



# DR Currents

A Publication of the Dispute Resolution Section of the State Bar of Georgia Summer 2014

## AMERICANS WITH DISABILITY ACT (ADA) AND MEDIATION/ARBITRATION: THINGS TO THINK ABOUT

### Contents

From the Chair.....	2
Americans with Disability Act (ADA) and Mediation/Arbitration: Things to Think About.....	3
Is There A Bad Faith Exception to Mediation Confidentiality?.....	7
Collaborative Divorce' Is Collaborative in Name Only .....	9
Mediation Humor .....	12
A Response to "Collaborative Divorce".....	13
The Psychology of Mediation (II): The IDR Cycle, A New Model For Understanding Mediation.....	14

# FROM THE CHAIR

by Joan Grafstein

I encourage everyone to attend the **8th ANNUAL ARBITRATION INSTITUTE** on **Friday, Aug. 8, at the State Bar of Georgia Conference Center in Atlanta** from 8:20 a.m. to 3:30 p.m. The Co-Chairs of the Institute, veteran arbitrators John A Sherrill, of John Sherrill Dispute Resolution Resources, Atlanta, and F. Carlton King, of Ford & Harrison, LLP, Atlanta, have put together a terrific program on the theme, *An In-Depth Examination of the Differences Between Arbitration and Litigation for Arbitrators and Advocates*, with 6 CLE hours including 1 Ethics hour, 1 Professionalism hour, and 3 Trial Practice hours, on-site lunch, and these exciting panels:

- ◆ the popular and essential review of important **RECENT DEVELOPMENTS IN ARBITRATION**, moderated by John F. Allgood of Ford and Harrison, and featuring Peter B. “Bo” Rutledge of the University of Georgia School of Law and Gregory R. Crocket of Kutak Rock LLP
- ◆ in this global economy, the increasingly important **UPDATE ON INTERNATIONAL ARBITRATION IN ATLANTA**, moderated by Shelby Grubbs of Miller and Martin, PLLC, and featuring Valerie Strong Sanders of Sutherland Asbill & Brennan, and yours truly
- ◆ important guidance (and ethics credit!) in **ETHICS FOR PARTICIPANTS IN ARBITRATION AS COMPARED TO LITIGATION**, moderated by John A. Sherrill, with R. Wayne Thorpe of JAMS, and L. Tyrone Holt of the Holt Group in Denver and President, College of Commercial Arbitrators
- ◆ a fascinating comparative perspective from Hon. M. Gino Brogdon, Sr., of Henning Mediation & Arbitration Services, and Hon. Frank H. McFadden, of Copell & Howard, PC, Montgomery, AL, **PERSPECTIVE FROM THE BENCH AND THE PANEL CHAIR: TWO FORMER JUDGES, NOW ACTIVE ARBITRATORS, PRESENT VIEWS ON THE DIFFERENCES IN PRESIDING OVER CASES IN LITIGATION AND ARBITRATION**
- ◆ the views of two arbitration providers, **PERSPECTIVE FROM THE PROVIDERS PERCH: AAA’S AND JAMS’S VIEWS ON THE ADVANTAGES OF ARBITRATION OVER LITIGATION**, moderated by Ralph B. Levy of JAMS, and featuring Linda Beyea and John Bishop

of AAA in Atlanta, Liz Carter of JAMS, Washington, DC, and Meghan Koransky, JAMS Atlanta

- ◆ and rounding out the perspectives, we will hear from lawyers who represent clients in arbitration, **THE DIFFERENCES IN ARBITRATION AND LITIGATION FROM THE ADVOCATES’ PERSPECTIVE**, moderated by Herbert H. “Hal” Gray III, of Ragsdale, Beals, Siegler, Patterson & Gray, LLP, and featuring Taylor Tapley Daly, of Nelson Mullins Riley & Scarborough LLP, and Kamy Molavi, of Molavi Law, P.C. and F. Carlton King.

I am thrilled with the all-star cast of speakers and very timely topics, and hope that all of our Section members will mark their calendars to attend our Section’s **EIGHTH ANNUAL ARIBITRATION INSTITUTE** on Aug. 8. Information is available at [www.iclega.org](http://www.iclega.org).

Also, please contact me with your suggestions for topics and speakers for our **ADR INSTITUTE & NEUTRALS CONFERENCE** on Friday, Dec. 12, 2014, also at the State Bar Conference Center in Atlanta. We really want that program to be both thought provoking and practical. Your input is crucial. I look forward to hearing from you by email at [joan.grafstein1@gmail.com](mailto:joan.grafstein1@gmail.com) and hope to see lots of you on Aug. 8 and Dec. 12.



*Joan Grafstein is a full-time mediator, arbitrator and special master with JAMS in Atlanta, where she concentrates on complex high stakes disputes in the business/commercial, class action, employment, ERISA, financial, healthcare systems, higher education, personal injury, real property, securities and software development areas. She joined JAMS in 2003 after more than 20 years as in-house counsel for large public and private research universities where she managed litigation and mediation and handled a wide variety of claims and business disputes. Grafstein is a Fellow of the Chartered Institute of Arbitrators, secretary of the Atlanta International Arbitration Society, a member of the National Academy of Distinguished Neutrals, past Chair of the Women in the Profession Section of the Atlanta Bar Association, and was Program co-chair for the American Bar Association Section of Dispute Resolution Spring Annual Conferences from 2010 through 2012. She speaks and writes frequently on dispute resolution topics including e-discovery in arbitration, cost effective commercial arbitration, women in negotiation and mediation, arbitration and mediation/ conciliation in China, and recently co-authored the chapter on Arbitration in Georgia Business Litigation (Robert C. Port, Ed.) ALM Media Properties (2014.)*

# AMERICANS WITH DISABILITY ACT (ADA) AND MEDIATION/ARBITRATION: THINGS TO THINK ABOUT

by William Goren

The ADA and alternative dispute resolution are two concepts that mesh very well together. The ADA itself has language in it encouraging dispute resolution. In fact, both the EEOC and the Department of Justice have mediation programs dealing with ADA lawsuits. Also, with the courts having a very favorable view toward arbitrating claims, arbitration has become more common than ever with many employers requiring their employees sign arbitration agreements. In addition to the ADA and alternative dispute resolution being such a good fit, alternative dispute resolution has its own advantages. First, it is less expensive than proceeding to trial. Second, it saves time and has less of an impact on a business than litigation does. Third, mediation in particular allows for the parties themselves to craft their own solutions rather than have a solution imposed upon them by the legal system.

