

PERSPECTIVES

On the Professions

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"Adversary Legal Proceedings: Is it Time for New Directions?"

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"A common thread pervades all court room contests: lawyers are natural competitors, and once litigation begins they strive mightily to win using every tactic available litigation is not only stressful and frustrating but expensive and frequently unrewarding for litigants... There must be a better way."

Chief Justice Warren E. Burger

The above words from Chief Justice Burger's address at the 1982 mid year meeting of the American Bar Association express a widespread increasing dissatisfaction with legal proceedings in the United States. Critics point to mounting case backlogs, ever growing costs of litigation, and, in some instances, questionable social policies that emerge from the judicial resolution of disputes. This issue of PERSPECTIVES concerns the search for better ways to dispense justice which Chief Justice Burger called upon the legal community to find. It begins with an article by lawyer-sociologist Michael Joseph Rosanova which describes one promising recent

development-divorce related mediation. Under this approach the parties to a divorce attempt to settle such issues as child custody, visitation rights, division of property, and so forth through a voluntary agreement arrived at with the aid of a trained mediator. Rosanova, who has pioneered the development of divorce related mediation in Illinois, provides an overview of both its underlying theory and the practical problems surrounding its implementation.

The increased use of voluntary arbitration has been advocated as a means both of expediting medical malpractice claims and containing the cost of medical malpractice insurance. The second piece in this issue of PERSPECTIVES is excerpted from a study under the auspices of the Department of Health, Education and Welfare evaluating a project in which patients at eight hospitals in southern California agreed to submit any malpractice claims they might file to arbitration. The HEW study compares the hospitals participating in the project with a contrast group in regard to various critical matters related to the processing of malpractice claims.

Chief Justice Burger confined his remarks about the shortcomings of adversarial legal proceedings specifically to the civil law. The adversarial character of criminal trials, however, has recently been

the subject of searching criticism by a number of prominent legal scholars. Robert Ladenson describes the views of two such scholars, Lloyd Weinreb and John Langbein. Weinreb and Langbein both point to the countries of continental Europe for examples of distinctly less adversarial modes of criminal procedure which may serve as useful models for judicial reforms in the United States. Ladenson also discusses how the proposals advocated by Weinreb and Langbein bear upon some of the most difficult questions of legal ethics for criminal defense attorneys.

"Divorce-Related Mediation"

Michael Joseph Rosanova

What Mediation Is

Mediation is a negotiation process. Two spouses contemplating divorce work with each other and with a skilled professional, trained to help both of them mutually to resolve issues of parenting, property and support.

In a private, low-stress, neutral setting, couples negotiate an agreement cooperatively, rather than in a competitive struggle.

Unlike the adversarial process, neither party "wins" at the expense of the other. The goal of mediation

is the development of a dissolution agreement created by and acceptable to both parties-one that is fair to each and is best for the children.

It is true that a judge must approve any settlement agreement during the dissolution hearing which takes place in court. And it is also true that independent legal counsel is required to prepare a legally binding agreement which reflects the results of the mediation process and to represent the parties in the court proceeding for the divorce.

Yet mediation itself remains as a distinctive conflict-reducing technique, enabling the settlement of disputes by bringing together the conflicting parties themselves in the presence of a disinterested third party. With the help of this disinterested third party (the mediator), the divorcing spouses are able to focus on the issues and to deal with them. The mediator intervenes continuously to allay the untoward emotional entanglements which would otherwise sabotage the bargaining process. Mediation gets the conflicting parties to communicate with each other, and to bring the best available information to bear on the questions in conflict.

The disputants are not committed in advance to conform to the opinions of the mediator, as they would be in arbitration or conciliation. In arbitration the findings of the arbitrator are binding. In mediation, the mediator merely attempts to facilitate the problem-solving process.

What Mediation is Not

Mediation is not the practice of law. It is a great advantage, of course, for the mediator to have been trained in the relevant law. The mediator should be apprised of laws relating to housing, health insurance, pension plans, and a

variety of other topics. Yet the mediator does not provide his clients with information on such topics, the mediator never gives legal advice.

The mediator does not advise nor represent. To prescribe a course of action for the parties, or to champion the cause of one party at the expense of the other is totally contrary to the definition of mediation. Such a course of action would destroy the basis of any mediated agreement.

Similarly, mediation is not therapy. It is a great advantage for a mediator to understand the dynamics of therapy and its various techniques, dependence, and related topics. But the mediator has no right to find individual behavior "healthy" or "pathological," nor to convince clients to amend general patterns of behavior, nor to undertake searches for unconscious motives. The mediator is interested in therapeutic technique only in so far as it will help the mediator to help his clients focus on resolving the practical problems of restructuring their families and independently rebuilding their lives. Generally speaking the mediator's clients are not sick people; they are normal people facing many exceptionally distressing problems. If therapy is indicated, the mediator will refer out.

Mediation is not therapy. Mediation is not the practice of law.

Why The Distinction is Important

Mediation as a profession faces potential threats from two established professional groups: the established Bar and the various ranks of therapists.

Certain members of the Bar raise objections to mediation on the basis of professional ethics. -The ethics of law emphasize the adversarial relationship between the two

parties, and the duty of the lawyer to press the advantage of his particular party with "zeal" and without remorse. It is presumed that the truth will emerge like a phoenix from the devastation wrought in trial by combat-a mechanistic, utilitarian presumption reminiscent of conservative, 18th-Century economics. It is also presumed-perhaps more precariously-that every quarrel has only two sides, or at least that every fight can be recast into a two-sided object (the interest of the children in a divorce action, for example, being somehow identifiable with the cause of either the husband or the wife, as in the traditional fiction that children are chattel property in whom an adult can hold legal title). To act as a mediator of a dispute writhing through a family network rather than as a champion of a stylized two-sided war (wherein God is on our "side." not theirs, if indeed there is any justice)... to act as a mediator clearly violates the right of each "side" to be "zealously defended." And this amounts to a brazen denial of due process, as guaranteed by the Constitution of the United States.

That's objection number one.

The second objection consists in the idea that mediation-this travesty of justice-amounts to "the practice of law." Who do these psychologists, psychiatrists, and even (a shudder) social workers think they are, trying to "practice law"? Who granted them their letters patent? Who administered their hazing? It wasn't the Bar; and that's unethical-because only the Bar can "authorize the practice of law." The practice of law is a monopoly, defined as such by the law. Mediators are upstarts.

That's objection number two.

According to the first objection, mediation would be all right if it weren't mediation but were rather

the practice of law. According to the second objection, the whole problem with mediation is that it is the full-blown "practice of law": in other words, mediation might just be all right, if only lawyers were mediators, or if only the organized Bar or some auxiliary to it were handing out the licenses to practice (significant power accruing to whoever might grant such licenses or occasionally choose to snatch them away).

These two objections lie in contradiction so flagrant that it would be obvious to anyone other than a professionally socialized, two-sided thinker. The key to this contradiction lies in another dimension. It lies in what attorney Richard Crouch has perceptively termed "the danger" that an anti-mediation Bar might be perceived by the public as a "jealous profession" baring its canines at the edge of its "turf."

The question of authority-apparently justified power-is inherent in any discussion of professional organizations. It is a steady, unmistakable theme in any discussion of professional ethics. For there are at least two kinds of professional ethics. The first concerns "how to do the job right." The second concerns "who does the job." And above these concerns lie the questions "who decides how it's done?" and "who decides who does it?" This is the level where the power lies. But the entire system would collapse if the profession's intended clients were to perceive the profession itself with derision, as though the profession had nothing serious to offer, nothing worth paying for.

