Advanced Commercial Mediation Training

Dispute Resolution Section

June 12-13, 2018

Fordham University School of Law
150 West 62nd Street, New York, NY 10023

Thank You! This program is made possible by the generous donation of time and expertise by members and volunteers. Thank you to our volunteers—and to you, for choosing NYSBA Programs.

This program is offered for educational purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials, including all materials that may have been updated since the books were printed or distributed electronically. Further, the statements made by the faculty during this program do not constitute legal advice.

MCLE INFORMATION

Program Title: **Advanced Commercial Mediation Training**
Date/s: June 12-13, 2018 Location: New York, NY

Total Credits: **16.0 New York CLE credit hours**

Credit Category:
4.0 Areas of Professional Practice 10.0 Skills
2.0 Ethics and Professionalism

This course is approved for credit for **both** experienced attorneys and newly admitted attorneys (admitted to the New York Bar for less than two years). Newly admitted attorneys participating via webcast should refer to Additional Information and Policies regarding permitted formats.

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

1) **Sign in** with registration staff
2) Complete and return a **Form for Verification of Presence** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Form for Verification of Presence certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also provided above.

ADDITIONAL INFORMATION AND POLICIES

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

For official New York State CLE Board rules, please see www.nycourts.gov/attorneys/cle. In accordance with New York CLE Board Regulations and Guidelines (section 2, part C), newly admitted attorneys (admitted to the New York Bar for less than two years) must complete **Skills** credit in the traditional live classroom setting or by fully interactive videoconference. **Ethics and Professionalism** credit may be completed in the traditional live classroom setting; by fully interactive videoconference; or by simultaneous transmission with synchronous interactivity, such as a live-streamed webcast that allows questions during the program. **Law Practice Management** and **Areas of Professional Practice** credit may be completed in any approved format. The transitional CLE requirement for newly admitted attorneys does not include the Diversity, Inclusion and Elimination of Bias CLE credit component.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or the NYSBA Member Resource Center at (800) 582-2452 (or (518) 463-3724 in the Albany area).

Lawyer Assistance Program 800.255.0569

NYSBA

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

1.800.255.0569

NEW YORK STATE BAR ASSOCIATION

☐ As a NYSBA member, **PLEASE BILL ME $35 for Dispute Resolution Section dues.** (law student rate is $10)

☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Dispute Resolution Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

_____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

Fax number (_____) _____

E-mail address _____

Date of birth _____ /_____ /_____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Dispute Resolution Section Committees

Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested.

___ Continuing Legal Education and Programming (DRS1020)
___ Legislation (DRS1030)
___ Membership (DRS1040)
___ Diversity (DRS1100)
___ Collaborative Law (DRS1200)
___ Arbitration (DRS1300)
___ International Dispute Resolution (DRS1301)
___ ADR within Governmental Agencies (DRS1400)
___ ADR in the Courts (DRS1500)
___ Publications (DRS1600)
___ Ethical Issues and Ethical Standards (DRS1700)
___ Mediation (DRS1800)
___ Mediation of Trusts, Estates, Guardianship and Elderly Disputes (DRS1801)
___ International Mediation (DRS1802)
___ Education (DRS2200)
___ Website (DRS2300)
___ Liaison and District Rep Coordination (DRS2400)
___ Negotiation (DRS2500)
___ New Lawyers and Law Students (DRS2600)
___ Blog Master (DRS2800)
___ Liaisons (DRS2900)

JOIN OUR SECTION

2018 MEMBERSHIP DUES

Class based on first year of admission to bar of any state. Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2010 and prior	$275
Attorneys admitted 2011-2012	185
Attorneys admitted 2013-2014	125
Attorneys admitted 2015 - 3.31.2017	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2010 and prior	$180
Attorneys admitted 2011-2012	150
Attorneys admitted 2013-2014	120
Attorneys admitted 2015 - 3.31.2017	60

OTHER

Sustaining Member	$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS
Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS
Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS
Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS
Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association
Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association
*Newly admitted = Attorneys admitted on or after April 1, 2016

Please return this application to:

MEMBER RESOURCE CENTER,
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • FAX 518.463.5993
E-mail mrc@nysba.org • www.nysba.org

SCHEDULE OF EVENTS

Tuesday, June 12, 2018, Morning Session

4.5 MCLE Credits (4.5 Skills)

8:00 a.m. – 8:30 a.m.	**Registration & Continental Breakfast**
8:30 a.m. – 8:45 a.m.	**Welcome and Introduction to the Commercial Mediation Training**
8:45 a.m. – 10:00 a.m.	**Convening & Contracting a Commercial Mediation Choosing Processes, Setting Tone, Disclosing style, Expectations** Simeon H. Baum with Stephen A. Hochman *(1.5 MCLE Credit in Skills)*
10:00 a.m. – 10:10 a.m.	**Break**
10:10 a.m. – 11:00 a.m.	**Teaching and Training | Core Attributes and Skills of the Commercial Mediator** Simeon H. Baum *(1.0 MCLE Credit in Skills)*
11:00 a.m. – 12:40 p.m.	**Role Play: Focusing on a Commercial Scenario** Small Groups with Facilitators *(2.0 MCLE Credit in Skills)*
12:40 p.m. – 1:20 p.m.	**Lunch**

Tuesday, June 12, 2018, Afternoon Session

3.5 MCLE Credits (2.5 Areas of Professional Practice, 1.0 Ethics)

1:20 p.m. – 2:35 p.m.	**Evaluation: (Whether, When & How)** Simeon H. Baum and Stephen A. Hochman *(1.5 MCLE in Areas of Professional Practice)*
2:35 p.m. – 3:25 p.m.	**Forum: Unique Commercial Matters, Joint Sessions, Caucuses, and Risk Analysis)** Simeon H. Baum and Stephen A. Hochman *(1.0 MCLE in Areas of Professional Practice*
3:25 p.m. – 3:40 p.m.	**Break**
3:40 p.m. – 4:30 p.m.	**Ethics: Mediation Theory and the Role of the Mediator** Simeon H. Baum and Stephen A. Hochman *(1.0 MCLE Credit in Ethics)*
4:30 p.m. – 5:00 p.m.	**Q & A**

