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Show Me the Money: Part Two, Monetizing the "Value Added" of Attorneys Who Serve as Mediators and Arbitrators

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THE ETHICAL COMPASS

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Introduction

In the oft-told fable "The Emperor's New Clothes," the candid, uncensored observations of a young child that the Emperor's "new clothes" weren't clothes at all but actually the emperor's nudity, freed the rest of the townspeople to finally acknowledge the jarring reality that their the emperor was naked. And so, "The Emperor's New Clothes" has become a metaphor for having the courage to see things as they actually are, not for what we are incorrectly told they are. In Part One of this column, I began the discussion of how settlement-savvy lawyers might realistically use alternative fee paradigms instead of traditional hourly billing to more accurately and ethically monetize the true value of the settlement skills they bring to clients. Continuing this discussion about more realistic billing paradigms, in Part Two of this column, I discuss how lawyers who serve as mediators and arbitrators might more accurately and ethically monetize "the value added"[1] they bring to parties through creative fee structures, beyond traditional hourly or daily fees. To engage in this discussion, dispute resolution practitioners are encouraged to adopt a more realistic and nuanced perspective about what mediator and arbitrator impartiality actually means in the context of ethical billing paradigms and forgo our long-held, unattainable concept of mediator and arbitrator impartiality.[2]

Traditionally, mediators and arbitrators have primarily relied on hourly and daily billing, believing this type of billing is comfortably ensconced within the ethical contours of their ethical mandates as lawyers and dispute resolution professionals. Moreover, many have avoided contingency billing regimes for fear that contingency billings would ethically jeopardize their impartiality as mediators and arbitrators. However, as with "The Emperor's New Clothes," we all know whatever billing regime is used, the mediator and arbitrator has an economic interest in settling the case that may potentially influence, either explicitly or implicitly, mediator and arbitrator impartiality towards settlement. That is the reality of the business of dispute resolution.

Therefore, in order for us to even consider alternative billing regimes such as contingency billing that monetize the "value added" that mediators and arbitrators offer, we need to revisit the long-held belief that impartiality is a fixed fulcrum that clearly defines impartial billing behavior and instead reconceptualize impartiality as a more dynamic standard that guides ethical practice. I will begin this column by introducing some alternative fee arrangements for arbitrators and mediators that help monetize the "value added" they bring to cases. Then, I will continue the discussion by identifying the relevant Rules of Professional Conduct and the ethical mandates of arbitrators and mediators that define the ethical contours of mediator and arbitrator ethical billing regimes. In Part Three, I explain the reason our dispute resolution community should reconceptualize impartiality as a dynamic ethical standard rather than an absolute. Finally, I will conclude with suggestions for the next steps.

Part One: Alternate Fee Paradigms to Monetize "Value Added"

Despite the fact that so many of us are enthusiastic about finding innovative fee structures that ethically monetize our "value added," there is a paucity of information about the topic. As part of my preparation for writing this column, I posted an inquiry on Maria Volpe's listserv, asking listserv members to share any creative fee structures that they used.[3] Although my inquiry generated interest among listserv members who were eager to learn more about this topic, only a couple of neutrals volunteered that they had actually used any type of creative billing paradigms. Thus, I invite you to consider the fee paradigms introduced in this section as the beginning of an ongoing discussion that hopefully whets your appetite, and will serve as springboard for generating other viable fee structures as we go forward.

Scott Peppet, one of the few dispute resolution scholars who has addressed this topic, proposes three types[4] of contingency fees for mediation where the fee would be dependent on some aspect of the outcome: success fees,[5] percentage of cost-savings fee[6] and percentage-of-value-created fee.[7] As the name implies, in a success fee agreement, the mediator gets paid only if the case gets resolved.[8] Those mediators who along with consenting parties opt for a percentage of cost-savings agree at the onset of the mediation that the parties will pay the mediator a voluntary bonus based on the percentage of legal fees and other expenses saved in addition to the mediator's daily rate.[9] Those mediators who contract with parties for a percentage-of-value-created fee are compensated for

the expanded value the mediator brings to the parties by creating additional business or economic value beyond the scope of the initial dispute.[10]