Some of the questions that come up with the ADA and alternative dispute resolution are: what style of mediator do you want; how to prepare for an ADA mediation/arbitration; what strategies might be used in an ADA mediation; should be mediated or arbitrated, and what kind of ADA issues are better mediated versus arbitrated.

## Mediator categories: Facilitative or Evaluative

Mediators typically fall into two broad categories and they are facilitative or evaluative. There is the question of how important it is that the mediator have substantive expertise in the laws of ADA. A facilitative mediator is a mediator who lets the two parties come to their own conclusions through the mediation process. A true facilitative mediator is a true neutral and lets the parties seek their own solutions. On the other hand, an evaluative mediator is a mediator who makes it clear which way he or she believes the case is likely to wind up. By doing so, an evaluative mediator helps the parties reach their own solutions through the mediation process. As it pertains to the ADA, I believe that in general a facilitative mediator possessing substantial substantive expertise (the evaluative component) in the ADA is the best mediator for several reasons.

First, as readers of my blog know by now, the ADA is an extraordinarily complex law that is extremely broad in its reach. There are few areas of law that are left untouched by the ADA, and many of the issues are esoteric and quite complex.

Second, the ADA is full of shades of gray and contains a lot of elastic principles. The beauty of the ADA lies in its elasticity. However, that elasticity also means an increased premium on substantive knowledge of the ADA since elasticity increases complexity.

Third, prior to the amendments to the ADA, many of the cases never moved beyond the stage of whether a person had a disability. Therefore, a mediator with knowledge of the ADA may not have been that big a deal. It may have been more important for the mediator to have the ability to figure out whether a disability as defined by the case law existed. However, the amendments to the ADA have moved us beyond whether a person has a disability to the merits of the case. Therefore, a mediator/arbitrator with knowledge of the substantive provisions of the ADA becomes more important because it is extremely unlikely that a case can get thrown out on the question of whether a person has a disability. It does happen, post ADA amendments, that a case may get thrown out because a person does not have a disability, but it is becoming very rare.

Fourth, a facilitative mediator with substantive expertise makes a great deal of sense for another reason. That is, disability discrimination is about real feelings on both the plaintiff and defense side. The plaintiff is likely to be upset that his rights and feelings as a human being with a disability have been ignored or taken advantage of. On the other hand, the defense is likely to be extremely frustrated and confused, especially if they have tried many different accommodations and a lawsuit resulted. A facilitative mediator would allow the feelings of both sides to come to the fore. That is important because the ADA is about what it means to an individual with a disability to get to the same starting line as a person without a disability. On the defense side, the ADA is all about accommodating the person with a disability but not by fundamentally altering the essential nature of: the job, business, program, or activity. Both views engender quite a bit of feeling when expressed and can be very hard to evaluate.

Finally, this is not to say that an evaluative element to a facilitative mediation is not in order. I am not convinced that a true facilitative mediator, without an evaluative component, is the answer either. The ADA is extraordinarily complex and if there is no evaluative piece,





completes his training, may also be subject to a suit under title I of the ADA. The judge refers it to mediation. How might this play out?

First, there is little argument that the plaintiff has a disability per the ADA.

Second, the defense might argue that a person who is deaf is not going to be able to do the essential functions of being a basketball referee; therefore, they have no duty to accommodate the person with respect to the training. This is where substantive expertise of the mediator is critical. In particular, the defense has it wrong. That is, at this point, the question is whether the deaf referee can be accommodated without it fundamentally altering the nature of the business and not whether the deaf referee is able to do the essential functions of being a basketball referee. I see this issue all the time with respect to academic institutions where an academic program says that they are off the hook because a person with the disability cannot do the essential functions of the job that person is studying in the academic program. It doesn't work that way. Rather, the question is whether the person involved in the training can be reasonably accommodated. In this situation, having gone through a basketball referee training program myself (I did some refereeing at the junior high and high school level many years ago), I believe a deaf person could be reasonably accommodated in training to be a basketball referee.

Third, the defense might also argue that the referee Association is not a place of public accommodation under title III of the ADA. Again, here is where substantive expertise may be very helpful. As we have seen, case law is evolving so that it isn't necessarily the case that a place of public accommodation must be a physical space.

Fourth, with respect to the title one piece against the referee Association, the defense might also argue that the referee Association is off the hook because they are not an employer of the referee; most referees are independent contractors and not employees of the referee Association. Again, substantive expertise of the mediator/arbitrator is critical. As set forth in this hypothetical, the case is currently a title III suit and not a title I suit at all. Also, case law does exist saying, for example, that a person seeking privileges at a hospital could use title III as the vehicle for redressing disability discrimination. (See *Mentkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113 (3rd Cir. 1998)). Furthermore, it may be possible to show that the referee Association exercises sufficient control over the referee so that the referee would be considered an employee (See *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003)). While this particular issue wouldn't be germane to the title III suit per se, it might be helpful for the mediator/arbitrator to discuss so that the defense is aware, if the pleading hasn't already made them aware, that their liability starts with title III but also may involve into



a title I liability issue after the referee has completed the training. It is also possible the title I piece could be part of such a suit if the plaintiff were also moving for injunctive relief to prohibit the Association from discriminating against the plaintiff once he completes the training. Regardless, such discussion may push settlement.

Fifth, the plaintiff is going to want to argue that they can go through the training without it fundamentally altering the nature of the business. Further, for the plaintiff to get a comprehensive resolution to the matter they are going to want to show that once they do complete the training, they will be able to perform the essential functions of being a basketball referee. Here, the mediator/arbitrator may need to do some education to show that major life activities and essential functions of the job are not the same thing. Also, in the mediation process the essential functions of being a referee may need to be hammered out. That discussion should focus on the essential functions rather than on the major life activities.

## Mediate or Arbitrate?

While both mediation and arbitration are categories of alternative dispute resolution, they are very different from each other. Mediation is where the neutral facilitates a process where the parties create a win-win solution. Whether a particular party is right or wrong is not the issue. Rather, the focus is on reaching an understanding agreed to by the parties based upon shared interests. On the other hand, arbitration is an adversarial process and one side is the winner. The arbitrator is much like a judge in deciding the matter before him or her.

