreements about the vulnerability of the higher state court verdicts to reversal on appeal, and uncertainty about what effect the entry of a consent decree in the Environmental Protection Agency remediation action would have on the property damage cases.

This surely was a mediation nightmare. Too many factors outside the mediator's purview, let alone his control, or even the parties' and courts' control, created blockages to settlement. For example, even if the plaintiffs' lawyers representing the eighteen thousand new federal cases could be persuaded to concede *sub silentio* that the average value of all of these new cases was within or close to the average value of the first federal settlement, would they agree to such a settlement if the higher state court verdicts survived appeal? The possibility that the plaintiffs' lawyers would be criticized for settling for less than the state court awards might retard the negotiation process. Thus, settling the eighteen thousand new federal court cases by themselves appeared nearly impossible in these circumstances.

What to do? Again, role analysis is critical to the solution. The state court cases were preventing the federal cases from being settled. Therefore, the state court cases had to be addressed before mediation in the federal cases could continue fruitfully. However, the state court cases were not in the mediation. The solution seemed obvious: to have a chance at resolving the eighteen thousand federal cases, the scope of the dispute had to be *enlarged* to include the state court cases. The problem had to be made bigger, not smaller, in order to be solved. The state cases had to be added to the mediation, but these cases were in state court, before another judge, being prosecuted by other attorneys. With the consent of the federal judge and the parties to the federal cases, the state court parties were approached and asked whether they would enter into the mediation. When they agreed, the federal judge called up his state court

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counterpart to discuss how they could cooperate to encourage a settlement of all the cases. Both judges understood that molecules do not recognize state and federal jurisdictional lines. The state and federal judges were wise and flexible enough to recognize that their cases required state and federal cooperation. With the consent of the parties, the judges agreed to encourage simultaneous mediated discussions of the state and federal cases and to participate in those discussions themselves.

After many mediation sessions, both with and without the judges, a resolution of all the state and federal cases as well as the EPA regulatory case was achieved. The settlement of the more than twenty-one thousand state and federal cases was first announced in the federal court at a hearing presided over by the state and federal judges, and was then explained to the community outside the state courthouse with both judges in attendance. The resolution of these cases addressed many of the critical public health and safety needs of the Anniston community, and hopefully will contribute to the amelioration of many of the environmental problems they face.

From a mediation perspective, the Anniston cases required great flexibility and receptivity to innovative participatory roles by all participants, especially the judges. Within the mediation process, and with the parties' consent, the judges played a very helpful and active role in guiding the parties toward settlement. State plaintiffs' counsel, federal plaintiffs' counsel, defense counsel, agency lawyers, and experts on all sides all played important roles. In the midst of all the activity, the mediator played a critical but limited and circumscribed role, essentially attempting to create the environment in which all of these other actors could exchange views about values, interests, and positions, negotiate, come together to solve problems, make the decisions necessary to reach agreement, and then structure and reduce to writing their agreements in a valid and appropriate form. As this case and the others described above demonstrate, the mediator cannot attempt to do all of these things himself or dictate how they will happen in a complex case. Respect for, and deference to, the necessary and proper roles of all the other participants is crucial to successful completion of the mediation process.

#### CONCLUSION

To this mediator looking back over nearly twenty-five years in mediation practice, the most interesting lesson is how far mediation has come during this span – from a novel, pioneering, and radical idea welcomed by only a few innovative senior counsel, to the dispute resolution mechanism of choice in nearly all the largest and most significant cases of our time. As the descriptions of the mediations of these megacases demonstrate, mediation is a flexible and powerful tool capable of resolving even the seemingly impossible case. The process has shown a remarkable adaptability to the various demands

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of individual cases, responding to the needs and expectations of each contextual environment.<sup>109</sup>

Based on the experiences described in these and other megacases, as well as conversations with other mediators and judges wrestling with similar kinds of disputes, mediation's adaptability needs to be stretched to reassess the conventional wisdom about the mediator's and the judge's roles in mediation. While in the last twenty or thirty years mediation of civil lawsuits has evolved from an innovative, uncommon, and private alternative to a routine procedural step within the established litigation system, assumptions about the limits of the mediator's and court's proper roles in mediation have not fundamentally changed. According to the conventional wisdom, there should always be a firm wall between mediation and the court which judges should not cross, except perhaps to encourage or appoint a mediator. This fossilization is unfortunate; as we gain experience in applying mediatory techniques to megacases, we should take advantage of mediation's malleability with regard to the variety of roles that judges and mediators can and should play depending on the particular needs of the specific case.