Wednesday, June 13, 2018, Morning Session

3.5 MCLE Credits (3.5 Skills)

8:00 a.m.	**Continental Breakfast**
8:30 a.m. – 8:45 a.m.	**Introductory Remarks; Summary and Overview**
8:45 a.m. – 9:15 a.m.	**Decision Tree Analysis in Mediation and Use of Risk Management Software** Simeon H. Baum and Stephen A. Hochman *(.5 MCLE in Skills)*
9:15 a.m. – 9:40 a.m.	**Risk Analysis Exercise** Simeon H. Baum and Stephen A. Hochman *(.5 MCLE in Skills)*
9:40 a.m. – 10:05 a.m.	**Lawyers Advocacy - Coaching Counsel** Simeon H. Baum and Stephen A. Hochman *(.5 MCLE in Skills)*
10:05 a.m. – 10:20 a.m.	**Break**
10:20 a.m. – 12:00 p.m.	**Role Play: Focusing on a Commercial Scenario** Small Groups with Facilitators *(2.0 MCLE in Skills)*
12:00 p.m. – 12:45 p.m.	**Lunch**

Wednesday, June 13, 2018, Afternoon Session

4.5 MCLE Credits (1.5 Areas of Professional Practice, 2.0 Skills, 1.0 Ethics)

12:45 p.m. – 2:00 p.m.	**Mediator's Proposal | Whether, When & How** Simeon H. Baum and Stephen A. Hochman *(1.5 MCLE in Areas of Professional Practice)*
2:00 p.m. – 2:10 p.m.	**Break**
2:10 p.m. – 3:25 p.m.	**Forum – Impasse Breaking: The Art of Diplomacy – Handling Challenges in Personalities, Bargaining Style, Strategies, Commitment Level, Inter- Party Dynamics, and Messages** Simeon H. Baum and Stephen A. Hochman *(1.5 MCLE in Skills)*
3:25 p.m. – 3:50 p.m.	**Mediator Self Care** Simeon H. Baum and Stephen A. Hochman *(.5 MCLE in Skills)*
3:50 p.m. – 4:00 p.m.	**Break**
4:00 p.m. – 5:00 p.m.	**Ethics: Remaining Ethical Issues** Simeon H. Baum and Stephen A. Hochman *(1.0 MCLE in Ethics)*

Co-Sponsored by the Dispute Resolution Section of the New York State Bar Association

NEW YORK STATE BAR ASSOCIATION
NYSBA *Serving the legal profession and the community since 1876*

Advanced Commercial Mediation Training

June 12-13, 2018

(Approved Training for Commercial Mediators Under Part 146 of the Rules of the Chief Administrative Judge, NYS Unified Court System)

Program Trainers --

Simeon H. Baum, Esq., Resolve Mediation Services, Inc. (www.mediators.com)
Steven A. Hochman, Esq.

Index of Materials

Agenda

Materials

1. Trainer Bios …….1

Studying the Study of Mediation…….5

2. Peter S. Adler, *Unconscious Excellence: An Exploration of Mastery and Incompetence – Being Also, a Rumination on Art, Craft, Career, Bungling, Skill Acquisition, Bell Curves, Baseball, Cooking, Surfing, Dentistry, Tree Trimming and Why Mediators and Facilitators May Be Dangerous to Those We Are Trying to Help* (Chapter 2 in *Bringing Peace Into the Room, The Personal Qualities of the Mediator*, edited by David Hoffman and Daniel Bowling, Jossey-Bass 2003)…….7

Views of the Mediator & Mediation Process……..25

3. Simeon H. Baum, *Mediation – Alchemical Crucible for Transforming Conflict to Resolution.*……27

4. Stephen B. Goldberg and Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three.*…….40

5. S. E. Schlosser, *The Myth of Mediator as Settlement Broker.*……..66

 Resolve Mediation Services, Inc., 1211 Avenue of the Americas, 40th Floor, New York, NY 10036 (212) 355-6527; fax (212) 753-0396; http://www.disputeResolve.com; email: SimeonHB@disputeResolve.com

6. Susan T. Mackenzie, *In Defense of Party-Based Mediation*……81

7. Gary Friedman and Jack Himmelstein, *Challenging Conflict: Mediation Through Understanding – Introduction to the Understanding Based Model*……87

8. Gary Friedman and Jack Himmelstein, *Challenging Conflict: Mediation Through Understanding – Saving the Last Dance: Mediation Through Understanding*....91

9. Robert D. Benjamin, Peter Adler, *War, Negotiation and Leadership: Lessons for Mediators – Introduction, Overview and Outline*……..95

10. Robert D. Benjamin, *Guerilla Mediation: The Use of Warfare Strategies in the Management of Conflict*……..99

11. Stephen A. Hochman, *When and How to Use Medation to Your Advantage*…..109

Negotiation & Mediation…….115

12. Peter S. Adler, *Protean Negotiation*……...…….117

13. Stephen A. Hochman, *Why Mediation Works When Negotiation Fail*...…….133

14. Stephen A. Hochman, *How To Be An Effective Advocate in Mediation*…….135

15. Simeon H. Baum, *Negotiation Skills: Tips on How to Negotiate and Acquire Negotiation Skills*……143

Top 10s…….155

16. Stephen A. Hochman, *Ten Mistakes Even Good Mediators May Make*……..157

17. Simeon H. Baum, *Top Ten Things Not to Do in Mediation*……159

Emotion and Psychological Factors In Mediation……..……..163

18. B. Sambeth Glasner & J. Lack, *Creativity in Mediation: Why, How and When?*……165

19. Rich Birke & Craig Bachman, J. Lack, *Neuroscience, Negotiation and Persuasion*……..235

20. David W. Plant, *Mediating with Emotion*…….....311

21. Dwight Golan, *Cognitive Barriers to Effective Negotiation and How to Overcome Them*……317

Evaluation and Economic Views In Mediation……321

22. Douglas N. Frenkel and James H. Stark, *Generating Movement through Problem Solving and Persuasion*, from *The Practice of Mediation, A Video Integrated Text*…….323