As mentioned above, the ADA is an extraordinarily broad, often esoteric and extremely complex law. Thus,

the question becomes, are there certain issues better off mediated rather than arbitrated and vice versa?

### Issues ideal for mediation:

This list is not exclusive, but rather issues ideal for mediation under the ADA.

1. What are the essential functions of the job or the essential eligibility requirements of the program or activity. Both issues are ideally suited to mediation because you need to get into the head of what the business is trying to accomplish and what the person with a disability is trying to do.
2. Are reasonable accommodations possible is another ideal topic for mediation since just about anything goes providing you can get a person to the same starting line as those without disabilities without fundamentally altering the essential functions of the job, the essential eligibility requirements of the program or activity, or the nature of the business.
3. When does an accommodation for a licensing exam fundamentally alter the nature of that exam? This particular one may also be one suited for arbitration. It could go either way because of the education needed that a person is just trying to get to the same starting line and is not seeking an unfair advantage. On the other hand, there is also education needed that the integrity of the test cannot be compromised.

4. Whether a high school athlete with a disability can participate in a school sport.

### Issues ideal for arbitration:

This list is also not exclusive, but issues ideal for arbitration under the ADA.

1. Is an alleged service dog engaged in recognition and response?
2. Is a person a direct threat to self or others?
3. Was there a pre-employment medical inquiry or exam?
4. Is there an undue burden in the financial sense?
5. Have the equal protection rights of a person with a disability been violated?
6. Is the person a recovering addict or alcoholic?

### Issues that can be mediated or arbitrated:

This list is also not exclusive.

1. Is a place of public accommodation involved?
2. Is a structural modification readily achievable?
3. Can a zoning requirement be waived without a fundamental alteration to the program?
4. Is a person with a history of MH is of sufficient character and fitness to be a member of the State Bar?

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# IS THERE A BAD FAITH EXCEPTION TO MEDIATION CONFIDENTIALITY?

by Phyllis Pollock

**R**ecently, I received an e mail alerting me to an order of a federal court providing that mediation confidentiality would not apply to prevent an insurance company from using statements made during mediation to defend itself against claims of insurance bad faith.

In *Craig Milhouse and Pamela Milhouse v Travelers Commercial Insurance Company*, Case no. SACV 10-01730-CJC (ANx), plaintiffs suffered the total loss of their home in Yorba Linda, Calif. in November 2008, when the Yorba Linda Freeway Complex fire swept through their neighborhood. After filing a claim with their insurer, Travelers Commercial Insurance Company (“Travelers”) but reaching no resolution, they agreed to mediate the dispute and attended mediation on Oct. 5, 2010. No settlement was reached. (Order at 1-3, and 23-30; Plaintiffs’ Motion for New Trial at 8; and Orange County Superior Court Docket Sheet for Case no. 30-2010-00415058-CU-BC-CJC)

Two days later-on Oct. 7, 2010, - Dr. and Mrs. Milhouse filed suit in Orange County Superior Court which the defendant Travelers removed to federal court based on

diversity jurisdiction. (*See* Orange County Superior Court Docket Sheet.) In August 2013, the case was tried before a jury. The issues were whether Travelers had breached its contract with the plaintiffs and breached the implied covenant of good faith and fair dealing (or, in essence, acted in bad faith) in not settling their claim.

During trial, the court allowed in as evidence, statements of what had occurred during the mediation on the basis that the parties had waived mediation confidentiality. More importantly, the court ruled that even if the parties had not waived it, the statements would be admitted to provide due process to Travelers to defend itself against claims that it had acted in bad faith by refusing to settle. (*See*, Order at 19-21 and 23-31.)

The jury found that Travelers had breached its contract with plaintiffs and awarded damages to plaintiffs but also found that Travelers had not acted in bad faith such that plaintiffs were not entitled to punitive damages. (*See*, Order at 2.)

Not surprisingly, both sides filed post-trial motions. In its Order, the district court essentially affirmed the jury verdict though ordering the award be reduced to a lesser amount, giving plaintiffs the option of either accepting this lesser amount or going forward with a new trial on the issue of breach of contract only. (Order at 1-3, 31-32.)

In their post trial motion, plaintiffs moved for a new trial on the issue of bad faith arguing that the admission of statements concerning the demands and offers made during the mediation was extremely prejudicial requiring a retrial on this issue. (*See*, Motion.)

The district court rejected the notion that mediation confidentiality was even an issue. First, it believed that the parties had waived it by not timely objecting (which plaintiffs disputed in their motion), and more importantly, even IF the plaintiffs had timely objected, the court would have overruled the objections based on due process:

*Due process demanded that the Court allow the jury to hear the testimony regarding the parties’ mediation statements.*

*The Milhouses argued extensively at trial that Travelers, “unreasonably or without proper cause, failed to pay or delayed payment of policy benefits.” (Citation omitted) More specifically, the Milhouses contended that Travelers acted in bad*





*faith by refusing to settle their claims. ...*

*For the Milhouses, the case was one about a despicable insurance company that had a policy of not fairly and reasonably cooperating with its insureds to settle their claims after a tragic loss. They now argue the Court erred by allowing the jury to hear the parties' mediation statements. The Milhouses are wrong. Travelers needed to present the parties' mediation statements to provide a complete defense of its actions and to avoid paying millions of dollars in bad faith and punitive damages for wrongfully refusing to settle the Milhouses' claim. (Order at 27-29.)*

After tersely noting the factual history of Travelers' efforts to settle this case, commenting that the matter did not settle due to the actions of the plaintiffs, rather than Travelers, the court concluded:

*It was entirely proper for Travelers to present the parties' mediation statements to the jury. The evidence presented at trial clearly demonstrated that Travelers did not settle the Milhouses' claim because of the positions that were taken during and after the mediation by the Milhouses and their attorney. The jury therefore needed to hear all about what happened during and after the mediation so it could determine whether Travelers did in fact act unreasonably, maliciously, fraudulently, or oppressively by refusing to settle the Milhouses' claim. To exclude this crucial evidence would have been to deny Travelers' of its due process right to present a defense. See Cassel v Superior Court, 51 Cal. 4th. 113,119 (2011) ("We must apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose.") (Emphasis added.)...." (Order at 31.)*

This ruling flies in the face of both statutory and case law on mediation confidentiality. As this matter was based on the diversity jurisdiction of the court, under Federal Rules of Evidence 501, California law would apply. (See, Motion at 5.) California Evidence Code section 1119(a) clearly states "No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, mediation or a mediation consultation is admissible...in any... civil action." (*Id.*) The California Supreme Court beginning with *Foxgate Homeowners' Association, Inc. v Bramalea California, Inc.* (2001) 26 Cal. 4th 1 and ending with *Cassel v. Superior Court* (2011) 51 Cal 4th 113 has made it abundantly clear that there are no exceptions! "No ifs, ands, or buts about it!"