The first duty of any member of any professional group is not to be laughed at.

These remarks are not intended to deride the profession of law or legal

ethics. All professions and all systems of professional ethics must deal with this sociological fact of life.

As Weber argued. "authority" consists not merely in the exercise of power but in the appearance of justification, the subjective acceptance of that power on the part of client populations. That's why the first duty of any member of any professional group is not to be laughed at: derisive laughter signifies the end of appearances, the end of apparent justification, and the beginning of the end of power.

It makes sense, then, for example, that members of the Bar are "ethically obligated" to report outrageous behavior by fellow lawyers (not to the public but to the Bar)-and are "subject to discipline" if they don't. Outrageous behavior-behavior unbecoming an officer and a gentleman-threatens the social bases of an organization's power.

So, similarly, lawyers are forbidden to practice together with therapists, especially within the context of divorce work. If a lawyer himself is qualified to act as a marital counsellor or therapist, then the lawyer must bill his time as law work, not as therapy. People might get the impression that a "marital counsellor/ Lawyer" was counselling divorce and thereby stirring up business or "soliciting" for himself.

The only way out of such problems is for the Bar to declare that interdisciplinary cooperation in the form of mediation simply is not the practice of law. This is the basic distinction we have drawn: mediation is something other than the practice of law. As a professional organization as a whole, the Bar would be well served by this distinction. But the unenlightened self-interest of certain segments of the Bar-fearing

that mediation will do away with domestic unrest (with roughly as much justification as undertakers fearing that modern medicine might do away with death) have hindered the Bar from looking after its own good.

It is in the self-interest of the Bar as a professional organization to heed this distinction: mediation is not the practice of law.

And this is why the distinction is of importance to therapists, as well. If therapists fail openly to recognize the distinctiveness of mediation, then they immediately put themselves on a collision course with those elements of the Bar who would like either to co-opt mediation or to crush it, forcing it sideways as "law work" into the category of "lawyer's billable time." And there is a very good chance that lawyers would emerge as victors from such a conflict. And (many) therapists seem to know this or fear it.

So it is highly likely that the coming years will see the emergence of a new professional group, a national professional society for mediators as mediators, regardless of "disciplinary background"-if mediation itself in the meantime will not have been suppressed. A major, new professional organization is going to emerge as the result of problems inherent in older, established professional societies.

Mediation is not the practice of law. Mediation is not therapy. A new realm of power is at stake. That is why the distinction is important.

Natural Allies of Mediation: Judges

It's interesting that judges have been among the most significant allies which mediation enjoys. Perhaps this arises from the judges' knowledge that the role of the

<p>lawyer is not necessarily confined to that of champion or adversary. The role of the judge itself is not an adversarial role.</p> <p>Or perhaps judges' tolerance of mediation arises from tradition. "Mediators of questions," as they were called, were helping to settle commercial cases as early as the Middle Ages in England. In the 1300's, their status was confirmed by statute (27 Edw. III, St. 2, c.24).</p> <p>Or perhaps judges' interest in mediation arises from the structure of the profession and the realities of those judges' every day work. One of the primary realities of judges' work today is its sheer magnitude. Sanders (70 ER.D. 79, 111) summarizes Barton's findings (24 Stanf. L. Rev. 567, 1975) as follows:</p> <p>If federal appellate cases continued to grow for the next 40 years at the same rate at which they have grown during the last decade, then by the year 2010 we can expect to have well over one million federal appellate cases each year, requiring five thousand federal appellate judges to decide them and one thousand new volumes of the Federal Reporter each year to report the decisions. Since the number of cases initiated in the federal system each year is approximately ten times the number of decided appeals, one can readily extrapolate Professor Burton's projections to the trial level.</p> <p>And if one reflects on the fact that the county courts of the various state systems (where domestic relations cases are tried) have caseloads which dwarf even those of the federal system, then one begins to grasp the nature of the problem from the point of view of a practical judge.</p> <p>And fear of some lawyers that mediation will destroy their</p>	<p>business appears rather inappropriate.</p> <p>Of course, judges could respond to the press of overloaded dockets in ways not involving mediation. If the judges in divorce divisions across the country were to multiply their numbers by several hundred percent, the backlog might disappear. But of course, this would diminish the exclusiveness of the judiciary itself. In domestic relations, a field enjoying scarce prestige among lawyers themselves, judges would be loath to diminish the prestige of their station by multiplying judges.</p> <p>If the judges in divorce divisions in the various states were to simplify current proceedings even more radically than in recent years, the backlog might disappear similarly without recourse to the recognition of mediation. But then that would present the possibility that the entire divorce process would be demoted to the realm of registration and administration, as in Japan, where litigation over such questions does not exist. Such a prospect can hardly excite judges, whose stock in trade, after all, is litigation.</p> <p>On the other hand, if judges were to accept the results of mediated settlements, the number of cases in formal litigation would drop without crushing the demand for litigation, and would thereby maintain the position of the judiciary itself. Or possibly enhancing it. While successfully mediated cases would not need to go into litigation, judges must still approve the agreements reached by the parties in mediation when it comes time for the "prove up" (the court hearing in an uncontested divorce). Through their power to approve such agreements, judges have the prospect of implicit power over a broad new population, namely mediators (including not only attorneys, but also a variety of</p>	<p>social scientists over whom judges have previously exercised no similar authority).</p> <p>Faced with similar problems of overloaded dockets, judges on American criminal benches have adopted a structurally similar solution; plea bargaining.</p> <p>Plea bargaining is the process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty to a lesser offense or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that possible for the graver charge. (Black's Law Dictionary, 5th ad., 1979).</p> <p>The similarity between plea bargaining and divorce-related mediation ends with structural resemblance, however. Plea bargaining resolves the problem of overcrowded dockets in the criminal trial courts by encouraging settlements over which judges maintain power; but here the resemblance ends.</p> <p>The critics of plea bargaining maintain that the laudable ends of efficient case processing are betrayed by villainous means. They hold that too often the accused sits months at a time in the most desperately degrading of prisons-victims of sexual and other violence-before the attorney shows up to begin the plea bargaining. When he appears, the attorney explains to the prisoner that if he is willing to plead guilty (and thereby forego his right to a trial before "a jury of (his) peers"), then his sentence at a summary hearing may just be equal to or not as much longer than the time the accused has already served. On the other hand, if the accused insists on going to trial in order to protect his</p>
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innocence, he may have to sit in jail just as long or longer awaiting a trial at which he may well be found guilty, at which time he may be sentenced to a penitentiary for a period of many years. The accused, who generally is desperate, generally chooses to plead guilty. John Langbein, professor of law at the University of Chicago, calls this aspect of plea bargaining "the modern analogue to medieval torture." James Mills quotes Martin Erdmann, an attorney noted for his success in plea bargaining: "I have nothing to do with justice."

Mediation, however, has everything to do with justice—certainly with the parties conviction that justice has been done, certainly with what Curbs calls "the satisfaction of those concerned." In order to succeed, any system of dispute resolution "must give (even to) the losing party, and his friends and sympathizers, as much satisfaction as any loser can expect." (C. P. Curtis, *The Ethics of Advocacy*, 4 *Steal. L. Rev.* 3, 1951).

In divorce, though one partner may be farther along than the other in his adjustment to the fact that the relationship is dead, there are no parties who do not consider themselves in some sense "losers." This is especially clear when fresh litigation arises after the decree of divorce has issued. Even ardent litigation attorneys are frustrated and dismayed by "post decree." Creating a sense of satisfaction—if in no other sense, then at least in the feeling that the various inevitable losses have been fairly shared—is crucial in resolving disputes among by-gone intimates.