A premise of this Article is that judges need to consider playing a much more active role in mediation and settlement of megacases than has generally been thought appropriate for routine cases. Megacases often require specialized case management plans custom tailored to the particular case, rather than the standard orders entered automatically in typical cases. Likewise, these cases often require that the judge be prepared to engage more aggressively in settlement activities along the active end of the continuum which runs from suggesting mediation through encouraging, ordering, managing, and even engaging in mediation. This does not mean that a presiding judge should actually attempt to be the sole mediator in the case, as most judges are neither prepared nor inclined to take on this role (although there are notable exceptions). Nor is it to suggest that judges should feel free to engage in mediation without careful consideration of appropriate ethical constraints and rules of good practice. But within well-defined rules designed to protect the integrity of the adjudicatory process and the perception of unbiased neutral courts, judges can and should play a much more active and positive mediatory role in megacases, working in conjunction with non-judicial professional mediators.

As a team, a non-judicial mediator (selected by the parties or appointed by the court) and a judge can often complement each other. Together they supply more of the ingredients needed to help the parties in a megacase evaluate dispute resolution options and implement them in a well-informed and efficient manner. Teamwork between a mediator and the judge can be synergistic because certain settlement tasks are better allocated to the mediator –

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<sup>109</sup> See Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 576-77 (2004).

organizing and meeting with the disputants, orienting the parties and counsel to the settlement process, identifying interests and settlement options, conducting multiple and joint ex parte settlement meetings, improving and fixing communication problems, exploring settlement proposals, and facilitating the early- and mid-stage offer-exchange process. Other tasks may require the judge's involvement and can be better accomplished by a judge willing to engage actively in the settlement process. Most importantly, after the mediator has sought and received the parties' permission, the judge can provide informal, provisional, and non-binding feedback on critical legal and factual issues that the parties need to evaluate in calculating their "no agreement alternatives" and hence their settlement reservation prices. Further, when suggested by the mediator based on the mediator's assessment of the status and timing of settlement talks, the judge can provide the parties and counsel with the court's views about the benefits, costs, and risks of settlement versus trial, which may be more meaningful and valuable to the disputants than the mediator's views, no matter how compelling.<sup>110</sup> The judge is the judge; the mediator is not. By pairing the judge with the mediator in a megacase, disputants receive the highest competencies of both in their respective areas of expertise.<sup>111</sup>

This new activist mediatory paradigm for judges in megacases emphasizes the dispute resolution function of courts as opposed to the norm creation and lawgiving role. It is premised on a set of assumptions about civil disputes that place the settlement of those disputes very high on the list of functions that courts serve. In this paradigm, disputes are a normal byproduct of a vibrant democratic, pluralistic, and capitalistic society that places a high value on individualism, freedom, growth, and creativity. In such a society, one key function of government is to create and foster mechanisms to manage and resolve civil disputes fairly, consistently, and efficiently. However, the disputes belong to the disputants rather than to the government, the courts, or

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<sup>110</sup> See Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 350 (1986).

<sup>111</sup> The timing, mechanics, and operational details of judicial involvement in mediation vary from case to case. However, in most cases in which the judge operates as a member of the mediation team, the judge's entry into the mediation process is at the suggestion of the mediator or the parties' counsel, with agreement by counsel and the mediator that it would be a good idea to involve the judge. The mediator then approaches the judge to explain the request for judicial assistance and ascertain the judge's willingness to participate. Typically, the court then discusses the request with counsel for the parties and satisfies itself that all parties consent to the court's involvement; usually the court requires counsel to indicate their consent in writing or on the record. Once judicial involvement has been established, the judge works closely with the mediator to make sure that the judge's involvement is most effectively focused and timed. While not a conventional co-mediation, the mediator-judge combination is a team effort. This teamwork arrangement should mitigate if not eliminate criticisms of judicial involvement in mediation based on competency concerns.

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the academic commentariat. The disputants' individual needs and interests take precedence over those of the judicial institution.

For the most part, the disputants are motivated by the short-term goal of resolving their disputes rather than a desire to generate norms or legal precedents. Settlements (except in special cases) resolve disputes voluntarily and efficiently without producing new rules of law and, hence, without the need to apply the full panoply of jurisprudential principles necessary when law is being made. Instead of jurisprudential purity, the quality of a settlement is determined by party satisfaction, efficiency, legitimacy, procedural justice, durability, and acceptability. Mediation, when applied properly and at the right time, generally improves the quality of a settlement when judged by these values. Thus, to the extent that a primary role of courts is to promote and foster high quality settlements as well as to provide state-sanctioned and state-provided dispute resolution of last resort, courts should be actively involved in the full range of mediatory interventions from suggestion to participation. At the same time, because courts also play a central role in propounding normative rules and making law at the interstices of legislation, care must be taken to protect the integrity of the adjudicatory process so that cases actually needing full-blown adjudication are assured appropriate treatment of that sort. It has been clear for some time that many judges and overwhelmingly most lawyers approve of judges being involved in settlement. Criticism of judicial involvement in settlement comes almost entirely from academics who have little or no actual experience in the litigation system and approach the subject from a theoretical or sometimes ideological perspective.