While the District Court does cite a one sentence caution or *obiter dicta* in *Cassel v. Superior Court, supra*, as its justification for "due process", the District Court leaves out the California Supreme Court's very next two sentences: "No situation that extreme arises here. Hence, the statutes' terms must govern, even though they may compromise petitioner's ability to prove his claim of legal malpractice (citations omitted)." (*Id.* at 119.) (Emphasis added.) Without doubt, the California Supreme Court has been adamant that the mediation confidentiality statutes be very strictly construed and simply stated the one sentence caution to provide an exception or loophole, if ever needed. ... And the district court seized upon it, contravening the entire intent of the legislature and the Supreme Court on this subject.

Yet, the California Supreme Court in *White v Western Title Insurance Co* (1985) 40 Cal. 3d. 870 has also held that in a first party action against the insurer by its insured for breach of the covenant of good faith and fair dealing, evidence of settlement offers made by the insurer are admissible under California Evidence Code section 1152 and Code of Civil Procedure section 998 as long as the statements are offered to prove issues other than liability, such as the bad faith of the insurer to investigate and resolve the claim! That is, the Supreme Court held that even after the insurer has been sued by its insured for not honoring a claim, the insurer still has the continuing duty to act in good faith in evaluating and resolving the claim. Shortly after this case was decided, the California legislature amended Evidence Code section 1152(b) to allow any opposing or rebuttal evidence regarding such settlement offers to also be admitted. As a result, many insurers will now request a *White* waiver before discussing settlement so that anything it offers can NOT be later used against it at trial.

... An interesting juxtaposition. Does mediation confidentiality usurp Evidence Code section 1152(b) and Code of Civil Procedure section 998? Or vice versa? Did the district court judge unwittingly and correctly apply *White v Western Title Insurance Co., supra*?

Both parties have appealed this ruling to the Ninth Circuit Court of Appeals (Case No. 13-56959); will that appellate court take the easy way out and rule on the issue of waiver or will it tackle the hard issue and discuss mediation confidentiality, offers to compromise in general and the exception made in Evidence Code section 1152(b) and Code of Civil Procedure section 998?.... We shall see... stay tuned.

Just something to think about.

*Phyllis Pollack with PGP Mediation uses a facilitative, interest-based approach. Her preferred mediation style is facilitative in the belief that the best and most durable resolutions are those achieved by the parties themselves.*



# COLLABORATIVE DIVORCE' IS COLLABORATIVE IN NAME ONLY

by Mark Baer

**O**n May 2, 2014, CNBC published an article by Deborah Nason titled "Collaborative divorce can ease emotional, economic stress." While it is a wonderful article, it contained a great deal of inaccuracies, in my opinion.

First of all, it is misleading to refer to collaborative divorce as a peaceful resolution. To me, collaborative divorce is a more constructive approach to conflict, but I would hardly refer to it as tranquil. This distinction is extremely important because words having meaning. By misleading the public into believing that collaborative divorce is a peaceful resolution process, it creates unreasonable expectations and limits interest in the process to low conflict situations.

As Stephen Willis, Ph.D. said in his book titled *Power through Collaboration: When to Collaborate, Negotiate, or Dominate!*:

When it is imperative to achieve the best possible outcome, conflict needs to be faced and managed productively. The best approach, for collaborative situations or otherwise, is to make conflict purposeful and productive, and harness its potential for creating innovative options and solutions. Collaboration takes diverse viewpoints and progresses from tolerating them to understanding, respecting, balancing, integrating, and ultimately synthesizing them.... In general, collaboration allows for better use and management of conflict. It creates a safer climate in which to deal directly with sensitive and divisive issues. Collaborators tend to have greater toleration for differences of opinion, greater ability working around or resolving people related conflicts, and staying focused on what really needs to be accomplished.... The more difficult, complex, and vital the task is, the more essential as well as advantageous collaboration of empowered individuals actually is.

It should be noted that Dr. Willis is an expert on the subject of collaboration. He has written two books on the subject. One is titled *Power through Collaboration: The Formula for Success in Challenging Situations* and the other is titled *Power through Collaboration: When to Collaborate, Negotiate, or Dominate!* He is the founder and moderator of the Power through Collaboration LinkedIn group and also consults on the subject.

Second, if collaborative divorce is about negotiation, it should be properly called "cooperative divorce." Willis defines collaboration as follows: "Collaboration is a subset

of goal-directed cooperative behavior in which people who mutually care about achieving each other's goals work willingly and freely to achieve each other's goals." Negotiation, on the other hand, "is a subset of goal-directed cooperative behavior in which people who are primarily focused upon achieving their own goals develop agreements to assist or allow each other to achieve some goals in exchange for foregoing other goals." Words have meaning and are powerful; therefore, we shouldn't use words that don't apply properly because it causes confusion and unintended negative consequences. As Willis says, "The typical picture that people have of Collaboration is actually Negotiation, which is the most common form of cooperation. The typical Cooperator is actually a negotiator even though they often describe themselves as collaborative."

The biggest problem I have with the collaborative divorce process is that the professionals involved don't tend to be collaborative and don't even know what it means to be collaborative. According to Willis, "Effective collaboration does begin with and depend upon communication and shared understanding, starting especially with a shared understanding about the meaning of collaboration and what it entails." As I have said before, you can call a process 'Collaborative Divorce,' but without 'collaboration,' what the hell is it?