According to Jessica Pearson, director of a major federally funded study of the results of mediation in five states, mediation dramatically reduces post-decree litigation. The reason for reduced post-decree litigation is heightened satisfaction

among the parties. The parties' satisfaction with the resolution of their divorces increases because the parties themselves directly bargain with each other and personally restructure their lives. The mediator is not a blind champion of any one "side;" the mediator facilitates the consideration and discussion of the goals to be accomplished by the divorce, and the various ways the parting couple can accomplish them. If the mediator succeeds in calming the static between the spouses and in providing necessary information and referrals, the couple themselves will come to an informed choice of their own, the couple will have a greater investment in the agreement itself. That's why mediation dramatically reduced post-decree litigation.

This is an infinitely more competent and humane way of clearing the dockets than plea bargaining could ever hope to be. Mediation is an appeal to good sense and enlightened self-interest—whose classical vehicle, of course, is contract.

The judges who support mediation either know all this or should know all this. In any case, mediation helps to resolve the problem of overcrowded dockets, perhaps the most serious organizational problem currently facing divorce-division judges. That's why judges are natural allies of mediation.

Other Natural Allies of

Mediation: Lawyers & Therapists
It should be obvious from the foregoing discussion that not all lawyers nor all therapists can be counted among the friends of mediation. Far from it. On the other hand, not all lawyers nor all therapists are opposed.

First, there are those lawyers who do not specialize in domestic relations litigation, and who consequently do not imagine nor

fear that mediation represents an economic threat to them. These are business lawyers, mainly, who are hesitant to get involved in the embroiled emotions which characterize divorce, and who probably wouldn't accept the proportion of divorces they do except as a service to business law clients who request them to do so. For this sort of lawyer, mediation offers a way around the nasty side of divorce. Moreover, when the mediation has produced a successful agreement, these lawyers stand to be asked to review the agreement on points of law, to do the drafting and filing, and to appear for the client at the summary hearing called a "prove-up." This is the kind of work that traditional lawyers are trained to do; successful mediation for clients may mean more satisfaction, fewer complications, and increased volume or at least a faster turn-over of such cases for lawyers.

Most lawyers should greet the news of such benefits with pleasure: there's no cause for lament in a solid, lawyerly job and a corresponding fee. Nevertheless, differing conditions in urban, suburban and rural areas will probably affect the attitudes of non-divorce-lawyers toward mediation.

Other characteristics influencing attitudes toward mediation would include the relative youth and the relative power of the lawyers, be they urban or otherwise. The coming of age of the baby-boom generation and dubious economic conditions have helped cause the number of lawyers to double. Many young lawyers in America today—like young lawyers in other countries in other times—feel relatively emarginated, and even disenfranchized. Women lawyers and many ethnic and other lawyers also consider themselves relatively emarginated, somehow disenfranchized. Many of the young

and many of the traditionally emarginated display a positive interest in mediation. Maybe this is because X lawyers (name a group) have a natural inclination toward good feelings and common sense, since they have been so often and so long unjustly excluded. Or maybe this is because they view mediation as a new game, a new field to conquer, a new and less crowded hierarchy where they might more successfully claw their way to the top. Whatever the motivations, many young lawyers and many traditionally emarginated lawyers regard mediation with positive interest.

Many therapists and kindred people-oriented professionals face similar circumstances, as a result of which they also emerge as natural allies of mediation. Those who work for agencies have faced vast cutbacks due to the slow economy and the policies of President Reagan. Private practice-perhaps in family mediation-seems like an attractive option to quite a few.

The current wave of deregulation by the States is another reason why mediation looks good to psychologists and social workers. It appears that medical doctors have been lobbying for some time to deregulate clinical psychologists and social workers. If clinical psychologists and clinical social workers are deregulated, they will no longer have State certification. If they no longer have State certification, insurance companies will no longer pay for their services. The only ones left with State certification would be psychiatrists, who are licensed as medical doctors; they would have the field of insurance payments all to themselves. This may account for the fact that far fewer psychiatrists than psychologists or social workers have displayed an interest in the emerging field of mediation.

In any case, those who qualify as natural allies of mediation include many judges, many psychologists and social workers, many lawyers not specializing in divorce litigation, many lawyers too young or too different to avoid being emarginated within their own profession, and a few creative and forward-looking divorce lawyers.

Mediation in Illinois

The professional society for mediators in Illinois began with a list of Illinois residents who had contacted O. J. Coogler, John Haynes, and their associates at the Family Mediation Association, then based in suburban Washington, D.C. Having researched mediation for a year and a half and having taken the training in mediation offered by the FMA, I was eager to find others back in Chicagoland who had taken the training and who might be interested in co-mediating cases for the sake of experience. To my surprise (and chagrin), nobody whom I contacted had done either. In fact, none of them seemed to be aware of the others existence.

I decided to call a meeting, and notified three judges in the divorce division of what I was doing. Close to thirty people attended that first meeting. It was an informative event. Everybody had a different opinion about just about everything. In fact, there was even confusion as to what mediation consisted in-though several present claimed not only that they knew what it was, but that they had been practicing mediation for twenty and thirty years. And these included people who were unable to distinguish between the role of a mediator, the role of an arbitrator, and the role of a spiritual counselor.

Nevertheless, there was sufficient interest in organizing a professional society to foster the development of mediation, whatever definition might emerge. I drew up the papers necessary to incorporate the

Mediation Council as a not for profit organization, procured the necessary signatures, and filed.

I consulted again with the judges just mentioned. I was pleased to learn that the Presiding Judge of the Divorce Division at that time, Charles Fleck, had decided to create a court-based mediation program. As presiding judge, judge Fleck had the power to assign cases to the remaining judges in his division. He intended to set a "mediation calendar" along side his conventional court case assignments calendar. He intended to inform the lawyers who appeared before him at his Tuesday and Thursday afternoon calls that mediation might be an option they should consider; and if the lawyers and/or their clients displayed an interest in mediation, judge Fleck's clerk would hand them a list of mediators who judge Fleck believed to be competent. Eventually, if the plan worked in Chicago land.

Judge Fleck intended to report the results to his former colleagues in Springfield at the State Assembly so that a State-wide program might be implemented. A rigorous statistical survey was to investigate the progress and results of the Chicago plan-a truly noteworthy plan, by the way, since even the then recently adopted California plan mandated mediation only as to custody settlements.

There were a number of problems which judge Fleck hadn't anticipated. For one, the judge had assumed (as I myself had earlier assumed) that there were domestic relations mediators already actively practicing in the Chicago area, and that there was some sort of professional society out there certifying competent professional mediators. My recommendation was that a formal training program be held in Chicago, so that those interested in mediation might at least acquire a common vocabulary,

and so that the Mediation Council might grow into a full-fledged, standard-setting professional society. Judge Fleck had already gone to the press with news of his mediation program, committing himself to a kick-off date in March, 1982. It was too late to turn back. Moreover, Judge Fleck was determined not to allow the mediation program to meet the same fate as a notorious contracts-arbitration program which had been discussed, forgotten, and resurrected again and again over the proceeding seven years, all to no avail nor any product except frustration.

The judge asked me to investigate training programs which might be arranged for some time before March. Since I'd been involved in research on mediation for nearly two years by that time, I knew where to look and whom to call for evaluations of the various groups then engaging in training. Unknown to me, the judge had also (wisely) requested others also to investigate training programs for him. In any case, we decided to invite Steven Erickson of the Academy of Family Mediators for a personal interview with judge Fleck, and we subsequently decided that that group would be best.