23. J. Michael Keating, Jr., *Mediating in the Dance for Dollars*…….……349

24. Eleanor Barr, *Making Sound Decisions: How to Help Your Client Evaluate Settlement Options*……..353

25. Jeff Kichaven, *Evaluative Mediation Techniques Help Achieve Success*…….355

Insurance & Mediation; Risk Analysis; Decision Trees…….359

26. J. Anderson Little, *The Language of Numbers: Mediating and Negotiating the Settlement of Insured Claims*……..……361

27. Simeon H. Baum, Charles Platto and Peter A. Scarpato, *Insurance/Reinsurance Arbitration and Mediation*…….373

28. Simeon H. Baum, *Risk Analysis for Commercial Mediators*…….389

29. Jeff Kichaven, *A Tool for Multi-Party Insurance Litigation Mediation with "Additional Insureds"*…….405

30. Douglas C. Allen, *Decision Analysis Using Decision Tree Modeling*……..411

31. Marjorie Corman Aaron, *The Value of Decision Analysis in Mediation Practice*……419

32. Marc B. Victor, *The Proper Use of Decision Analysis to Assist Litigation Strategy*……..425

33. Jeffrey M. Senger, *Decision Analysis in Negotiation*……..439

34. David B. Hoffer, *Decision Analysis as a Mediator's Tool*……..453

Tao of Mediation……467

35. Simeon H. Baum, *The Technique of No Technique: A Paean to the Tao te Ching and Penultimate Word on Breaking Impasse*……469

Multi-Party Mediation; Impasse Breakers……..479

36. Albert Bates, Jr. and L. Tyrone Holt, *Large, Complex Construction Disputes: The Dynamics of Multi-Party Negotiation*……..481

37. Simeon H. Baum, *Sausage Making Laid Bare – The Consensus Based Risk Allocation Model and other Impasse-Breakers and Approaches to Multiparty Naysayers (when each one points the finger at the other as the more culpable party).*……487

38. Dwight Golan, *Nearing the Finish Line: Dealing with Impasse in Commercial Mediation.*……503

39. Bennett G. Picker, *How to Best Aid Negotiation by Breaking Down Barriers.*……511

40. Stephen A. Hochman, *The Mediator's Proposal: Whether, When & How It Should Be Used*……521

41. David W. Plant, *Why Not Embrace Impasse.*……533

42. J. Jacks, M. Schweisberg, D Thompson, E. Tonkin, *Exit Strategies: Mediating to a Hopeful End.*……539

Mediator Self Care…….549

43. John Kinyon, Ike Lasater, Julie Stiles, *Mediator Self-Care.*……551

44. Simeon H. Baum, *Hawking Our Wares in the Marketplace of Values – Sell Quality Not Cost When Promoting Mediation; the Interplay of Global Norms of Justice and Harmony in the Mediation Forum.*……559

Ethics…….581

45. Melvin A. Rubin, *Ethical Conundrums for the 21st Century Lawyer/Mediator "Toto, We're Not in Kansas Any More".*……583

46. Susan Nauss Exon, *The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation.*……603

47. Commercial Division, Supreme Court, New York County, Alternative Dispute Resolution Program: *Standards of Conduct for Mediators.*……647

48. ABA, AAA, ACR, *Model Standards of Conduct for Mediators*……654

49. NYS Unified Court System, Part 1200 – *Rules of Professional Conduct* – Excepts pertinent to Mediation and Negotiation……663

Mediation Clauses and Agreements…….695

50. Resolve Mediation Services, Inc., *Sample Mediation Clauses*……697

51. Resolve Mediation Services, Inc., *Sample Mediation Agreement*……...……700

52. Stephen A. Hochman, *Sample Mediation Agreement.*……..…..707

Feedback Sheet……..……711

Role Plays……..…….717

Speaker Biographies

Resolve Mediation Services, Inc.
1211 Avenue of the Americas, 40th Floor
New York, NY 10036-8704
(212) 355-6527 (tel.)
(212) 753-0396 (fax)
info@mediators.com
(www.mediators.com)

Simeon H. Baum
President

Simeon Baum, President of Resolve Mediation Services, Inc., has successfully mediated over 1,000 disputes. He has been active since 1992 as a neutral in dispute resolution, assuming the roles of mediator, neutral evaluator and arbitrator in a variety of cases, including the highly publicized mediation of the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site, Trump's $ 1 billion suit over the West Side Hudson River development, and Archie Comics' shareholder/CEO dispute. Since 2005, he has consistently been listed in "Best Lawyers" and "New York Super Lawyers"for ADR, was the Best Lawyers' "*Lawyer of the Year*" for ADR in New York for 2011, 2014, and 2018; and in International Who's Who of Commercial Mediation Lawyers 2012-18.

An attorney, with over 30 years' experience as a litigator, Mr. Baum has served as a mediator or ADR neutral in a wide variety of matters involving claims concerning business disputes, financial services, securities industry disputes, reinsurance and insurance coverage, property damage and personal injury, malpractice, employment, ERISA benefits, accounting, civil rights, partnership, family business, real property, construction, surety bond defaults, unfair competition, fraud, bank fraud, bankruptcy, intellectual property, and commercial claims.