Third, the special training the professionals in collaborative divorce receive is a 3-day interdisciplinary training program. Willis' "working rule of thumb is that genuine aspiration can move a person's PtC Type up by a half or a full range with just a modest yet sincere effort. To achieve a larger upgrade requires transformative events, compelling motivation and genuine commitment, plus hard work to break old habits and replace them with a more collaborative way of seeing and doing. Often professional coaching is needed as well." In fact, in their book titled *Navigating Emotional Currents in Collaborative Divorce*, Kate Scharff, M.S.W. and Lisa Herrick, Ph.D. said:

*The inevitability of professional-owned countertransference is a good argument for each of us doing the hard work of getting to know ourselves well. Good psychotherapists know they must undergo significant psychotherapy themselves before they can be effective clinicians. The authors of this book would go so far as to suggest that personal psychotherapy should be placed alongside a basic Collaborative training as a prerequisite for practice.*

The PtC types are as follows: (1) Collaborator; (2) Cooperator; (3) Competitor; (4) Enslaver; and (5) Predator. In my review of Willis' book, I stated that the personality type for attorneys tends to fall in the Competitor category or even further down on that scale. In response to my review of his book, Dr. Willis said, "Mark, your assessment of attorneys as being of the 'Competitor or worse' type is probably the prevailing viewpoint as well. For 'Collaborative Divorce' that seems especially troubling. Corporate clients seeking out attorneys who are Competitor, Enslaver, or Predator types does not seem incongruous. Presumably the client is knowledgeable and capable of adequately managing the competitive or predatory blowback, or even is of the same type. Presumably, the effective practice of collaborative divorce seems to demand that the attorneys be of the Cooperator or Collaborator types, as well as operating by the more collaborative motivations. For example, in a divorce situation in which the 'best interests of the children' is the espoused guiding principle, an attorney being a 'Competitor or worse' operating via Achieve Own Goals motivation is incongruous."

As Willis said in *Power through Collaboration - When to Collaborate, Negotiate, or Dominate!*, "Predators, Enslavers, and Competitors do not wake up one day inspired and instantaneously become capable of being Cooperators, much less Collaborators.... Type is a significant factor in determining whether investing in collaboration will pay off. Some types are better to collaborate with, and some types are better not to collaborate with. Neglecting to ascertain PtC Type can result in wasting precious time and energy. With some types, collaboration can be not just counterproductive, but even downright dangerous."

Fourth, the CNBC article provides in pertinent part as follows: "Collaborative divorce differs from mediation, where the couple works only with one neutral party--the mediator. In the collaborative process, each spouse has an attorney who looks out for the best interests of his or her client, while working within a collaborative framework." I work as a consulting attorney on mediated cases and when I mediate, I prefer when the clients retain mediation-friendly attorneys. As Diana Mercer said in her comment to my article titled What Is "Collaborative Divorce" Without Collaboration?, a "mediation-friendly" attorney understands their client's needs, interests, values and goals, and makes sure that the agreement accomplishes their client's desired result. When the right attorneys are involved, this also addresses power imbalance issues. Financial neutrals and other such professionals can be brought into any process, not just collaborative divorce.

Moreover, as Dr. Willis says:

*Collaboration Is Not Just Using Project*

*Management, Teamwork, Or Collaborative Tools. Although valuable, such are not synonymous with collaboration. Neither is the use of collaborative technologies and processes.... People in conflict can strategically engage in seemingly collaborative behavior and processes, but in reality be working against the other parties or trying to gain an unfair advantage. People in such situations often mistakenly attribute poor results to the failure of a collaboration that was only a façade and never actually existed.... Just about every collaborative appearing behavior and process can readily be part of non-collaboration, and sometimes even part of predation. The Nazi regime, for example, was infamous for its project management system.*

Fifth, 1 of the "4 key elements of collaborative practice [is] ... a balanced commitment to respect both parties' shared goals." In fact, the source of that information was the International Academy of Collaborative Professionals. However, according to Willis, "Collaboration does not even require common goals and mutual benefit, despite common belief to the contrary. Collaboration can occur even when goals being worked on are not shared or of direct mutual benefit." In other words, one of the "4 key elements of collaborative practice" is not even necessary for collaboration. The reason for this mistake is that the whole concept of collaborative divorce is based upon an erroneous understanding of what collaboration really means. Thus, the results are not what they would be if it were based upon true collaboration. What they describe as collaboration is nothing more than "cooperation."

Sixth, it has long been recognized that the meaning of words influences human behavior. However, as Dr. Willis says, "Collaboration sometimes fosters greater cohesion and harmony, but that does not mean having to be polite, nice, and agreeable to everyone all the time. The absence of conflict is neither required for nor indicative of collaboration, and can sometimes indicate the opposite...."



When conflict avoidance prevents issues from being addressed, a façade of harmony can be detrimental. As Edwin Land, the co-founder of the Polaroid Corporation stated, ‘Politeness is the poison of collaboration.’ Conversely, polite and agreeable behavior can actually be a deception. A common predator tactic is to carefully restrain emotions and behavior so as not to spook the quarry and precipitate outright ‘fight or flight’ which would jeopardize an advantageous position.” As I have said before, terminology and tone alone do not make something or someone collaborative or a ‘peacemaker.’

Seventh, as the article states, “‘With collaborative divorce, the focus is on win-win.’” According to Willis, “‘Win-win outcomes are a product of negotiation in which the parties’ interests take center stage, and their relative power determines the outcome. A ‘win-win’ occurs when the interests of the parties are satisfied in proportion to their power. The weaker parties get a sufficient amount relative to what they expect their power could get them. The more powerful parties give more than they need to relative to their power, but benefit from less cost, struggle, or backlash. Highly touted ‘win-win’ agreements often are terrible outcomes compared to what is capable of being accomplished and what is needed.... The Mutual Success Dynamic goes beyond the Win-Win Dynamic as a mode of cooperation. It takes into account the interests and goals of the parties, but gives precedence to what needs to be accomplished. The Mutual Success Dynamic seeks an outcome that is optimal for the circumstances and that maximizes the overall success of all the stakeholders. Mutual Success starts with and is more about mission than interests and goals of particular parties.... ‘Win-win’ negotiation works within the reality and limits of the parties’ interest and power, and what they will accept. ‘Mutual success’ works within the reality and limits of what the parties are capable of accomplishing.... Interests of involved parties need to be considered and met. Compromise is always necessary. However, compromise based on the parties’ interests leaves out a lot more than compromise based on what needs to and

can be done. The latter takes into account and satisfies a lot more than the former.”

I realize that this article contains much food for thought, but my concerns are real and have serious consequences. Unfortunately, my experiences with the “collaborative law” community are not unique. In fact, I was recently asked to contribute to a chapter in an upcoming book regarding the “story of collaborative practice.” I respectfully declined the opportunity because I cannot promote the process at this point. My colleague responded as follows: “Mark - I hear you. My own ‘collaborative community’ has been anything but. It’s a struggle to keep supporting a method when some of the practitioners are so backbiting. It’s disheartening and contrary to the principles of the practice. Keep doing what you do, Mark. I appreciate your contributions to our integrative attorney movement!”