I arranged for the training session to be held over a four-day weekend at the Stuart School of Business of the Illinois Institute of Technology, where I was teaching at the time. The training program met with success beyond anyone's expectations. It had looked as though eighteen or twenty might attend; in fact, forty therapists and lawyers showed up.

That training session made all the difference. It was the turning point. By the end of those four long days, there was a core of forty-one people in Chicago who shared a common

vocabulary and a few common assumptions about mediation and the utility of a professional society for mediators in Illinois. By the end of the fourth day, the group had decided to set a date for the next Mediation Council meeting.

Burton Zoub chaired that meeting-a very successful one. I arranged for a videotape of a David Suskind show featuring members of the Academy of Family Mediators, a tape which very nicely illustrated the definition and goals of mediation. Six different committees emerged, and elections were discussed.

What no one knew was that for other reasons he would later explain to the press-that the pay scale offered to the judiciary is a scandal-Judge Fleck was planning to resign from the Bench that summer. Judge Fleck's Chicago plan never came to pass.

That was a great disappointment and a serious setback for mediation in Illinois. Judge Fleck's program would have been a marvellous innovation with nation-wide implications.

On the other hand, judge Fleck should be congratulated on catalyzing a great rush of interest in mediation. It was only in light of this rousing dynamic of professional interest that the need for a professional society became apparent.

The Mediation Council is vigorously engaged in promoting mediation in the State of Illinois. MCI's By-Laws Committee has seen to it that MCI fulfill all the functions of a professional society. There is a committee to evaluate training and to sponsor continuing education activities such as peer supervision groups and lecture programs. There is a Professional Liaison Committee whose purpose

is to explain mediation to other established professional groups in such a way as to alleviate some of the otherwise inevitable conflicts. There is a Public Relations Committee working to inform potential clients that mediation exists. There is a Referrals Committee whose purpose is to make sure that those seeking mediation find qualified mediators in their areas.

MCI's emphasis on professional competence is high. The Membership Committee has determined that any Regular Members who fail to keep up with continuing education requirements will be dropped. It's in the interest of mediation as a profession to assure that all who mediate be competent both skills and knowledge. The public must be able to have confidence in mediation. To that end, MCI has also established an Ethics Committee.

For those who wish to practice mediation in Illinois, joining MCI is the right thing to do.

Conclusion

Mediation represents a revolution in the ordered resolution of domestic disputes. Mediation in domestic relations cases is a fine idea with praise-worthy goals.

Nevertheless, to consider mediation apart from the attitudes, habits and interests of established professionals-apart from the dynamics of self-interest and the fear of the unknown-is a great mistake. It was Weber who wrote that all law consists in bureaucratic means of dispute resolution. Modern law is distinguishable from all other informal or pre-modern forms of normative regulation precisely because modern law conforms to bureaucratic principles, and especially to the principle of expediency (in Weber's term,

Rationalitaet).

In considering mediation, it is imperative to consider not only the good of clients but also questions of professional interests-apparently inevitable questions, some of which I have set out above.

Michael Joseph Rosanova, a sociologist and lawyer, is currently a partner in the Chicago mediation firm, the Family Mediation Center.

"An Analysis of the Southern California Arbitration Project"

"In July, 1969, the California Hospital Association and the California Medical Association jointly sponsored the first hospital based arbitration experiment in the country. the experiment included eight Southern California hospitals geographically located in the Los Angeles area. All of the hospitals selected were voluntary non-profit community hospitals with combined admissions of 498,190 during a period of from January, 1970 through June. 1975. [The project] was created in response to a critical situation developing in the State of California with respect to medical malpractice claims ...California was experiencing an increase in the incidence of malpractice litigation in excess of 25% of the increase at the national level."

"With this negative trend evolving, most of the major malpractice insurance carriers commenced to withdraw from the marketplace. This threat of

unavailability of malpractice insurance loomed very intently over the California health care industry. It was thus hoped that arbitration would provide a less expensive and more expeditious method of resolving claims."

"The arbitration option utilized within this project is voluntary and binding upon all parties agreeing in writing to be bound by the arbitration contract. This type of arbitration contract was permissible in California under the California Arbitration Code ...Patients are advised by Admissions Office personnel of the arbitration option and the opportunity available to them to either initial the form and thus opt out of arbitration; or to revoke the option by forwarding such notification to the hospitals within 30 days from their date of discharge from the hospital. Patients are advised that admission to the hospital is not in any way dependent upon their agreement to arbitrate."

"A study was designed to compare data accumulated from two segments of time of four years each. The period prior to the implementation of arbitration, 1966 through 1969, and the period following commencement of the arbitration, 1970 through 1973, were used. These four year periods were analyzed to determine the impact of the arbitration concept on a group of hospitals which had enacted the concept as compared to a group of hospitals which had not."

"A further study [extended] the original one with incorporation of an additional eighteen months of data accumulated for both groups of hospitals. This study retained the identical data for the period

prior to the implementation of arbitration, 1966 through 1969; however, the period following the commencement of the arbitration concept. 1970 through 1973, was extended to include claims experience from 1970 through June 30. 1975."

"The sample for the group of hospitals which had implemented an arbitration option consisted of the eight hospitals participating in the Southern California Arbitration project during the entire course of the program from 1970 through June, 1975. While a significant number of hospitals have joined the Project since the end of 1973, their data was not included within the sample group of arbitration hospitals. A comparative group of hospitals in the Los Angeles area was selected to represent hospitals which were not yet involved in arbitration. The same group of hospitals was utilized in the earlier study to ensure consistency in the analysisData from insurance company records were analyzed to ensure comparability of the two groups of hospitals, and to determine the proportional impact of the arbitration option after five and one half years of operation."

[The following were among the principal findings of the study: (1) substantially fewer claims were filed in the hospitals participating in the arbitration project hospitals than in the comparative group; (2) both the total number of closed patient claims and the percentage of closed patient claims were significantly higher in the arbitration project hospital; (3) the arbitration project hospitals had both a significantly lower total paid loss, paid loss per closed claim, and paid loss per admission

than did the comparative group; (4) the total cost of defending against malpractice complaints as well as defense costs per admission were significantly lower for the arbitration project hospitals; (5) the average length of time per claim from both the incident date and the date of filing to the date of settlement was significantly shorter for the arbitration project hospitals.]

"Notwithstanding the difficulties in implementation and administration of the arbitration system, the arbitration group of hospitals has documented their ability to more expeditiously resolve claims, once they were formalized with lower attendant costs ...than a group of hospitals not employing the arbitration conceptThe positive transferability of the arbitration concept, as employed in the Southern California Arbitration Project, to other geographical areas throughout the country remains largely a matter of conjecture. However, its successful application in the resolution of medical malpractice claims in the Southern California Project should warrant further experimentation and evaluation of the concept as a viable alternative to the traditional litigatory system."

The foregoing is excerpted from An Analysis of the Southern California Arbitration Project, January 1966 through June 1975, prepared by Duane H. Heintz. This report is available to the public from the National Technical Information Service, Springfield VA 22181.

"Adversary Criminal Procedure and Ethics: An Impossible Combination?"