Mr. Baum has a longstanding involvement in Alternative Dispute Resolution ("ADR"). He has served as a neutral for the United States District Courts for the Southern and Eastern Districts of New York Mediation Panels; New Jersey Superior Court, Civil Part, Statewide; Commercial Division, New York State Supreme Court, New York & Westchester Counties; U.S. Bankruptcy Court, Southern & Eastern Districts of New York; the New York Stock Exchange; National Association of Securities Dealers; the U.S. Postal Service, the U.S. Equal Employment Opportunity Commission, CPR, AAA, and National Academy of Distinguished Neutrals (NADN), among others.

Mr. Baum's peers have appointed him to many key posts: e.g., Member, ADR Advisory Group, Commercial Division, Supreme Court, New York County; ADR Advisory Group and Mediation Ethics Advisory Committee, N.Y. State Unified Court System. Founding Chair of the N.Y. State Bar Association's Dispute Resolution Section, he was also subcommittee chair of the N.Y. State Bar Association's ADR Committee; Legislative Tracking Subcommittee Chair of the ADR Committee of the Litigation Section of the American Bar Association; Charter Member, ABA Dispute Resolution Section Corporate Liaison Committee; President, Federal Bar Association's SDNY Chapter, and Chair of the FBA's national ADR Section. He is past Chair of the New York County Lawyers Association (NYCLA) Committee on Arbitration and ADR. Besides serving on the NYCLA's Committee on Committees, he is past Chair of the Joint Committee on Fee Dispute and Conciliation (of NYCLA, ABC NY, and Bronx County Bar Associations), and is on the Board of Governors, NYS Attorney-Client Fee Dispute Resolution Program. He is also a Fellow of the American Bar Foundation. He is a Director for the New York NADN panel.

Mr. Baum has shared his enthusiasm for ADR through teaching, training, extensive writing and public speaking. He has taught ADR at NYU's School of Continuing and Professional Development, and he teaches Negotiation, and Processes of Dispute Resolution (focusing on Negotiation, Mediation and Arbitration) at the Benjamin N. Cardozo School of Law. He developed and conducts 3-day programs training mediators for the Commercial Division, Supreme Court, New York, Queens, and Westchester Counties. He has been a panelist, presenter and facilitator for numerous programs on mediation, arbitration, and ADR for Judges, attorneys, and other professionals. Mr. Baum is a graduate of Colgate University and the Fordham University School of Law.

SUMMARY OF PROFESSIONAL BACKGROUND AND MEDIATION EXPERIENCE

of

Stephen A. Hochman
shochman@prodigy.net 212-750-8700 ext 129

Mr. Hochman recently retired from the New York City law firm of Friedman, Wittenstein & Hochman, where he practiced from 1987 – 2006, first as a partner and later as counsel. He was a founding partner in the firm now known as Kramer, Levin, Naftalis & Frankel, where he practiced from 1968-1987, specializing in corporate, commercial and securities law. He also represented both investors and issuers in real estate, tax oriented and other types of investment partnerships. Prior to 1968, he was a partner in Kramer, Nessen & Hochman and an associate at Proskauer Rose Goetz & Mendelsohn, where he began the practice of law following his graduation from Cornell Law School in 1959.

Mr. Hochman now practices exclusively as a mediator and arbitrator. He is a member of CPR's Panel of Distinguished Neutrals and is on the mediation panels of the federal district courts in the Southern and Eastern Districts of New York, the U.S. Bankruptcy Court in the Southern District of New York and the New York State Supreme Court's Commercial Division in New York County. For many years he has been one of the two mediation trainers certified by the New York State Office of Court Administration to train the mediators for the Commercial Divisions in the Supreme Courts in New York County and various other downstate counties. He is also a Special Master for the Appellate Division, First Department, of the New York State Supreme Court.

Mr. Hochman writes, consults and lectures frequently on the subjects of arbitration and mediation and is a member of the American Law Institute and various ADR-related bar association and advisory committees. He is a former Chair of the Arbitration Committee of the American Bar Association's Section of Dispute Resolution and former Co-Chair of its Large, Complex Case Subcommittee and served as a member of the American Arbitration Association's Securities Arbitration Rules Task Force and its Commercial Arbitration Practice Committee. He is presently a member of the Executive Committee of the New York State Bar Association's Section of Dispute Resolution and Co-Chair of its ADR in the Courts Committee. He served for many years as Chair of the American Law Institute-American Bar Association's annual program on Alternative Dispute Resolution and Chair of its annual program on Corporate Mergers and Acquisitions.

Mr. Hochman has mediated over 350 commercial, business, international and other types of disputes, including securities, contract, employment, insurance, real estate, bankruptcy, construction, franchise, brokerage and class action disputes, approximately 98% of which have settled. In addition to his own investment activities, he serves on the investment committees and boards of various not-for-profit corporations, including several hospitals and a non-profit captive re-insurance company. Mr. Hochman has also been an Adjunct Lecturer in Securities Regulation at Columbia Law School and an Adjunct Lecturer in both Mergers and Acquisitions and Alternative Dispute Resolution at Fordham Law School.

Studying the Study of Mediation

UNCONSCIOUS EXCELLENCE

An Exploration of Mastery and Incompetence [1]

Being Also, a Rumination on Art, Craft, Career, Bungling, Skill Acquisition, Bell Curves, Baseball, Cooking, Surfing, Dentistry, Tree Trimming, and Why Mediators and Facilitators May Be Dangerous to Those We Are Trying to Help

Peter S. Adler [2]

---

[1] Chapter 2 in *Bringing Peace Into The Room: The Personal Qualities of the Mediator* edited by David Hoffman and Daniel Bowling, Jossey-Bass, 2003.