Sadly, I hear similar comments from many attorneys who have practiced Collaborative Divorce. For example, one of my colleagues posted the following comment on my Facebook page: “I have found the collaborative lawyers harder to deal with than the reasonable and skilled regular family law lawyers. I could say more, but why bother. I’m preaching to those in the know, and to others, they will simply hear my words as antagonistic.”

Furthermore, Andrea Vacca recently published an article titled **Questions to Ask Before Hiring Your Collaborative Divorce Attorney**. She shared that article in various LinkedIn groups in a discussion titled *Is your divorce attorney really a collaborative professional?*

Susan J. Friedman, LCSW, BCD, DVS commented to the post as follows: “A timely, excellent post and discussion as I find there are many collaboratively trained professionals who have not made the emotional paradigm shift; I call them wolves in sheep’s clothing and that goes for the financial and mental health professionals as well. Here in N.J. we are excited that legislation is proposed and moving through the process. While this is exciting it is clear that it will not protect clients and other professionals from working with those professionals who have not made the paradigm shift. Woody Mosten’s approach to his clients is open and transparent. Unfortunately not all professionals make that clear to their prospective clients and the process can quickly go astray making much more work for everyone and puts settlement in jeopardy. I am always looking for new ways to assess the mindset of professionals on the team. Take care.”

I made the following comment in that discussion: “I am very pleased to see that people are beginning to talk about the elephant in the room. There are far more questions than just the few you referenced in your article, but there is a difference between calling yourself a ‘collaborative





professional' and being collaborative. Furthermore, what about those who are actually collaborative, but happen to be lacking when it comes to the skill-set for their actual profession? For example, if someone is a 'collaborative family law attorney,' what if they are collaborative, but their reputation as a family law attorney is poor? Do they suddenly gain that skill-set through osmosis? In addition, just because someone is a member of one or more collaborative practice groups is little indication of their 'collaborative' mindset. First, the requirements for any given practice group differ. Some don't even require mediation training and some don't have any continuing education requirement. Second, just because someone is involved in groups that do have such requirements does not in and of itself mean that they are 'collaborative.' Lord knows, I have left a number of collaborative groups because I didn't feel that the members 'got it' and VERY little, if any, collaborative work was being generated by them as a result. Furthermore, I have written about closed collaborative practice groups in the past and my experience with one in particular. It seems to me that the conduct of that group demonstrated the fact that the members don't 'get it.'"

In addition, I recently received the following email from one of my colleagues: "I teach Collaborative Divorce at UMD law school, yet I am so disgusted with the direction that practice is heading. I think there is more of an opportunity to make a difference in the practice of family law by working on thoughtfulness and the principles underlying collaborative practice within the mainstream family law community than to continue within a collaborative law community that seems more intent on patting itself on the back and devising a way for all of us to make more money than in really helping our clients. Sorry for the run-on sentence." I responded as follows: "The collaborative law community doesn't even know what collaboration is - at least in my geographic area." She replied, "Not in mine either. In fact, the collaborative cases I have are causing me and my clients more stress than my 'regular' ones - and it's as much because of the interaction of the professionals as the clients."

It seems to me that as currently practiced, "Collaborative Divorce" is collaborative in name only and at best should be called "Cooperative Divorce."



*Mark B. Baer is a former litigator who advocates the use of mediation and collaborative law whenever possible. Utilizing his vast array of information and knowledge Baer provides insight on how the dissolution of familial relationships leads to less-than-optimal results, both financially and emotionally. He*

*also highlights the difference between 'dispute resolution' and 'conflict resolution' to offer simple ways of achieving a better result for all parties involved, including the children.*

## MEDIATION HUMOR

by John Kenyon

**W**hat is the difference between a mediator and an ice skater? A mediator always skates on thin ice.

This rich man and his very attractive wife are trying to settle a nasty divorce. The mediations have been going on for weeks and finally the man cracks saying "Anything. I'll give you anything you want. Do you want the houses? The cars? You can have all the money! Just name it and you can have it!" The woman looks at her husband and then at the mediator and says softly "I want him to listen to me like you do."

A mediator is very pleased with the way a complicated commercial mediation is going as over the last few weeks the parties seem to be getting along better and better. But she is concerned that they never seem to get to a final agreement and keep adding new problems. Finally after several more sessions she confronts one of the parties. "I have noticed that every time we get close to a final agreement it falls apart - is this a problem for you?" "Oh no," he replies "None of us want an agreement. No-one wants to stop. You see we are able to get things done in mediation we couldn't do otherwise."

What is the difference between a mediator and an astronaut? An astronaut may sit on top of a controlled explosion but at least he has some idea of the direction it's headed.

*John Kenyon has been a mediator in Houston since 2001. He has a B.Sc. from Bristol University, UK and has worked in the Oil & Gas business for over 25 years. He is a member of the Texas Association of Mediators, a TMCA Advanced Credentialed Mediator and on the Board of ACR Houston. NOTE: The following article is an illustrated version of an article that was originally published on mediate.com at [www.mediate.com/articles/baderE3.cfm](http://www.mediate.com/articles/baderE3.cfm). It is an excerpted and edited version of Elizabeth's article, *The Psychology of Mediation: Issues of Self and Identity and the IDR Cycle*, 10 Pepp. Disp. Resol. L. J. 183 (2010).*

# A RESPONSE TO “COLLABORATIVE DIVORCE” ...

*The following article is the response of the Board members of the Collaborative Law Institute Of Georgia to the article by Mark Baer entitled “ ‘Collaborative Divorce’ is Collaborative In Name Only.”*

**W**e do agree that “collaborative divorce” does not necessarily imply that the process leads to a “peaceful divorce”; divorce is anything but peaceful no matter what process is utilized to accomplish the process. But we do believe that the collaborative process can be more constructive and far less destructive than the traditional litigation process. One of the goals of the collaborative process is to preserve the relationship between the parties to the extent that they can function as co-parents in the best interest of their children; the traditional litigation process does nothing to promote co-parenting and in fact can frequently undermine the parties’ relationship as co-parents which leads to further turmoil in the future after the divorce is completed. We also disagree that the collaborative divorce process is only appropriate in low-conflict situations. With coaching from a mental health professional in the area of communication, co-parenting, managing stress and emotions, (and from neutral financial experts regarding division of debts, assets, and spousal support), the collaborative process is uniquely positioned to be more effective in cases where there might be considerable conflict. Wisdom and clearer heads may frequently trump “shooting in the foot fury.”