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Technology

The adversary procedure in criminal trials is familiar to most of us, at least in its basic aspects. At the outset the prosecutor summarizes the state's evidence in an opening statement. He or she then presents the evidence by calling witnesses. The defense counsel generally cross examines these witnesses, and the testimony elicited may move the prosecutor to ask further questions on redirect examination. Such, in turn, may stimulate recross examination by the defense counsel, and so on until neither side has anything more to ask. When all witnesses for the prosecution have appeared the defense counsel then presents witnesses. The same procedure as before takes place, only this time the prosecutor asks questions on cross examination. After the defense rests, either side may call additional witnesses, but only to testify about issues raised in the preceding testimony of the opposite side. When neither the prosecuting attorney nor the defense counsel has any more witnesses to present they each make closing arguments to the jury.

Because of their familiarity to us, adversary criminal proceedings, on first reflection, seem natural and inevitable for dispensing justice. Perhaps for this reason, criticism of them tends to concentrate upon particular deficiencies. One seldom hears objections to adversary criminal

proceedings as a matter of basic principle. Nonetheless, precisely these kinds of objections have been voiced recently by an influential minority of observers of the legal system.¹ This paper begins by summarizing the substance of these objections. It then briefly describes the features of a less adversarial approach to criminal procedure. Finally, it explores the implications of the recent criticism of adversary criminal proceedings for some familiar but continually troubling problems of legal ethics.

Lloyd L. Weinreb writes that, "even at their most extravagant the justifications [of adversary criminal proceedings] do not reach the concrete consequences of practices which, but for their familiarity, we should regard as peculiar in the extreme . . . the most distinctive features of a criminal trial in this country should not be regarded as virtues. They are generally contrary to any of the purposes for which the trial is supposed to be conducted."²

Weinreb begins his critical attack by considering the examination and selection of jurors known as *voir dire*.³ Under this procedure prospective jurors are interviewed by both sides. If the answers given to questions put by either the prosecuting or defense attorney reveal a basis for doubting the ability of a prospective juror to consider the case objectively, the judge will excuse him or her "for cause." In addition, however, each side is allowed a number of "peremptory challenges" under which jurors may be eliminated with no inquiry into the reasons for doing so. Weinreb points out that the existence of peremptory challenges makes the *voir dire* examination in practice not a

means of excluding jurors of doubtful objectivity, but rather, quite the reverse.

Lawyers use the examination, he contends, primarily to include on the jury, if they can, persons likely to be favorably disposed to their side of the case. Since peremptory challenges need not be based on generally accepted grounds for suspecting partiality, lawyers tend to ask very broad questions. They attempt to elicit from a potential juror indirect expressions of his or her religion, economic status, ethnic identification, political views, and so forth from which the lawyer tries to guess the potential juror's attitudes toward the issues in the case. Manuals on trial tactics, Weinreb notes, are replete with advice about how to identify favorable and unfavorable jurors not only from information they give, but from their demeanor as well. Weinreb complains that voir dire thus introduces into a criminal trial at its very outset a tactical feature wholly unrelated to the defendant's guilt or innocence.

As for the trial itself, Weinreb has an equally negative point of view.⁴ In his words: "[in] one way or another, every aspect of the trial is distorted by the presentation of evidence exclusively through the prisms of the prosecution and defense the testimony of a witness is shaped and packaged to meet the particular needs of the side for which he testifies, according to the general assumption that all testimony favors one side or the other."⁵

Thus, Weinreb complains, witnesses are "coached" to improve the impact of their

testimony upon the jurors. The more simple, direct, and unequivocal a witness's testimony the better, even though, as Weinreb notes, under ordinary circumstances these very qualities could make the testimony suspect. Before trial both the prosecutor and the defense "help" witnesses make uncertain recollections more definite. They encourage witnesses to give answers to questions that probably would not have occurred to them, so that their perception of important facts appears more certain than it really is. The attorneys discuss questions the opposing counsel will probably ask, and what the answers should be. If an attorney's own witnesses disagree about some important factor, it is considered quite proper for him or her to seek resolution of the disagreement. Attorneys only ask questions of their witnesses worked out ahead of time to which they anticipate favorable responses. On cross examination the attorneys try to "shake" opposing witnesses, often by belaboring minor inconsistencies or insisting upon precision about trivia.

Weinreb notes that the seemingly excessive competitiveness which prevades the adversary criminal process even reflects itself in customary criteria of success for both defense attorneys and prosecutors. The former gain their reputations on their ability to "get clients off". For prosecutors, likewise, the outcome is all that counts. Prosecutors never receive congratulations for an acquittal. Thus in practice adversary proceedings far more resemble a rough and tumble competition than a process one would associate with a reasonable effort to establish the truth about guilt or

innocence.

Increasingly dissatisfied with criminal procedure in the United States, some legal scholars have begun to look at criminal justice systems in the countries of continental Europe as a source of guidance for reforms. John H. Langbein provides a concise description of German criminal procedure which emphasizes some fundamental respects in which it contrasts with the adversary approach.⁶ To begin, according to Langbein, no jury exists in German trials. Instead, a panel of judges, consisting of both professional judges and lay persons hears the case and deliberates about it collectively. In cases of serious crime, the professional judges outnumber the laypersons three to two. For less serious crimes the lay judges predominate two to one. For both kinds of cases German procedure requires a two-thirds majority for conviction.

Trials are presided over by a professional judge who, Langbein notes, is the leading figure in the proceedings. He or she has the primary roles that belong to the opposing lawyers in the Anglo-American system, most importantly, examining the accused and taking evidence. Before the trial the presiding judge examines a dossier on the case provided by the prosecution to determine the order in which to call witnesses and to prepare himself or herself for examining them. All witnesses nominated by the prosecution and the defense must be examined. The court, however, may call witnesses on its own. Moreover, German procedure specifically provides that the presiding judge shall determine when and how many

expert witnesses to summon.

Because the presiding judge conducts the taking of proof, lawyers for the prosecution and for the defense play relatively minor roles at the trial. The prosecutor reads the accusation aloud when the trial begins, and both lawyers may ask questions of the various witnesses after the presiding judge has completed his or her examination. Langbein maintains, however, that ordinarily lawyers do not make extensive use of this opportunity. He observes that "if the judge has been thorough, there will be little for the 'advocates' to ask."⁷ Even if the judge has not handled an examination as the prosecutor of defense would have wished, lawyers will be reluctant to examine at length themselves for fear of seeming to imply dissatisfaction with the judge's performance.⁸ When the presiding judge has concluded proof taking, the prosecutor and defense counsel then each make closing statements. The two opposing lawyers thus generally remain more or less passive throughout the proceeding, taking notes in preparation for presenting their cases on appeal. The German system has very liberal rules about appeal which apply equally to both sides.⁹

German criminal procedure minimizes the role of the attorneys for the prosecution and defense not only because the judge performs the primary functions allotted to them under the Anglo-American system, but because, the defendant plays a far more active role. As Langbein says, "[in] the usual Anglo-American trial the accused is a strangely awkward bystander. His lawyer does the talking. Even if

the accused elects to testify, his role is assimilated to that of other witnesses: he is examined and cross examined, then he relapses into silence."¹⁰ In sharp contrast, defendants in German trials participate actively. They speak directly to the presiding judge without the intercession of counsel. Furthermore, German procedure encourages defendants to talk directly and extensively. Defendants are not sworn, and thus never risk perjury. After witnesses have testified, the presiding judge frequently invites defendants to respond to their testimony. German procedure requires that the accused be permitted to put questions to the witnesses.