Balancing these quite different judicial functions – dispute resolution and law creation – requires a careful adjustment of the rules governing the judicial role in settlement and adjudication. Experimentation in setting this balance should be encouraged within court rules that set basic parameters but permit a wide range of discretion depending on the very different circumstances presented by different kinds of cases. A rigid rule, such as prohibiting any judge who takes part in settlement discussions from trying the case if settlement fails, goes too far and unnecessarily sacrifices the benefits and flexibility of mediation of legal disputes.<sup>112</sup>

Acceptance of a more activist role for judges in mediation raises a host of specific questions that will have to be debated and worked through. For example:

- When, if ever, is it appropriate for the judge to participate as a co-mediator with a non-judicial mediator in a case before that judge?

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<sup>112</sup> For an argument in favor of such a rule, see generally John C. Cratsley, *Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers To Meet*, 21 OHIO ST. J. ON DISP. RESOL. 569 (2006). For an argument against, see Dan Aaron Polster, *The Trial Judge as Mediator: A Rejoinder to Judge Cratsley*, 5 MAYHEW-HITE REP. ON DISP. RESOL. & CTS. (2006-2007), <http://moritzlaw.osu.edu/jdr/mayhew-hite/vol5iss1/lead.html>.

- In a more traditional court-appointed mediation, how much information should the judge receive from the parties or the mediator about the mediation?
- Should the judge and mediator coordinate on case management orders and decisions such as the timing of dispositive motions?
- How active should the judge be in the selection of a mediator?
- Should the judge request written reports from the mediator?
- How much control should the disputants have over the judge's role in settlement talks or mediation?
- What rules should govern judicial attempts to obtain consent from disputants for judicial involvement in settlement or mediation?
- What kind of training should judges receive in settlement negotiations and mediation?

Even though most of those questions are not new,<sup>113</sup> the answers are not obvious; as mediation penetrates the civil litigation system more pervasively than ever, these issues need fresh examination with an open mind. If the result is a change in emphasis from adjudicatory and adversarial dispute resolution to consensual and agreement-focused dispute resolution, that would constitute evolutionary progress. It took thousands of years for dispute resolution to evolve from an eye for an eye, tooth for a tooth system of retribution to a law-based system of adjudication and proof. There is no reason to think that the evolutionary process is complete or stops at the current regime of adjudicatory due process. Further development and evolution may bring us to a point where dispute resolution based on communication, consensus, negotiation, and

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<sup>113</sup> See, e.g., Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743, 752-65 (1989). Tornquist lists eleven disadvantages of active judicial involvement in settlement: (1) real or implicit coercion to settle the case; (2) second-class justice if sanctions are imposed for failure to settle; (3) lack of party freedom to decide who conducts the mediation/settlement conference; (4) use of ex parte conferences; (5) exacerbation of power differences between parties; (6) contamination of the judge with inadmissible information learned in settlement discussions; (7) inability to review the fairness of a settlement in which the judge was involved; (8) impairment of the law reform functions of the courts; (9) unpredictable outcomes; (10) consumption of judicial time and resources; and (11) use of statements made in settlement discussions as evidence. Of course, any process can be abused; but the value of a process should not be judged under an assumption of bad practice. Tornquist's disadvantages can all be controlled and avoided, especially with reasonable rules regarding judicial involvement and the involvement of a non-judicial mediator with the judge.

mediation will be recognized as a higher and better form of dispute resolution than even the civil justice system we rightfully treasure today.<sup>114</sup>

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<sup>114</sup> The first recorded description of a trial that I have found is in Aeschylus' *Eumenides*, the third book of the *Oresteia*, where Orestes is tried by the gods for killing his mother. So begins Stage Two, the Adjudicatory Stage, of dispute resolution. While we continue to slip back into Stage One, the Retributional Stage, greater interest in conciliation, mediation, and consensus building as an alternative to adjudication may be the early signs of progression to Stage Three, the Collaborative Stage, of conflict resolution. In a shrinking world armed with technologically devastating means of destruction, continued evolution to Stage Three may be a survival imperative. Judges teaming with mediators can be an intermediate step in the evolutionary process.