Regarding the difference between “collaborative divorce” and “cooperative divorce,” Mr. Baer misses the point. Collaborative Divorce is a formal, specific process in which the parties sign a Participation Agreement that specifically includes three principles: (1) full, voluntary, and complete transparency in all facts of the case; (2) a pledge not to file contested litigation while the collaborative process is on-going; and (3) a withdrawal clause in which all collaboratively trained professionals must withdraw from representation of the parties if the collaborative process breaks down (none of the professionals can continue to represent the parties after the collaborative process has been concluded).

A “**cooperative divorce**” is more like an informal process involving attorneys who are willing to utilize the tools of the collaborative process in a case that is not a collaborative case (i.e., a Collaborative Participation Agreement is not signed); in other words, the case is not a formal collaborative case by definition but the tools of the collaborative process are used as needed in order help the parties reach a resolution out of court.

Certainly it is true that some collaboratively trained attorneys find it difficult to make the paradigm shift from traditional litigation to the collaborative process, particularly attorneys who practice both types of processes; attorneys are trained to be legal advocates in the courtroom – a litigation process - and to conduct themselves in that manner. However, the fact that some collaborative practitioners have not made that paradigm shift does not mean the process itself is flawed; in fact, collaborative cases in which the professionals – including the attorneys – “get it” and have made the paradigm shift unquestionably lead to collaborative divorces where the outcome is far better for the parties than traditional litigation and the conclusion of the divorce is far better than litigation.

We disagree that the collaborative divorce process only generates a “win-win” outcome without “mutual success.” The parties’ interests do not take center stage in the collaborative process and their relative power does not determine the outcome; in fact, this is more like a litigation process (when power, intimidation, and money can have an effect on the outcome) than the collaborative process. The collaborative process is focused not on the parties’ individual interests as it would be in the litigation process, but is focused on the interest of the family and children going forward after the divorce is concluded; it is focused on the mutual success of the parties in achieving a co-parenting relationship that is healthy for themselves and their children, as well as the mutual financial health and success of both parties. In the article referenced by Andrea Vacca, *Questions to Ask Before Hiring Your Collaborative Divorce Attorney*, she spells out how to differentiate between those lawyers who may have gone through collaborative divorce training from those who CAN DO collaborative divorce. Follows are some questions for the attorney: “How concerned are you about whether my spouse gets what he/she wants out of this divorce?” “Do you believe that people who are truly in conflict can engage in negotiations without drawing lines in the sand and using threats and coercion to get what they want?” and “How comfortable are you using other professionals as part of our divorce team?”

In conclusion, while there are some professionals who have gone through the interdisciplinary training and have not made the paradigm shift and thereby cause a negative reaction to the process, the fact remains that there are many professionals who do “get it” and are committed to the process. We are not as skeptical of nor disheartened with the process as is Mr. Baer. In fact, we do our best to promote the collaborative process, help others understand the process and work with other professionals who have made the paradigm shift.

# THE PSYCHOLOGY OF MEDIATION (II): THE IDR CYCLE, A NEW MODEL FOR UNDERSTANDING MEDIATION

by Elizabeth E. Bader

## Introduction

As discussed in Part 1 of this article, it is well established that issues of “face,” “ego,” self-esteem and self-identity pose formidable psychological barriers to resolution in mediation.<sup>1</sup>

What has been generally unnoticed, however, is that “face” issues not only shape individual reactions during mediation. They profoundly shape the process of mediation through what I have called the IDR cycle. This is an introduction to this complex subject.

## The IDR Cycle

Parties in mediation typically pass through a cycle of psychological inflation (overconfidence), deflation, and, finally, if the dispute settles, realistic resolution.<sup>2</sup> This is the IDR cycle. I have explained the causes of this phenomenon in great depth in my recent article in the *Pepperdine Dispute Resolution Law Journal*.<sup>3</sup> It is caused, fundamentally, by the all-too-human tendency for parties to take conflict personally, and the outcome of the mediation as a reflection of who they are.

A simple overview of the cycle is as follows. Parties enter negotiations full of overconfident dreams and expectations, and these dreams and hopes are linked in their minds with the sense of who they are. Unfortunately, their expectations rarely coincide with what is actually possible. After all, the other side also has an agenda. As a result, there is inevitably a period of disappointment and deflation once negotiations begin in earnest.

Realistic resolution of the dispute, then, often coincides with parties’ recovering from their sense of injured pride and disappointment. Along the way, they must let go of their identification with their preferred resolution of the conflict, and, implicitly, their sense of who they are in relationship to it.

## The Inflation/Overconfidence Stage: The Key to the IDR Cycle



The key to the IDR cycle is the first stage, the stage of what I call “inflation” and what social psychologists call “overconfidence.” Numerous research studies have shown that at the outset of negotiations, parties are generally overconfident, and this is so even if one accounts for the phenomenon of posturing. In fact, it has been said that the findings on overconfidence are “[a]mong the most robust findings in research on social perceptions and cognition over the last two decades.”<sup>4</sup>

Overconfidence is a complex phenomenon.<sup>5</sup> However, here are a few of the reasons for it:

- ◆ Due to the way the sense of self-identity is created during

childhood, interpersonal conflict is experienced as threatening the value and even the existence of the self.

- ◆ As a defense to the anxiety created by conflict, parties tend to self-inflate, to reassure themselves that they will meet the challenge and emerge victorious.
- ◆ The physical challenges posed by conflict, including adrenal surges, also contribute to the initial inflation/overconfidence phenomenon.
- ◆ You know you are in the overconfidence stage when, particularly at the beginning of the mediation, parties
- ◆ Make a discernible effort to project a sense of confidence, not just in their cases, but in themselves (“I am a winner!”, “I am tough,” etc.).
- ◆ Overestimate the strength of their case,
- ◆ Seem to be unwilling or unable to face adverse facts or law, or
- ◆ Deny their own vulnerability, including their vulnerability in the litigation.