Weinreb has vigorously advocated reform of American criminal procedure along lines similar to the German system as Langbein describes it. He says in this regard that, "[a] proceeding conducted along these lines would be entirely unlike an American trial, although not so unlike proceedings in other countries. The departures from our existing practices are only the result of eliminating the adversary system where its effect is not to further the goal of a prompt, accurate determination of guilt At the same time, where partisan advocacy would assist the goals of the proceeding it would be retained If the shift of the line between neutrality and advocacy seems strange in the context of a criminal trial, it is a far more normal one in our experience generally. But for its unfamiliarity, it is likely to be more easily understood, applied, and accepted than the lines we draw now."¹¹

The immediately preceding

comments by Weinreb may have special relevance in the area of legal ethics. Personally troubling moral problems often confront defense lawyers engaged in adversary criminal proceedings. By contrast, under the continental system it would seem that such problems do not arise, or at least not in the excruciatingly difficult form they can take in an adversary system.

May defense attorneys present testimony that their clients have admitted to them is untrue? May they seek to discredit testimony that they consider accurate? If a client, who an attorney has defended successfully, discloses his or her guilt, what should the attorney do? What if another person is later convicted of that crime? By their very nature these questions appear to call for categorical answers. Yet in considering them, one finds oneself strongly pulled in opposite directions. For this reason, diametrically opposed answers often seem unpersuasive. A brief look at how two leading writers, Alan Goldman and Monroe Freedman, deal with these questions suffices to illustrate the point.

Alan Goldman strongly contends that "[there] are cases in which skepticism on the part of the lawyer [about a client's guilt] is impossible. In such cases the goal of maximum protection for the innocent, which defines the normal role of the criminal lawyer in the adversary system does not apply. Lawyers are not therefore justified in using all those tactics to secure acquittal, including presentation of false testimony, harmful aggressive cross examination, or impeachment of testimony,

harmful, aggressive cross examination, or impeachment of testimony of truthful witnesses, that they might be justified in using to prevent conviction of an innocent client. If a lawyer knows with certainty that his client is guilty of a serious crime, then his convincing a jury of the client's innocence by hiding incriminating facts, presenting false testimony, or breaking truthful witnesses appears to thwart the moral purpose of the legal system rather than further it."¹²

The last point seems obvious on first impression. Criminal procedure exists primarily for the determination of guilt or innocence. In adversary proceedings, the attorneys have between them virtually the sole responsibility for presenting the evidence upon which the jury reaches its verdict. Because of this, defense lawyers who ask questions on direct examination which they believe will be answered untruthfully, undermine accurate testimony, and so forth, substantially assist guilty client's to escape deserved punishment. Goldman contends that a straightforward moral assessment of the matter, unmediated by "institutional blinders", inescapably leads one to regard the above kinds of behavior by lawyers as completely unjustifiable.¹³

Goldman's arguments for the above position, however, are unpersuasive. The considerations he points to are all compelling, in and of themselves, but the conclusion he draws from them seems far too pat.¹⁴ On reflection, there is a completely different side of the question he fails to appreciate fully.

The fact that lawyers more or less dominate adversary criminal proceedings cuts two ways. It makes them alders and abettors in a guilty client's successful evasion of deserved punishment. On the other hand, precisely because of the dominant role it accords lawyers, the adversary system of criminal procedure does not provide very extensively for client self help. The duty of confidentiality thus serves an essential purpose. A defendant's belief that his or her attorney strictly adheres to fosters candor without which the attorney cannot prepare an effective defense. As just mentioned, it is extremely difficult for individuals to represent themselves in adversary criminal proceedings. This means that if defense attorneys cannot prepare effective defenses then, for all practical purposes, clients go undefended.¹⁵

Monroe Freedman forcefully presses the above points in his book *Lawyers Ethics in an Adversary System*.¹⁶ He briskly but thoroughly reviews the various proposals advanced for enabling defense lawyers to avoid having to present perjured testimony, undermine truthful witnesses, and so forth, and shows how, in one way or another, they leave the client defenseless.¹⁷ Freedman concludes, "I stand with those lawyers who hold that the lawyer's obligation of confidentiality does not permit him to disclose the facts he has learned from his client which form the basis for his conclusion that the client intends to perjure himself". What this means necessarily it seems to me is that the criminal defense attorney, however unwillingly in terms of personal morality, has a professional responsibility as an

advocate in an adversary system to examine the perjurious client in the ordinary way to argue to the jury, as evidence in the case, the testimony presented by the defendant."¹⁸

Freedman's arguments, however, like Goldman's, leave one feeling dissatisfied. Despite the vigor and thoroughness with which he presses these arguments they ultimately yield a conclusion which, although Freedman seems unaware of it, is highly conditional. In effect, he concludes that lawyers within an adversary system have no responsible choice, consistent with their roles as advocates, but to pursue the course he (Freedman) describes in the preceding quotation.

What should one make of this? I think it depends upon one's general attitude toward the adversary system of criminal justice. If one regards it as an essential aspect of criminal due process then the presentation of perjured testimony, discrediting of truthful witnesses, and so forth, by defense attorneys will seem a necessary evil. On the other hand, one who does not so regard the adversary system might well take Freedman's conclusion as strong grounds for a career decision not to become involved in adversary criminal proceedings as an advocate for the defense. In other words, it counts substantially against the choice to occupy a certain institutional role that doing so will place one time after time in morally ambiguous situations.

Freedman fails to note this point, I think, because he presupposes the indispensability of an adversary system of criminal procedure.¹⁹ Not everyone, however, shares

such a view. Indeed, quite the opposite, I suspect that Weinreb's litany of defects in adversary criminal proceedings cited earlier strikes a responsive chord in most people even if their negative feelings about the matter do not run so deep as his do. Freedman's approach then, like Goldman's, overlooks a critical aspect of the ethical problems faced by criminal lawyers in an adversary system. For this reason, however admirable its conciseness and clarity, Freedman's discussion leaves one with the feeling that something very important was left out.

The foregoing remarks strongly suggest that the most difficult problems of legal ethics defense attorneys confront in an adversary system of criminal procedure admit of no satisfactory resolution. So long as one plays the role of advocate for the defense in such a system, the duty to maintain the confidences of one's clients seems nearly paramount. This is because, given the predominant role of the attorney in adversary proceedings, departure from very strict adherence to this duty deprives the client of any defense. The adversary system makes it virtually impossible for defendants to function without assistance of counsel. But realization of these points fails to remove the sense of moral ambiguity that surrounds the defense attorney's role. Because of the seemingly vast divergence of adversary criminal proceedings from common sense beliefs about how one should ascertain guilt or innocence, one can hardly avoid a demoralizing sense of skepticism about the entire enterprise.

The German system of criminal

procedure, described by Langbein, allots attorneys a significantly smaller role than they have in adversary proceedings. This strongly suggests that many of the wrenchingly difficult moral problems encountered by defense attorneys under the Anglo-American system do not arise for their German counterparts. Since the presiding judge carries out the examination of witnesses, German defense attorneys generally do not face the problems of whether to present perjured testimony or to discredit truthful witnesses. Since they have a much smaller role in the proceedings than do lawyers under the Anglo-American system, in all likelihood their clients feel less need to tell them everything. Thus, German attorneys seldom face situations under which they feel compelled to reveal confidential disclosures of their clients to legal authorities.

Perhaps the best answer one can give to the hard ethical questions for Anglo-American criminal defense attorneys is that these questions will remain intractable so long as we retain the adversary system in its current form. They could be made far less pressing as a practical matter, however, by a move in the direction of the German approach. This point, perhaps, by itself does not constitute a decisive ground for effecting such a move. But its weight is far from negligible. It is not good when a procedure creates such complex moral dilemmas for its leading participants that they develop highly ambivalent feelings about the value of their allotted roles. Such a situation in time has damaging psychological effects upon the participants, and these, in turn, ultimately work to undermine the process itself.

