Southern California Mediation Association Newsletter, September 2004
***Written after the Justice Scalia debacle (he shot a fellow hunter while out duck-hunting): one in a series of articles exploring the ethical dilemmas of mediation participants*.**

IS DUCK HUNTING FOR MEDIATORS?

By Max Factor III

Supreme Court Justice Scalia has been requested by the Sierra Club, a litigant with an appeal pending involving Vice President Cheney and the White House task force he headed to develop the Bush Administration's national energy policy, to step down from consideration of this case.

Justice Scalia's vote on this appeal may be the decisive fifth vote in what is anticipated to be a 5 to 4 decision by the U.S. Supreme Court.

The Sierra Club's request stems from a duck hunting trip the two men took some three weeks after the High Court agreed to hear Cheney's appeal of a court order that he produce documents about meetings of the energy policy task force. The two flew on a small jet from Washington, DC to Morgan City, Louisiana and stayed a weekend at a private hunting camp.

This is the type of one-of-a-kind weekend experience with the Vice President of the United States that is available only to close friends and those of extraordinary wealth or influence.

Jay Leno, in his monologue on "The Tonight Show" commented on the Sierra Club's Motion for Recusal of Cheney. He stated that Vice President suffered an embarrassing moment when he recently visited the White House. "Security made him empty his pockets and out fell Justice Anthony Scalia."

But to be fair-minded, let us not subscribe to any wrongful intent by the Vice President to influence privately and improperly the Associate Justice. Instead, assume this one-of-a-kind vacation invitation is a natural growth of good friendship. In other words, assume Cheney would never try to purchase Scalia's vote with an extravagant weekend vacation or the opportunity to rub elbows with others of the Power Elite; however, it is certainly reasonable to assume Cheney did desire to nurture his friendship with Scalia.

What is ethically troubling about this particular friendship between these two intelligent and powerful Washingtonians?

First, "Friends" is more than a television show. Friendship generally leads to increased trust in the credibility of the friends' words, acts or intentions. It may also cause one to be reluctant to embarrass or harm the other. Friends may – consciously or unconsciously – give a friend "the benefit of the doubt'.

So, when a “neutral decision-maker” accepts an extraordinary gift from a friend whose matter is currently before that “neutral decision-maker”, the neutrality of that decision-maker is likely to be affected – consciously or unconsciously – by the existence of the friendship, in a manner that may either result in a biased decision or the appearance that the decision was based on bias.

Second, it is troubling that the full disclosure of the extent of the trip and friendship between the two men was first uncovered by a Los Angeles Times reporter, rather than disclosed by either man. Was this silence an effort by the two men to hide or conceal from the public, or from other Justices on the Supreme Court, that the pending litigation before the Court was discussed, directly or indirectly, during that weekend duck-hunting trip? After all, one need not discuss the specifics of a case before a neutral decision-maker in order to bring up specific policies or principles, and discuss how implementation of such policies or principles may advantage one set of institutions or individuals over another. Even such general discussions, made outside the glare of publicity, could well have an effect on the thinking of Associate Justice Scalia.

Third, is it not possible that the lure of similar hobnobbing at exclusive locations may create a sense of indebtedness on the part of Justice Scalia to Vice President Cheney? Cognitive psychologists have written well and extensively on how, when one receives a gift from another, it has the unconscious effect of building what may be undue trust and respect. Indeed, long before cognitive psychology, the Greeks wrote the story of the Trojan Horse, in which an unexpected gift caused a conscious change in the level of trust between two parties who were hostile to each other.

Fourth, the U.S. Supreme Court has a broad responsibility to the citizens of this country. Among other things, that broad responsibility includes making decisions in a manner which is reasonably calculated to be perceived as fair and impartial justice.

In effect, when an Associate Justice of the Supreme Court flies off to go duck hunting at an exclusive private location with the representative of a litigant that is to come before the Supreme Court, the perception of fair and impartial justice on the part of the entire Supreme Court will be lessened by this single act of Associate Justice Scalia.

But this is an article for mediators and mediation advocates, so the question is whether "flying off to go duck hunting at a private club" with a prospective mediation participant or counsel for a prospective mediation participant, prior to a mediation, is as questionable as Justice Scalia’s behavior is.

Clearly the responsibilities of a mediator differ markedly from that of a sitting Judge who has the legal responsibility to be a final decision-maker. A mediator is <u>not</u> a decision-maker. A mediator is a negotiator and facilitator. Nevertheless, mediators have the ethical responsibility to assist the mediation participants and their counsel

in achieving their goals, while maintaining professional neutrality and avoiding the appearance of bias.

Mediation participants and counsel generally desire a mediator experienced in the subject matter of the dispute and skilled in the art of negotiation and persuasion. As a result, it is quite common that a mediator has worked with one or more counsel at each mediation, and/or one or more of the mediation participants, either in a prior mediation or in some prior professional, business or personal connection.