[2] Peter S. Adler, Ph.D. is President of The Keystone Center which specializes in the mediation of science and public policy problems. The author is indebted to colleagues who critiqued early drafts of this paper, among them, John Forester, Chris Honeyman, Paul Cosgrave, Robert Benjamin, and Kem Lowry.

1. Right Livelihood

If you are reading this, the odds are pretty good that you are a mediator, facilitator, ombudsman, or arbitrator. I am too. Mostly I mediate and facilitate. Along with a few other colleagues with whom I am associated, I have been doing this work for about 25-years. I study it, practice it, and teach it and find a certain triangular nourishment in doing all three. Primarily, though, I consider myself a practitioner. My specialty is environment, health, and energy issues.

Over the years I have worked on matters ranging from out-of-watershed bulk water transfers, the siting of geothermal power plants, and the creation of new telecommunication regulations. I have mediated many other more ordinary cases as well, inside and outside the court system, including disputes over broken promises, barking dogs, fights at weddings, and several especially nasty church and university feuds. Admittedly, plunging into other people's confusions is a peculiar, possibly aberrant way to make a living. Nonetheless, it is what I do and by some fluke, I like doing it.

When I was a graduate student in sociology, one of my professors assured me that I would one day have to choose between working in the world of action versus the world of ideas. Turns out he was wrong. The conflict resolution field combines both and does it beautifully. At its most elemental level, we get to try and help people get un-stuck and solve vexatious and stubborn problems with a methodology that, when it doesn't work, has few serious negative side effects.

When it does work, big things seem to happen. Agreements are made, relationships are improved, and people have new road maps for the future. Intellectually, people like me and you are privileged to study up close and personal the intricate ways human predicaments can be framed and tamed, how solutions can move from being exclusive to inclusive, how adversaries can turn the corner and become partners, how we can get all the people involved into the action and still get some action, and how people who mistrust each other deeply can ultimately face larger problems together.

Because conflict tends to be a sometimes nasty and venal crucible of human affairs, much of what we do is not just repugnant to other people, it is also – when they actually see what goes on -- boring. Mediation is not the big theater most people think it is. More often, it is something akin to a double-header baseball game. There are a lot of innings with not-too-much-happening interrupted once in a while by a high-intensity moments when the bases are loaded and a flinty-eyed

pitcher goes *mano a mano* with a great slugger. In evolutionary or biological terms (having never met good metaphors that couldn't be mixed), multi-party and multi-issue mediation is a quintessential example of what evolution expert Stephen Jay Gould called "punctuated equilibrium."

In my practice, I tend to work in the background of public quarrels over natural resources, health, energy development, and social and economic policy. Most of the disputes I get involved in have a lot of parties, are laden with ideological differences, and fraught with contentious politics and contested science. Usually, there is a legal or regulatory flap going on, or one that everyone recognizes is coming soon. In many of my cases and projects, business people want to make or do something, non-governmental organizations and community advocates oppose it, and government agencies are struggling to decide which public policies and in what combination properly apply.

I get involved in other conflicts as well. There are the usual business fights -- the two corporate officers locked in mortal combat, the shareholder factions trying to wrestle control from each other, and the construction disputes where costs have started to outdistance potential profits. I have been in the middle of family owned partnership dissolutions in which all sides were slowly descending into the abyss. And there have been numerous organizational matters which challenge our best ideas about democracy: parliamentary impasses, strategic planning problems, leadership battles.

Surprisingly, all of these cases follow a certain pattern. People (usually, but not always, of good will) espouse divergent positions or interests. Each side seeks advantage. They clash. They attempt to work things out. They fail. They start demonizing each other. Communication channels get clogged or severed. Deep distrust starts to permeate every transaction. Matters radiate centripetally or centrifugally and the dispute escalates. Each side counts on threats, brinkmanship, and bluffs to further its position. Finally, staring into the mirror of uncertainty and possibly an inferno of future conflict, someone says "let's try to mediate." There is a shuffling of feet, small mutterings and throat clearings, a bit of denial and face saving, and finally people consent to sit down and negotiate. To paraphrase my colleague Howard Bellman, "Having made a big mess in the kitchen, they now want me to come in and cook them a nice omelette."

In these kinds of melodramas, I have always thought my little part was fairly straight forward. I help people organize and stage difficult, touchy discussions. If I can, I shepherd them through the substantive, procedural, and psychological

mazeways they have created and bring some semblance of discipline to the processes of communication, negotiation, and agreement-seeking. In some environmental cases, participants need a lot of help as they puzzle their way towards a reasonable juxtaposition between viable commerce, a healthy environment, and social equity. In other cases, matters come down to interpersonal dynamics and attributions (rightfully or wrongfully) of avarice, revenge, or honor vindicated. In all cases, regardless of origins and dynamics, I follow Casey Stengel's dictum: "My job is to get all of these guys to hit a home run."

To do this, I try to have a variety of strategies at the ready. Sometimes matters require political disentangling. Other times, it is all about wayfinding, coalition development, vision setting, cohesion building, deal making, and the bargaining out of impasses. Some of what I do seems counter-intuitive to people outside our profession. With social workers, educators, psychologists, and others accustomed to endless verbal jujitsu, I try to narrow the issues and focus on problem framing and problem solving. With lawyers, engineers, and business professionals who are comfortable slapping down position papers, I may try to de-position their demands, widen the view plane, and focus on the communication of needs and interests.

Without meaning to boast, I think after 25-years of doing this kind of stuff that I now know something about designing good issue "taming" processes, convening stakeholders, mediating differences of opinions, helping people build constructive working relationships, and infusing high quality scientific and technical information into deliberations. All of this makes me, and you if you are also in the trade, potentially incompetent and quite possibly hazardous to the very people we are working so hard to help.