Consider the following remarks by an experienced criminal defense attorney:

"The constant exposure to lies has made me more suspicious of people. I find myself immediately sizing up character and trustworthiness, automatically searching out motives. I have developed a reflex of recalling all prior inconsistent statements, no matter how trivial. These are good habits for a criminal lawyer-if only they didn't bleed into my personal life.

Destroying witnesses can lead to an arrogance and an inflated sense of control over people that is, at times, difficult to leave behind in the courtroom. The temptation to dominate a social gathering or individual encounter sometimes seems irresistible. The arrogance will betray itself in an impatience with people who are not speaking 'relevantly' or 'responsibly'.

All successful criminal lawyers I know are egomaniacs.. . there isn't a criminal lawyer I know certainly including myself-who hasn't interpreted a 'not guilty' as proof of his unique gift, his insight into how to manipulate people."²⁰

If only because they might go some way toward making the above kind of self assessment by defense attorneys less prevalent, reforms in the direction of the continental system of criminal procedure should be considered seriously.

Footnotes

1. This article summarizes the following two books which present fundamental criticism of adversary criminal proceedings: Lloyd L. Weinreb, *Denial of Justice*. (New York: MacMillan,

1977) and John H. Langbein, Comparative Criminal Procedure: Germany (St. Paul, Minn.: West Publishing Co., 1977). Judge Marvin E. Frankel has voiced similar criticisms in an article entitled "The Search for Truth: An Umpireal View" University of Pennsylvania Law Review. Vol. 123 p.p. 1031-(1975).

2. Weinreb, p. 88
3. Weinreb, p.p. B8-87
4. Weinreb, p.p. 97-103
5. Weinreb, p. 99, p. 102
6. Langbein, cited at n. 1
7. Langbein, p. 64
8. Langbein, p. 64
9. Langbein, p.p. 82-85
10. Langbein, p. 65
11. Weinreb, p. 143.44
12. The Moral Foundations of Professional Ethics (Totowa, N.J.: Rowman and Littlefield. 1980) p.p. 119-120
13. Goldman, p. 151
14. Goldman presents a sophisticated analysis in which he applies an account of moral rights, worked out in the first chapter of his book, to problems of legal ethics. Since, it seems to me, the substance of my criticism of Goldman's views may be raised within his moral rights framework, I have not described the details of that framework.
15. Such was the basic idea behind the decision of the United States Supreme Court in Gideon v Wainright 372 U.S. 335 (1963).
16. (Indianapolis: Bobbs Merrill, 1975)
17. Freedman, Chs. 3 and 4
18. Freedman, 40-41
19. Freedman writes: "The system of professional responsibility that I have been advancing. . . is one that attempts to deal with ethical problems in context ...that is, as part of a functional sociopolitical system concerned with the administration of justice in a free society."(46)
20. Seymour Washman,

"Confessions of a Defense Attorney" Village Voice Vol. XXIII no. 39, Sept. 28, 1978, p. 45.

"News from the Center"

Dr. Frederick A. Elliston has joined the Center as a Senior Research Associate. He comes to us from the Criminal Justice Research Center in Albany, New York and brings with him a professional interest in business, legal and police ethics. He is currently preparing a casebook on strategies for resolving professional differences and, as part of his project on teaching police ethics, he is writing or editing several monographs.

With support from the Exxon Education Foundation, IIT's Center for the study of Ethics in the Professions is producing a series of instructional modules in applied ethics. **Mark Frankel** and **Vivian Weil** are pleased to announce that authors have been chosen for these modules.

James C. Petersen and Dan Farrell of Western Michigan University will write the module on whistleblowing. The author of the module on risk-benefit analysis will be Mark Sagoff of the University of Maryland. Heinz C. Luegenbiehl, of the Rose-Hulman Institute of Technology, will write about engineering codes of ethics.

A module entitled "Engineers' Responsibilities for Supplying Trustworthy Information on Policy Issues to the Public" will be written by Norman Balabanian

of Syracuse University. Rondo Cameron and A. J. Millard of Emory University will be the authors of "Technology Assessment: A Historical Approach." Purdue University professors Martin Curd and Larry May will write about professional responsibility for harmful action.

Eric J. Novotny, of the Communications Satellite Corporation, will contribute a module entitled: "Who Owns Your Ideas? Professional Autonomy and Organizational Control of Knowledge." A module concerning the moral status of loyalty will be written by Marcia Baron of the University of Illinois at Urbana. Paula Wells, of Wells Engineers, Inc., and Hardy Jones of the University of Nebraska will be the coauthors of a module on conflicts of interest.

These modules are intended for use in a wide range of undergraduate, graduate and continuing education courses. Each one will consist of an essay, illustrative case studies, and a bibliography. Drafts of these modules will be tested and evaluated by cooperating faculty at institutions throughout the country. They should be available for general distribution in late 1984.

In other news, **Vivian Weil** would like to report that a volume of proceedings of the Second National Conference on Ethics in Engineering is "in the works," and should be available sometime next year. This conference, which the Center hosted last March, was reported in the spring issue of PERSPECTIVES. Prof. Weil would also like to mention that the proceedings will include a bibliography in engineering

ethics. We would like to receive suggestions for items that we ought to include.

Prof. Tom Calero reports that he has just finished an article on the impact of the Foreign Corrupt Practices Act on U. S. exports trade. This paper is one of a number of papers which result from a business ethics conference held at the University of Illinois at Chicago Circle in May, 1981. These papers will be published in a book by the University of Illinois Press.

On October 5, 1982, **Professors Jack Snapper** and **Vivian Weil** attended the National Engineering Colloquium in Oak Brook Illinois. Prof. Snapper presented a paper entitled "On the Power of Private Organizations to Set Standards," and Prof. Weil spoke on the morality of whistleblowing.

Prof. Snapper would also like to report that he will be participating in panel on teaching computer ethics at the annual meeting of the Eastern Division of the American Philosophical Association in Baltimore on December 29, 1982. He will also be speaking on computer ethics in the Lyceum Lecture Series at Dutchess Community College on February 24, 1982.

At the annual meeting of the Society for Social Studies of Science in Philadelphia on October 31, 1982, **Prof. Warren Schmaus** presented a paper with the title "Fraud and Negligence in Science." He will also be speaking on this topic at a special session on fraud in science, which he helped to organize, at the meeting of the American Association for the Advancement of Science to be held in Detroit at the end of May,

1983.

Prof. Fay Sawyer reports that she gave a talk to the annual convention of the Society of Engineering Examiners on August 10, 1982 called the "The First DC-10 Case." She has also been pursuing research on moral issues in architecture, and spoke to the Chicago Meeting of the Society of Architectural Historians on May 27 of this year. Her textbook on architecture and ethics, which takes a case study approach, has just been completed, and she welcomes inquiries about it.

Robert Ladenson's book, *A Philosophy of Free Expression and its Constitutional Applications* (Rowman and Littlefield) will appear in January of 1983. In this book Professor Ladenson provides a theoretical approach to freedom of expression incorporating the insights of major philosophers and then applies it to a number of important First Amendment issues. Among the topics discussed are constitutional issues in connection with obscenity laws, the privilege claimed by journalists with respect to confidential information, the law of defamation as it affects the mass media, and freedom of expression in the corporate workplace.