Peppet acknowledges that these types of contingency fee arrangements could influence the mediator's impartiality in the way the mediator controls the process and the outcome of the mediation.[11] However, Peppet asserts that the mediator can safeguard the integrity of the mediation process by incorporating such procedural safeguards as explaining the fee arrangement in writing pre-mediation, encouraging parties to consult with an attorney about the suitability of such fee arrangement as it applies to the particular parties, and mediator assurances that the fee arrangement will not favor one party. Moreover, rather than disadvantaging parties, these more flexible billing paradigms honor the right of the mediator and the parties to fashion a fee arrangement compatible with everyone's interests.[12] Of course, contingency fee arrangements may not be for everybody, but they should be an available option in the right circumstances.[13]

Kenneth R. Feinberg, our renowned colleague who has spearheaded such high profile mediations as the mediation of the September 11 Fund, boasts that he is indeed biased in favor of settlement and that, in part, is why he is retained by sophisticated clients.[14] As a business decision, Mr. Feinberg seeks alternatives to hourly billing such as a success fee if there is a settlement. However, Mr. Feinberg acknowledges that such a type of fee arrangement could be problematic and inappropriate for unsophisticated clients.[15]

Another innovative billing regime suggested by one of our esteemed colleagues is a 50% discount from the rate agreed upon "if the dispute does not settle prior to the date that there is a final judicial determination of the case."[16]

Still another esteemed colleague from Maria Volpe's listserv has been actively exploring several innovative billing arrangements including getting paid according to "the percentage of money saved," having the parties he trusts pay the mediator based on "whatever you thought I was worth," and exchanging less fees for a glowing review on LinkedIn. All creative ways of monetizing the "value added."[17]

For arbitrators, I was not able to find anything on arbitrators "value added" beyond the traditional time-based, fixed–based and ad valorem method. However, I could conceive of the value in having a fee regime that would allow the arbitrator to get a premium for hearing and determining an arbitration within a pre-specified time. This would reward arbitrators for conducting and deciding arbitrations efficiently and promptly.

How do these innovative billing regimes comport with our ethical professional mandates?

Part Two: Ethical Parameters for Fee Paradigms

Of course, we are concerned about whether any of the suggested contingent fee paradigms fit within our ethical mandates concerning fees. Unfortunately, this is the juncture where a good idea hit an apparent ethical roadblock. Although variations of many of the suggested alternate fee paradigms would be ethically permissible for lawyers,[18] the same suggested fee regimes would be ethically barred for lawyers serving as mediators and arbitrators, because such contingency fee arrangements are considered to impugn a neutral's impartiality. Ethical codes for arbitrators and mediators regarding contingency fee arrangements are disfavored, because it is presumed that such contingency fee arrangements provide a financial interest in the dispute resolution process that compromises a neutral's impartiality. Let's have a more focused understanding of the challenge that exists within the current ethical framework that guides the ethical billing behavior of neutrals.

Lawyers who serve as arbitrators and mediators are required to consider both the Rules of Professional Conduct and the relevant ethical codes for arbitrators and mediators when defining ethical billing behavior. The challenge is how to harmonize the different ethical codes. As provided in the Rules of Professional Conduct, lawyers are ethically permitted to use "value added" fee arrangements such as contingent fees under certain delineated circumstances However, those lawyers who serve as arbitrators and/or mediators may be ethically barred from monetizing their "value added" by using contingency fee arrangements because the ethical codes of arbitrators and mediators prohibit contingency fee arrangements or any fee arrangement that impugns their impartiality as neutrals.

When figuring out the ethical bounds of permissible fee arrangements, lawyers must first consider their ethical mandates as lawyers. To recap what was discussed in Part One of this column, the New York Rules of Professional Conduct Rule 1.5 Fees and Division of Billing informs us that reasonableness[19] and transparency[20] shape the ethical contours of any billing structure that incentivizes settlement. Specifically, Rule 1.5(a) provides that any fees charged must be reasonable.[21] A fee is not reasonable, if "after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive."[22] Relevant factors that determine the reasonableness of a fee include "the skill requisite to perform the legal service,"[23] "the amount involved and the results obtained,"[24] "the experience, reputation and ability of the lawyer or lawyers performing the services,[25] and "whether the fee is fixed or contingent."[26] The concept of "the amount involved and the results obtained," mirrors the standard the U.S. Supreme Court articulates in determining the appropriate fees to be awarded to prevailing attorneys in a Title 42 U.S.C. § 1988.[27] Moreover, the Court guides that an award of a premium or enhanced award is

permitted "in cases of exceptional success" if the hourly rate multiplied by the actual number of hours worked is necessary to arrive at a reasonable attorney's fee.[28]