As a result, one of the first rules every mediator learns is the necessity of making a full disclosure of each personal, professional, or financial relationship that has existed between the mediator and any of the mediation participants, as early as practical in the process. In most cases, this disclosure should be made prior to retention of the mediator and, at a minimum, all such full disclosure should be made prior to the commencement of the mediation process. California Rules of the Court, CRC §1620.5 and the Model Standards of Practice for Mediators, as promulgated by the American Arbitration Association, American Bar Association, and the Association for Conflict Resolution, each require such disclosure.

Unlike litigation before a Judge, once a mediation participant is fully informed, any mediation participant who is dissatisfied with the mediator may simply "refuse to mediate" or "walk out" of the mediation. See California's Judicial Council's Rules of the Court, CRC §1620.5 and Model Standards of Practice I: "Any party may withdraw from any mediation at any time."

Moreover, even if both litigants and counsel are comfortable with the mediator's prior professional, financial or personal relationship with one of the participants, a mediator is required to withdraw from any mediation when the mediator believes that he or she cannot maintain impartiality towards all participants; or when the mediator choosing to proceed would jeopardize the integrity of the mediation process (e.g. one of the parties is not competent because of consuming drugs or alcohol, or is *pro per* and is incapable of giving informed consent), or the integrity of the court (e.g. the parties seek to do something illegal or that would cause significant harm to others). CRC §1620.5(e) & (f).

Putting "duck hunting" aside, it is ethically permissible for a mediator who discloses, fully and as early as possible, to give to an accountant, attorney, architect, real estate licensee, family therapist, ministers of various faiths, or others, a small gift as a way of nurturing a friendship and a business relationship with prospective mediation participants and prospective referral sources. An example of such a "small gift" would be to invite a prospective referral source out for a hike in the San Gabriel Mountains, or to a quiet business lunch, or to a Dodger game (although perhaps not the seventh game of the World Series), as a guest of the mediator, provided that the mediator advises all mediation participants of the "small gift".

Unlike Judges in an ad judicatory role, mediators often court potential clients by building personal or professional relationships. Most often, the amount of money involved is not significant to either person's income; and, if it is, each person pays his or her own tab at the evening's end or friends reciprocate on the next occasion. When the amounts of money are quite significant, such as an invitation to a nearly impossible to get seat at the seventh game of a World Series or a trip to Louisiana on an Air Force jet for duck hunting at an exclusive private club with highly influential people, the perception of ethical impropriety will be quite high, even if the mediator is able to rein in any conscious bias that may result from the friendship.

In such cases, clearly the disclosure of the relationship should be made at the time the mediator is first asked by any mediation participant if he or she has an interest in serving. The disclosure should be full and complete, and done in a manner that it would be reasonable to expect that one of the other mediation participants may insist upon another mediator. However, it is simply a fact that in many instances legal counsel for a mediation participant is quite happy when the mediator is identified clearly with the other side.

In such cases, it is believed the mediator's opinion may have a strong influence on his or her friend. When one feels that they have a very compelling case, and has a concomitant desire to get the matter resolved, using a mediator who is known to be friendly with a particular law firm or a particular mediation participant, is one way to increase the likelihood that the mediator will communicate the strengths of your case to his friend who is legal counsel or a mediation participant.

One of the many virtues of mediation is that the mediator has no authority other than the respect and trust he or she may be able to generate and his or her personal skills in negotiation and facilitating persuasive communication.

So while some mediation participants are loath to participate in mediation when a mediator appears to be indebted to an opposing counsel or an opposing litigant, others take a different tack. Many believe that a mediator may work extra hard, consciously or unconsciously, to assist in a persuasive way the side with which he is more friendly to understand all of the risks that that side faces so that the friend's decision will be informed.

Yet, a mediator is often chosen by one of the participants precisely because of a pre-existing personal or professional relationship exists. The reason is simple enough. Unlike ad judicatory situations, a mediator known to have an insurance defense background in his former practice, and to have served several times as a mediator at the request an insurance carrier, may be perceived as an ally to both sides.

Defense counsel for an insurance carrier is likely to respect advice from and any warning made by a mediator with a known history of working for or with insurance companies. And, Plaintiff may be fully satisfied having a mediator who is friendly with defense counsel because plaintiff knows that he will not be intimidated by any

effort of the mediator to trash the value of his case ("Know thy enemy!"), but plaintiff may be helped by putting on a highly persuasive "dog and pony show."

One way or the other, the decision about whether to use a mediator who is believed to be friendly to one side or the other is a matter of common sense ("Just beware of those bearing unexpected gifts") CRC §1620.9 ("A mediator must not at any time solicit or accept from or give to any mediation participant or affiliate of a participant any gift, bequest, or favor that might reasonably raise a question concerning mediator impartiality.").

The Moral: Duck hunting at a private club in Louisiana……. Just Won't Fly!
A Better Practice: A mediator may go to lunch with a potential mediation participant or referral source, with the intent of nurturing a relationship, provided that the mediator Disclose Fully and Early and even Withdraws, whenever appropriate.

Max Factor III is a mediator in private practice in the greater Los Angeles area. He is Chair of the SCMA Membership Committee.