Martin Malin's article, "Protecting the Whistleblower from Retaliatory Discharge" will be published in early 1983 in volume 16 of the *University of Michigan Journal of Law Reform*. It will form part of a symposium on individual employee rights. On January 12, 1983, Professor Malin will be speaking to the Labor and Employment Law Section of the Chicago Bar Association on the same subject. Professor Malin is a

contributor to the two volume treatise *Age Discrimination* which will be available on December 27, 1982 from Shepard's /McGraw Hill. The principal author is Howard Eglit (also a faculty member at Kent). Professor Malin wrote three chapters dealing with age discrimination in employment.

Ethics Center Senior Research Associate **Fred Elliston** recently published with **Norman Bowie** (from the Value Center at the University of Delaware) a collection of papers *ETHICS, PUBLIC POLICY AND CRIMINAL JUSTICE* (Cambridge, MA: O. G. & H.). It covers a broad array of moral issues that professionals face in the administration of justice. Part one deals with the concept of crime, part two with the police and law enforcement, part three with the courts and sentencing, part four with prisons and prisoners, and part five with policy formation. The topics include white collar crime, deadly force, affirmative action, mandatory sentencing, criminal insanity and the death penalty.

Among the philosophers and criminologists who contributed are Elizabeth Beardsley, Hugo Bedau, Herbert Fingarette. Geri Mockers, Andrew Rack, Ferdinand Schoeman, Ernest Van Den Haag, Roger Wertheimer and Marvin Wolfgang.

"Announcements"

Volume One of Working Papers, published by the Center for the

Study of Science in Society, is now available from the Center at \$2.50 per copy. Volume One contains the papers of Langdon Winner, Vivian Weil, Spencer Weart, and Robert Livingston presented in an "Ethics and Engineering" Series at Virginia Tech in the Spring of 1981.

Please send your check made out to the Center for the Study of Science in Society to the Center for the Study of Science in Society. Price House. Virginia Polytechnic Institute and State University, Blacksburg, VA 24601.

The Center for the Study of Ethics in the Professions at the Illinois Institute of Technology was established in 1976 for the purpose of promoting education and scholarship relating to ethical and policy issues of the professions.

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Adversary proceeding in bankruptcy (USA) – An Adversary proceeding in bankruptcy, is a lawsuit in the American legal system filed by a party called a plaintiff against a party called a defendant . ProcedureAdversary proceedings are governed by certain court rules found in Part VII of the – Wikipedia. Adversary – may refer to: In Judeo Christian religion: Satan, whose name means adversary in Hebrew. In computer science: Adversary (cryptography) is a malicious entity in cryptography whose aim is to prevent the users of the cryptosystem from achieving their – Wikipedia. How Adversary Proceedings Are Commenced. The creditor or trustee will draft a complaint, setting forth the facts and allegations which the plaintiff believes justify the granting of relief against the debtor, and stating the relief requested. All adversary proceedings must be filed electronically through the court’s E.C.F. system. The court will also assign an adversary proceeding case number to the matter, which is different from the original bankruptcy case number. Although court rules require that any extension of time be memorialized by a stipulation which is filed with the court, it is nevertheless common practice to merely confirm such extensions by way of informal letter. Stipulations, however, are always more desirable. The adversarial system or adversary system is a legal system used in the common law countries where two advocates represent their parties' case or position before an impartial person or group of people, usually a judge or jury, who attempt to determine the truth and pass judgment accordingly. It is in contrast to the inquisitorial system used in some civil law systems (i.e. those deriving from Roman law or the Napoleonic code) where a judge investigates the case. Contested Matters Versus Adversary Proceedings. Some issues in a bankruptcy case are more straightforward than others. If it requires a hearing and decision from the judge but not extensive evidence (and the subject doesn't appear on the Rule 7001 list – more below), it can proceed as a "contested matter." Regarding time, effort, and expense, contested matters are much quicker to resolve – weeks instead of months or years – and cheaper. A judge would resolve the following requests as a contested matter: lift the automatic stay (the order preventing collection action). While it is possible to represent yourself in an adversary procedure, they're complicated. A local, knowledgeable bankruptcy attorney can advise you of the best course of action. Talk to a Bankruptcy Lawyer. Adversary Proceeding - Free download as PDF File (.pdf), Text File (.txt) or read online for free. Adversary proceeding in Delaware bankruptcy case. Supreme Court of the State of New York relating to a 57 count indictment for, among other things, grand larceny, scheming to defraud and falsifying business records. 11. Upon information and belief, defendant James Margulies is a resident of the State. of Ohio. Attorneys Office for New York County, together with ten unindicted co-conspirators. The 57count indictment charged the pair with grand larceny, scheming to defraud and falsifying business records. INSIDER COMPLAINT.

Definition of Adversary Proceeding in the Legal Dictionary - by Free online English dictionary and encyclopedia. What is Adversary Proceeding? Meaning of Adversary Proceeding as a legal term. What does Adversary Proceeding mean in law? Adversary Proceeding. Any action, hearing, investigation, inquest, or inquiry brought by one party against another in which the party seeking relief has given legal notice to and provided the other party with an opportunity to contest the claims that have been made against him or her. A court trial is a typical example of an adversary proceeding. Cross-references. Adjudication. West's Encyclopedia of American Law, edition 2. Copyright 2008 The Gale Group, Inc. All rights reserved. Want to thank TFD for its existence? Vol. 2, No. 3/4, September/December 1982 Adversary Legal Proceedings: Is It Time for New Directions? [photocopies available for \$1.80]. Vol. 2, No. 1/2, March/June 1982 Proceedings of the Second National Conference on Ethics in Engineering [photocopies available for \$1.80]. Vol. 1, No. 3/4, September/December 1981 Fraud and Sloppiness in Science [photocopies available for \$2.40]. Vol. 1, No. 2, June 1981 Workplace Democracy and Employee Rights [photocopies available for \$1.20]. the time lost in litigation for witnesses, parties, juries, and others who have. better things to do, as well as the uncertainty of accurately predicting court. outcomes and liability ranges. A normative signiï-cance for us as legal actors. First, is it true that we have. fewer trials than in some other "golden age" of adversarial litigation? Secondly, even if it is true, is it necessarily a bad thing that we have fewer. trials, especially when other data suggest that we, in fact, have even greater. numbers of conï-icts and disputes among us, including greater numbers. Strengths of the Adversary System. The parties are able to fight their own battle and present their own evidence as they see fit The judge is impartial and operates as an umpire The compulsory need for legal representation ensures an even battle The consistency and strength of the rules of evidence truth may emerge. Weaknesses of the Adversary System. 4. The role of legal representation Lesser role due to judges active role Assist judge with finding out the truth This may include further questioning of witnesses. 5. Burden and Standard of proof No formal burden or standard is set Judge is personally responsible for bringing evidence and finding out the truth. Recent Reform. A stage of civil proceedings where the plaintiff makes a claim against the defendant and... Adversary Proceeding A lawsuit arising in or related to a bankruptcy case that begins by filing a complaint with the court, that is, a "trial" that takes place within the context of a bankruptcy case. Source: U.S. Courts ADVERSARY PROCEEDING - One having opposing parties; contested, as distinguished from a hearing in which only one party appears. AFFIANT- The person who makes and signs an affidavit. AFFIDAVIT: A written statement made under oath. ~ . Legal proceeding involving parties with opposing interests, with one party seeking legal relief and the other opposing it. Affiant: A person who makes and signs an affidavit. ~ A separate lawsuit filed in the bankruptcy court which arises in or is related to the bankruptcy case.