2. For Whom the Bell Curve Curves

It really makes no difference if you are a grizzled veteran of hundreds of disputes, a newly minted conflict resolver emerging from the womb of the university, or a certified graduate of four 150-hour training programs. Consider this: your clients and participants are at risk from the best of your intentions. Not only that, you yourself are in jeopardy of deluding yourself that you are doing something helpful, that your failures are harmless, and that your successes are great victories. It turns out that the highest forms of proficiency and the lowest forms of incompetence are two ends of the bell curve with the majority of us falling somewhere in between. Most of us, most of the time, are adequate and unexceptional. Stated differently, we get by.

Unfortunately for conflict resolvers, bell curves aren't all that helpful if you want to locate or improve your mediation and facilitation skills with any precision. The hot shots can't really tell us what it is they do to be exceptional and the nincompoops are blithely unaware that what they are doing doesn't work. Although most people think it is self-evident ("we know it when we see it"), incompetence may actually be a little easier to ferret out. Cornell psychologist David Dunning says incompetent people tend to be supremely confident in their own abilities and oblivious to the fact that they are mucking things up. Through his research, Dunning found that the blunderers, bunglers, goofs, and ignoramuses among us are actually more confident in themselves than the people who do things well.

Dunning's work get's even more interesting because the incompetents turn out to be in double jeopardy. They not only screw things up, but they also lack the reflective skills needed to change their patterns and make things better. Dunning says that this deficiency in self-monitoring skill explains why the humor-impaired keep telling jokes that are not funny, day traders repeatedly jump back into the market and lose more money, and "the politically clueless continue holding forth at dinner parties on the fine points of campaign strategy." [3]Thoughts/Inept.html. Ambrose Bierce said it even better: "Ignorance ain't so much what you don't know as what you do know that ain't so."

At the other end of the spectrum we have the more complicated business of "excellence" which the dictionary defines as "ability to an eminent degree" and "surpassing merit, skill, or worth." [4] These definitions sound fine so long as they stay comfortably disembodied from what we actually do. In arenas where it is observably harder to obscure bad results (sign making, truck driving, dermatology, fire fighting, newspaper printing), excellence is about measured performance that is superlative, meaning it is statistically far above the average, light years ahead of what the nincompoops do, and verifiable and replicable to other observers. All of which is a tricky bit of business when we talk about the stuff mediators, facilitators, and other people in helping professions seem to do.

---

[3] Goode, E. (1999). "Why the Ignorant are Blissful: Inept Individuals Ooze Confidence" originally in *New York Times*, now at http://www.zenspider.com/RWD/

[4] Brown, L. (ed) *The New Shorter Oxford English Dictionary*, Volume 1, Oxford University Press, 1993.

This is not to say that many good people have not struggled mightily to deepen our understanding of what performance with distinction really is. John Gardner, former head of Carnegie Corporation and a Secretary of Health, Education and Welfare during the Johnson years, viewed excellence in his area of interest, education, as a set of "critical qualities of mind" conjugally wedded to "durable qualities of character." [5] Dan Goldin, long-time NASA administrator, used to argue for human and hardware systems that could be engineered around a "faster, better, cheaper" philosophy with the implication being that this honed a version of excellence.[6] And Tom Peters, after describing an entire business strategy called MBWA ("management-by-walking around"), experienced what he himself called "a blinding flash of the obvious." He said that business excellence consists of caring for customers, taking care of your people, and constantly innovating.[7]

In the world of conflict resolution, it has been our professional associations that have thought the hardest about all this. They have actually tried to embrace practical strategies for calibrating and achieving a core level of proficiency. The Society of Professionals in Dispute Resolution, the Academy of Family Mediators, and the Conflict Resolution Education Network, through their newly merged self, the Association for Conflict Resolution, have a fine history of producing standards, ethics, and best practice statements. Like other professional groups ranging from dental hygienists to plumbers to Fung Shui practitioners, mediators and facilitators have been trying to define themselves by what they aspire to do. In the process, excellence has been rendered down to the pursuit of certain core values -- voluntarism, inclusion, confidentiality, diversity of opinion – followed by very detailed caveats and admonitions. All of this seems good for beginners and journeymen but not very helpful for people with a dozen or more years of mediation and facilitation experience under their belts.

There is, however, another approach. Beyond the bell curve and our statistical notions of excellence lies what Hawaiian cultural historian George Kanahele called "k□n□ ole" and what he sought to teach to the owners, executives, bartenders, maids, and bell caps in the Island visitor industry. "K□n□ ole" means

---

[5] Gardner, J. *Excellence: Can We Be Equal and Excellent Too?* W.W Norton & Company, 1995.

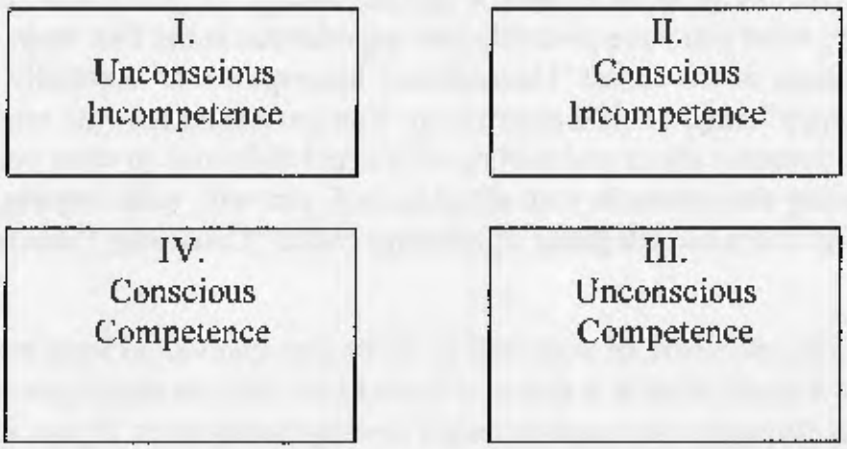
[6] Bergreen, L., *Voyage To Mars: NASA's Search for Life Beyond Earth*. New York: Riverhead Books, 2000.