Our New York Rules of Professional Conduct also inform that outcome-based compensation or contingency fees are ethically permissible[29] except for criminal matters[30] and certain domestic relations matter.[31] Interestingly, contingency fee arrangements are not considered to implicate the personal, financial or business conflict prohibitions contemplated in Rule 1.8 Current Clients: Specific Conflicts of Interest.[32] Thus contingency fees are allowed with specific exceptions even though we know that in practice, contingency fee arrangements may at times create a conflict between the client and attorney's interests. In fact, this tension becomes magnified when clients and attorneys have different risk preferences and different economic goals.

As with any agreed-upon billing regime, lawyers have an ethical obligation to fully explain the agreed upon billing regime to their client. Before representation begins or within a reasonable time thereafter, lawyers must communicate to lawyers "scope of the represenation and the basis or rate of the fee and expenses for which the client will be responsible,"[33] and "whether the fee is fixed or contingent." Moreover, "in domestic relations matters, a lawyer shall provide a prospective client with a Statement of Client's Rights and Responsibilities at the initial conference and prior to the signing of a written retainer agreement."[34] If the representation is based on a contingent fee, then "the lawyer must provide the client with a writing stating the method by which the fee is to be determined…and any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon the conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination."[35]

The ethical inquiry for the lawyer serving as the arbitrator and/or mediator does not stop here, but continues to the appropriate dispute resolution codes, and if appropriate, any relevant court rules. For the arbitrator, The Code of Ethics for Arbitrators in Commercial Disputes,[36] Canon VII, AN ARBITRATOR SHOULD ADHERE TO STANDARDS OF INTEGRITY AND FAIRNESS WHEN MAKING ARRANGEMENTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES, provides fee and billing guidance. According to the canon, arbitrators should preserve the integrity and fairness of the process in the following manner: prior to accepting appointment, arbitrators should establish, in writing, the "basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges;"[37] if services are administered through an institution, the institution should collect the fees; however, if self-administered, payments should be made in the presence of all parties (other than party-appointed arbitrators);[38] and "Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding."[39]

Beyond this guidance about fees, several places in the code emphasize that impartiality must be preserved. For example, CANON I. AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS cautions that "after accepting appointment and while serving as an arbitration, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality."[40] Again in Cannon I, arbitrators are advised they should accept appointment only if they can serve impartially[41] and independently from the parties.[42]

For mediators, the Model Standards of Conduct explicitly address mediator billing in STANDARD VIII: FEES AND OTHER CHARGES.[43] First, a mediator shall provide to each party or their representative "true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation."[44] The mediator should base their fees on such relevant factors as "the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services."[45] "The mediators should provide the fee arrangement in writing unless the parties request otherwise."[46]

As in the Arbitrator Code, the Mediator Code continues to warn against fee arrangements that impair impartiality such as contingent fee arrangements. Specifically, Standard VIII B provides:

A mediation shall not charge fees in a manner that impairs mediator's impartiality.

1. A mediator should not enter into a fee arrangement which is contingent upon the result of the mediation or amount of the settlement.
2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

Therefore, in an ethically perfect world, lawyers who are arbitrators or mediators should eschew any fee arrangement that impugns their impartiality. Like the astute child in the fable of "The Emperor's New Clothes," we realize that impartiality is an unrealistic ideal. As ethical practitioners we continue to struggle with how to reconcile our desire to be ethical practitioners

and ethically monetize our value as arbitrators and mediators.