Understanding the overconfidence phase, and the IDR cycle generally, is crucial for mediators for many reasons. To name just one, it helps us tailor our interventions to the parties’ needs. For example, the overconfidence phase is not the time to confront parties with the weaknesses in their case if you can help it. They



won't be able to hear you, and you will lose their trust.

## Overconfidence in Divorce and Other Disputes Involving Long-Term Relationships

Overconfidence/inflation may be more difficult to see when the parties' relationships are emotionally charged as a result of a long, difficult history. For example, in divorce mediation or in a will contest, hatred, resentment or envy may cover the underlying inflationary dynamic. In these cases, however, overconfidence is actually fueled by these emotions: a party feels certain they will be victorious in part because their resentment seems so justified. Thus, the IDR cycle is unfolding in spite of or along with the parties' emotional reactions.

Although outside the scope of this brief article, it is worth noting, too, that particularly in certain types of cases, such as divorce cases, some parties may not be able to be overconfident, and may initially present with deflation. In these cases, we must take care to "do no harm" (by analogy to the Hippocratic Oath) to these sensitive people, and, hopefully, encourage them to find adequate support from others during the process of mediation, including their attorneys.

## Deflation



In a typical case, however, the deflationary stage begins with the receipt of the first offer or counteroffer. This is when reality hits

home. Each party begins to realize that the other side exists as an independent agent, one who may not agree with their own preferred negotiated outcome.

You know you are in the presence of deflation when, particularly after an offer or counteroffer, parties

- ◆ Let you know in stringent terms that they take the outrageous offer of the other side personally,
- ◆ Noticeably start to feel less certain they will achieve their desired result,
- ◆ Devalue and blame others, such as the other side, the lawyers, or even the mediator, because things are not going as they "should."

The deflationary period is a tender time, when the trust the parties have vested in the mediator is tested. This is the time when, among other things, mediators should exhibit sincere respect for the client. Respect is a natural palliative for the sense of insult and deflation.

At the same time, it is necessary to remind parties of the need to keep the decision making process as objective as possible, without overreacting to the difficult feelings caused by the conflict.

## Impasse as a Narcissistic Crisis



Deflationary dynamics often lead to impasse as both parties hang onto their sense of insult and injured pride, and refuse to move past them.

In technical terms, impasse is the narcissistic crisis created when the parties' overconfident expectations and investments collide. (Note: the word narcissistic here is used in a technical but not a pejorative sense.)

Parties' reactions during impasse are generally the same as during deflation; however, there is an added emphasis on refusal to give in, or self-judgment if they do compromise.

One of the most useful things mediators can do during impasse is to depersonalize the impasse and sense of insult, and evaluate options which are objectively useful for the parties even if they are not the ideal solutions the parties had initially envisioned.

## The Importance of the Mediator's Issues of Self and Identity

In Part 1 of this article, I discussed the importance for mediators of becoming familiar with their own "face" or ego issues — issues related to their own sense of self and identity. This is particularly true during the time of narcissistic crisis, deflation and impasse for two reasons.

Firstly, if during this time we do not or cannot keep our commitment to do what is right for the parties — not what is right for our own self-image or our settlement rates — we will lose both our integrity, and generally, the parties to the mediation, who are keenly aware of our every move.

Secondly, especially during impasse or deflation, the key objective for the client is both to learn to let go, and to do what is best for their long-term interests, not their injured pride. The most profound and most effective message we can communicate during this time is that compromise is necessary for them, not because they are personally inadequate, but because, like us, they live in a world of conflicting interests, a world of self-and-other.

This point is best illustrated by action, not just words. Ideally, we do this by modeling interpersonal presence, our capacity to stay with them and the situation as it is, while considering options and the needs and requirements of all the people involved in the situation. If we are instead locked into our own narcissistic issues, it is unlikely that we will be able to meet them in the deep place they have been thrust into by the conflict, or to help them disengage and climb onto a higher plateau.

### Realistic Resolution



Realistic resolution, then, is the phase of self-and-other, the phase that comes when the parties manage to settle their dispute, relinquishing as appropriate or necessary the need to achieve only their own ideal result or to have the other side submit to their will. In many cases, it should be regarded as both a practical and a psychological achievement.

The development of the sense of self-and-other is the hallmark of human maturity. [6] It is also a skill we continue to develop all of our lives. [7] However, while it may be ideal for parties to develop this capacity in the context of mediation, their doing so is not necessarily dependent upon a conscious decision to understand or to recognize each other. We don't have to make this happen by manipulation or fiat. The conflict itself, coupled with the process of mediation, implicitly or explicitly drives them in this direction.

### Toward A New Model of Mediation

The model of mediation I have articulated here is not dependent on or linked to specific protocols, nor does it require that parties achieve specific levels of emotional maturity. Each person grows to the extent that is comfortable or appropriate for them. The mediator's job is accommodate each person's particular requirements. By looking deeply into the psychological dimensions of mediation, we are thus able to achieve greater flexibility in our handling of conflict, and, hopefully, be of greater service to parties in conflict.

#### End Notes

- 1 See the many authorities cited in Bader, *The Psychology of Mediation: Issues of Self and Identity and the IDR Cycle*, 10(2) PEPP. DISP. RESOL. L. J. 183-185, notes 1, 10, 13 (2010).
- 2 Bader, *op. cit.*, *passim*.
- 3 *Id.*
- 4 Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 *Ohio St. J. on Disp. Resol.* 281, 284, 291 (2006). See also Bader, *op. cit.*, pp. 203-205 for additional authorities.
- 5 Bader, *op. cit.*, 205-206.
- 6 I discuss and analyze the psychological literature which supports this point throughout the Pepperdine article, with particular emphasis on the role that conflict plays in the development of the sense of self-and-other. See for example, the work of Peter Fonagy and his associates on this point: "Conflict—or rather its adaptive resolution—prototypically calls for the perception both of the self and of the other in relation to the self, requiring individuals to reconcile their own legitimate claims with concern for the other." The capacities necessary to do this thus constitute an important "potential mediator of psychosocial risk." PETER FONAGY ET AL., *AFFECT REGULATION, MENTALIZATION AND THE DEVELOPMENT OF THE SELF* 53-54 (2004).
- 7 Jay R. Greenberg & Stephen A. Mitchell, *Object Relations in Psychoanalytic Theory* 279 (1983) (discussing what psychoanalysts call the related concept of "object constancy").

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