[7] Peters, T. and Austin, N. *A Passion For Excellence*, New York: Random House, 1985.

"flawlessness." [8] In Old Hawaii, wrote Kanahele, when a warrior, craftsman, priest, or King's official performed a task in his or her line of work, it was expected to be done perfectly and without defect. The concept was something akin to continuously rising standards: doing the right thing, in the right way, at the right time, in the right place, to the right person, for the right reason, with the right feeling... *the first time*. All of which locates our work as mediators in the realm of "craft" as opposed to art and art form and which brings us to the idea of "mastery."

3. Proficiency and Its Pathways

Years ago, I heard a description of the "Four Stages of Skill Development" that, if you are learning to play a violin, ride a bicycle, speak Hindi, ice skate (or presumably mediate disputes), looks something like this.[9]



Here's how it actually seems to work.

Imagine you are walking along a lovely beach one day and you happen to see someone surfing just off shore. It is a warm, bright morning. You stop and watch. Sunlight streams down and dances on the water. Sea birds are squawking and

[8] Kanahele, G. *Ku Kanaka Stand Tall: A Search for Hawaiian Values*. Honolulu: University of Hawaii Press, 1993.

[9] Bernie Mayer, Chris Moore, and Susan Carpenter told me about this in the early 1980s. I'm not sure if they actually invented the model or heard it from someone else. Regardless, the model has a certain elegance and sensibility that makes it pedagogically useful which is one of the reasons it get's recited at the start of many mediation training programs.

flapping above you. You gaze, mesmerized, as a certain surfer you have been watching steers his board into a wave, catches the leading edge of the wave's inner curl, rises to his feet, zigs and zags and dances down the slope of water, and then rides the break a few hundred feet until the power of the surge plays itself out on the flat of the shore.

Maybe it happens then or maybe it is a day or two later. You are bewitched, smitten with the idea that you can stand up on a stick of wood on top of the water and move with it. You go rent a board, drag it out in the water, fumble and bumble around in the baby surf, and eventually you crouch your way over a small ripple on your knees. You do it again. And again. Eventually you are in a half-standing, half-stooping position. At the end of the day, you have had a grand time goofing off at the beach, gotten fried from the sun, and caught your first few waves.

You could let all this go as an enjoyable one day escape. Or you could be hooked. If its the latter, what you have probably just experienced is the first stage of a learning trajectory that is called "Unconscious Incompetence." Basically, this is the "dumb and happy" stage of skill acquisition. You are enchanted with what you are experiencing, ignorant about real surfing skills, and oblivious to what you don't know. If you stay the course in your effort to surf, you will, with varying degrees of effort, move into a second phase of learning called "Conscious Incompetence."

At this point you are aware of your lack of skills and resolved to learn more. In effect, you now know what it is that you don't know. So you study, practice, and plod your way through a series of recurrent surfing experiences. If you were trying to learn violin, this would be the equivalent of doing scales. If you were studying Hindi, it would be repeated and exaggerated pronunciation, practicing the reading and writing of script, and doing conjugations and declensions. If you were working on bike riding or ice skating, you would be spending a lot of time with skinned knees and elbows or sprawled out on the sidewalk with a cold and sore butt.

Comes a time, however, when you somehow move into a third stage called "Conscious Competence." Although there are achievements that seem to mark the passage, it isn't always a clear transition. It just happens. With concentration and great expenditures of energy, you can perform the sequences and techniques that surfing requires. You know something about long boards and short boards, skegs and tethers, and how wax makes a difference to the traction your feet have on a wet

piece of fiberglass. You can paddle out, wait for a set, catch a small wave with generally positive results, and have a pretty good time doing all this. Unfortunately, it is also very hard work. After each ride, you are exhausted.

Eventually, of course, things get easier and you cross another invisible frontier. For most people it takes years. For a few it might be months and for a tiny minority, it could be days. It might happen like this. One day you paddle out to a shore break, one that you've been surfing at for awhile. You know the geography of this particular stretch of ocean, the reefs, sandbars, and seasonal ocean moods. On this day you take on a bigger and more challenging wave. Maybe its strategic or maybe its just something you decided by impulse. Regardless, you catch it at exactly the right moment, impeccably carve a luminescent groove in the water, revel in the spectral blues and greens and the fluid forces of water in motion, and come out the other side, not tired but energized and exhilarated.

You are now in that place called "Unconscious Competence," that beltway of human affairs where you can surf with a minimum of choreography and without thinking your way through every move. I think of this as "mastery," a kind of unintentional excellence that is fluid and beyond the rational procedures and techniques of reason. When you come to this moment, relish it because it is usually fleeting. Very shortly you will start the cycle over again, quite possibly with some new or kindred sport (wind surfing, para sailing, snow boarding), but also when you are confronted by some new aspect of surfing (a bigger wave, a faster set, a cleaner form, a whole new location) that devolves you back to previous stages, and possibly to the very beginning -- the unconscious incompetence stage.