Part Three: Developing a More Realistic Conceptualization of Impartiality

We cannot ethically implement the innovative billing regimes such as the contingency fee models discussed above unless we endorse a broader definition of impartiality than is currently defined in our ethical codes for arbitrators and mediators.[47] The current public, utopian viewpoint put forth in the Ethical Codes about the impartiality of arbitrators and mediators does not comport with the more private reality of good practice. Of course in the nascent stage of the mediation and arbitration professions, a narrowly defined standard of such ethical tenets as "impartiality" were requisites to establishing the integrity of the process and defining the respective dispute resolution profession. However, as the dispute resolution field continues to advance, we have learned from both our significant experience and the groundbreaking scholarly research about decision-making that impartiality is not a fixed concept, but a more nuanced one that is highly context-specific. Moreover, if we continue to hold onto the concept of "impartiality" as it is publicly discussed, we risk hampering the advancement of the field and our ability to ethically monetize "the value added" of arbitrators and mediators. In order to adopt a more realistic view about impartiality, we need to confront several truths.

Truth number one is that all humans have explicit and implicit biases. Behavioral cognitivists such as Daniel Kahneman[48] and Dan Ariely[49] have developed increasing bodies of research that educate us about how heuristics contaminate our impartiality and influence our decision making. Thus, impartiality is actually an ideal like nirvana rather than an achievable goal. Moreover, it is not an absolute, attainable standard, but a dynamic that is defined by the context. A more realistic approach is for us to deal with our human biases, embrace our humanity, heighten our awareness of our biases and develop conscious strategies to constructively harness these biases in arbitration and mediation.

Truth number two is that the traditional hourly and daily fees customarily charged by mediators and arbitrators, just as any economic interest can be, and sometimes is, manipulated to promote the economic interests of the neutral. We all know of neutrals who extend the time they need to conduct a mediation or arbitration so that they can earn a larger fee. Therefore, any economic interest, be it hourly, daily or contingency fees potentially influences a neutral's impartiality. Excluding contingency fees because they might impair a neutral's impartiality does not address the real issue. Economic interests do impact, either overtly or covertly, a neutral's behavior. I believe it is more realistic to discuss safeguards to address this reality, rather than eliminate contingency fees as one option to ethically monetize the "value added" of arbitrators and mediators.

Truth number three is that in arbitration and mediation partiality is ubiquitous, not just in fee arrangements but in the shaping and execution of the dispute resolution process.[50] For example, arbitrators and mediators frequently voice their preferences about how they conduct their process, how they define their role and how they assess success. As arbitrators and mediators, awareness, humanness and incorporating prophylactic strategies that address how our actions implicate our impartiality are ongoing and necessary to maintain the integrity of the arbitration and mediation processes.

I suspect these three truths are self-evident to many practicing arbitrators and mediators and confirm the reality that many arbitrators and mediators experience in their professional lives.

Conclusion

The topic of ethically monetizing the "value added" of mediators and arbitrators highlights the need to responsibly heed our concerns in a way that allows us as a profession to advance, rather than become paralyzed. The lesson of "The Emperor's New Clothes" reminds us of the value of having the courage to re-examine our stated reality and see things as they are. For me, an exciting part of this profession is the ongoing re-evaluation and evolution of ethical and effective dispute resolution practice. How fortunate to be part of such a dynamic profession that has matured to the point that it is ready to have this needed conversation about innovative billing regimes.

There may be those readers who are misconstruing the message of this column to be that that the dispute resolution sky is falling and that I am advocating for biased mediators and arbitrators. Relax. The important message that should not be lost is that I am advocating for a more reality-based working definition of impartiality. A more realistic definition of impartiality will allow our dispute resolution field to advance and prudently consider ethical ways to incorporate fee regimes that consider the "value added" arbitrators and mediators bring to parties.

Even if we adopt a broader definition of impartiality, I, like many of you, have concerns about the misuse of "contingency fee" billing and am against its wholesale adoption. However, in select circumstances, with enhanced procedural safeguards in place, "contingency fee" billing could be a welcome option for mediators, arbitrators and informed, sophisticated parties. The neutral would be wise to include such procedural safeguards such as having the neutral present the idea to the parties prior to the commencement of services, reducing the terms of the fee arrangement to a writing, allowing the parties adequate time to consider the proposed ar-

rangement, encouraging the parties to consult with their lawyers and assuring that the fee arrangement does not favor one party.

As with many of my columns, I hope this conversation is just a beginning. Your experience and perspectives are a vital part of that conversation. I look forward to hearing from you, sharing perspectives and collaborating on the continued advancement of our profession.

Endnotes

1. Mediators and arbitrators each offer distinct "value added" to the dispute. For mediators, "value added" could possibly include enhancing communication between disputing parties, providing each party a greater clarity about the available options, creating expanded opportunities for future economic collaboration between involved parties, mending damaged relationships and resolving the dispute. For arbitrators, the "value added" could possibly include conducting a fair, expedited process and offering a well-reasoned resolution.
2. *See, e.g.*, Scott R. Peppet, *Contactarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 Tex. L. Rev. 227 (2003).
3. Posting of Elayne E. Greenberg to nyc-dr@listserver.jjay.cuny.edu (July 10, 2012) (on file with author).
4. Even though Scott Peppet mentions the option of a percentage-of-settlement fee, that option is less likely to pass ethical muster. Peppet at 239.
5. *Id.* at 239.
6. *Id.* at 240.
7. *Id.*
8. *Id.* at 239.
9. *Id.* at 240.
10. *Id.*
11. *Id.* at 270.
12. *Id.* at 276.
13. *Id.* at 241.
14. Kenneth R. Feinberg, *Billing Reform Initiative*, 59 Alb. L. Rev 963 (1996).
15. *Id.* at 963.
16. Email from Stephen A. Hochman, Esq., Mediator & Arbitrator, to Elayne E. Greenberg, Dir., Hugh L. Carey Center for Dispute Resolution at St. John's University School of Law (Mar. 22, 2012 12:17 EST) (on file with author).
17. Email to Elayne E. Greenberg, Dir., Hugh L. Carey Center for Dispute Resolution at St. John's University School of Law (July 10, 2012 13:33 EST) (on file with author).
18. *See, e.g.*, Allison O. Van Laningham, *Ethical Issues for Alternative Fee Arrangements* (2011), *available at* http://www.thefederation.org/documents/6.Ethical%20Issues%20for%20Alternative%20Fee.pdf.
19. N.Y. Rules of Professional Conduct (22 NYCRR 1200.0) R. 1.5 (2009) (amended 2011).
20. *Id.* at R. 1.5(b), (c).
21. *Id.* at 1.5(a).
22. *Id.* at R. 1.5(a).
23. *Id.* at R. 1.5(a)(1).
24. *Id.* at R. 1.5(a)(4).
25. *Id.* at R. 1.5(a)(7).
26. *Id.* at R. 1.5(a)(8).
27. *See* Hensley v. Eckerhart, 46 U.S. 424 (1983); *see also* Blum, Comm'r, N.Y. State Dep't of Soc. Serv. v. Stenson, 465 U.S. 886 (1984).
28. *See Blum*, 465 U.S. 886 at 898 (1984).
29. N.Y. Rules of Professional Conduct (22 NYCRR 1200.0) R. 1.5(c) (2009) (amended 2011).
30. *Id.* at R. 1.5(d)(1).
31. *Id.* at R. 1.5(d)(5).
32. *Id.* at R. 1.8(c) cmt. 4C.
33. *Id.* at R. 1.5(b).
34. *Id.* at R. 1.5(e).
35. *Id.* at R. 1.5(c).
36. The Code of Ethics for Arbitrators in Commercial Disputes (Am. Bar Ass'n House of Delegates & the Exec. Comm. of the Bd of Dirs. of the AAA 2004).
37. *Id.* at Canon VII B(1).
38. *Id.* at Canon VII B(2).
39. *Id.* at Canon VII B(3).
40. *Id.* at Canon I(C).
41. *Id.* at Canon I(B)(1).
42. *Id.* at Canon I(B)(2).
43. Model Standards of Conduct for Mediators (Am. Arbitration Ass'n, Am. Bar Ass'n & Ass'n for Conflict Resolution 2005).
44. *Id.* at VIII(A).
45. *Id.* at VIII(A)(1).
46. *Id.* at VIII(B)(2).
47. *See, e.g., Peppet* putting forth his ideas about why we need a more fluid concept of impartiality.
48. Daniel Kahneman, Thinking Fast and Slow (2011).
49. Dan Ariely, Predictably Irrational, The Hidden Forces That Shape Our Decisions (1st ed. 2008).
50. *See, e.g.*, Leonard L. Riskin, *Decision-making in Mediation: The New Old Grid and the New New Grid*, 79 Notre Dame. L. Rev. 1 (2003).

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