The role of the unconscious as a developmental element of competence and incompetence has long been suspected. Recent experiments, however, reveal just how important mental processes that are normally inaccessible to our conscious self are in shaping professional judgements. In a battery of paper and pencil and card game tests, psychologist Thomas D. Wilson has shown that people divine or intuit the "rules of the game" well before they understand them intellectually. If true, the implications of this are potentially far reaching. Rather than being some vast swamp of primordial memories and suppressed emotions that only therapists can decipher, the unconscious is probably more akin to Windows, DOS, Unix, or Palm OS. It runs in the background of our thinking, learns and adapts, evaluates circumstances, sets goals, detects threats, judges people, and deduces causes and

effects, all below our normal waking radar systems.[10]

This also suggests a different way of thinking about mastery. Instead of being a condition, or strata, or state, its is probably more like a succession of unconscious, semi-conscious breakdowns and breakthroughs. Mastery isn't persistent and it isn't about continuous precision, though it may well be perceived that way by those who have not been exposed to the fundamentals. To the contrary, mastery is full of interruptions, failures, reversions to old patterns, discoveries, and small incremental gains. But there is also something else at play that the "Four Stages of Skill Development" model doesn't pick up: an obsession with perfection.

Gifted and remarkable people, says Malcolm Gladwell in an article on what he calls "physical geniuses," have great passion for their work and endless inquisitiveness about how to do it better. They are in love with what they do and they do it over and over. They seem to be on a high level quest for exactness, flawlessness, and precision and their commitment to the pursuit is recognizable by others. Fighter pilots (the Top Guns) and professional athletes (those who are selected by colleagues for the Pro Bowl) are good examples but so too are many auto mechanics, barbers, and chiropractors I know. Everyday lives are filled with great examples, if we stay alert for them.

High on my personal list is Dr. Harry Ishida who is able to bring science, craft, and art together in dazzling ways. Harry is my dentist. He understands mouth anatomy, jaw dynamics, the aging process of teeth, and the inevitability of disease. He works with human and synthetic materials with equal dexterity, does extractions and fillings without pain, casts molds , shapes molars, and does all of this and more with a continuing, quiet competence that I have admired for many years.

The same is true of Bill Steinhoff, the guy who annually trims our 60-year old avocado tree. For all of his 215-pounds of bulk and discomfort in social situations, Bill is agile, graceful, and shrewd when he get's anywhere near a tree. Moving through the branches and limbs, he is constantly surveying the tree, looking at the health of leaves and bark, examining its features, and noting our tree's basic desire

[10] Begley, S. "The Unconscious You May Be the Wiser Half," *Wall Street Journal*, Aug 30, 2002 courtesy of SFGate.com
(http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2002/08/30/financial0919EDT0060.DTL).

to grow over and into my neighbor's window. Like Harry Ishida, Steinhoff translates complex ideas into demanding movements and intentional strategies, in this case, the craft of the arborist. [11]

Then there is Charlie Wilson (no relation to psychologist Thomas Wilson) who, according to Malcolm Gladwell, is one of the best brain surgeons in the country. He is a high achiever who works mainly on pituitary tumors. Wilson thrives on complexity. Gladwell reports this reflection from one of Wilson's younger colleagues: "Most people are afraid of aneurysms. He wasn't afraid of them at all. He was like a cat playing with a mouse." [12] Or listen to Anthony Bourdain, a well regarded chef who is also a heroin addict who never wanted to do anything else except work with food. "Line cooking done well," he says, "is a beautiful thing to watch. It's a high speed collaboration resembling, at its best, ballet or modern dance. A properly organized, full loaded line cook, one who works clean, and has 'moves' -- meaning economy of movement, nice technique and, most important, speed -- can perform his duties with Nijinsky-like grace." [13]

Observers of very accomplished people tend to wax metaphoric about the virtuosity of "Unconscious Competence" but it seems to come down to six interlaced elements which I'll call "gifts," "models," "reps," "chunks," "critiques," and "grace." If these six workings really progressed step-like in a sequential way, life would be neat and predictable. Reality seems otherwise. Think them instead as layers of a Viennese chocolate-raspberry torte with a mocha sauce and a light slathering of whipped cream. All of the parts bind and blend together in ways that could be dis-aggregated if you tend to be a dissembler and require all your food to be separated into its constituent parts prior to consumption. Somehow, everything in a cake like this does better together. The ingredients create a culinary "synergy" in which 2 + 2 = 7 on the ten-point Richter scale of tortes.

---

[11] Adler, P. *Beyond Paradise: Encounters in Hawaii Where the Tour Bus Never Runs*. Woodbridge CT: Ox Bow Press, 1993.

[12] Gladwell, M. "The Physical Genius: What do Wayne Gretzky, Yo-Yo Ma, and a Brain Surgeon Have in Common?." *The New Yorker*, August 2, 1999.

[13] *Kitchen Confidential: Adventures in the Culinary Underbelly*. Anthony Bourdain, London: Bloomsbury, 2000.

Let's take "gifts" and endowments first. Basically, some people (perhaps most people) are blessed with certain raw talents and dispositions. It may be a unique capacity, a special mental acuity, or even some uncommon physical peculiarity. Former Senator Bill Bradley, for example, was one of the best basketball players Princeton ever produced and a starter with the New York Knickerbockers. Little known fact: Bradley was actually born with some extra peripheral vision. Baseball player Tony Gywnn, a superb hitter, says he can see the ball traveling to him. The average speed of a pitched ball is 89 miles per hour. Most of us can't see anything. Harry Ishida, my dentist, has very small hands that can fit into large talkative mouths like mine quite easily. And Ludwig Beethoven, Bruce Springstein, and Madonna all seem blessed with a certain "ear" for the sounds and cadences of their time.

The concept behind this has been well described by Howard Gardner.[14] While we tend to think of logical-mathematical aptitude as the key attribute for success, there are, in fact many other forms of intelligence. Gardner sees physical and kinesthetic abilities as a different but equally useful form of intelligence. So is musical intelligence (think of Yasha Heifitz), spatial intelligence (think of Frank Lloyd Wright), natural intelligence (think of Daniel Boone in America or Richard Burton in Africa), linguistic intelligence, or emotional and interpersonal intelligence. Ability comes in many forms and it is highly differentiated.

By itself, however, talent doesn't guarantee anything. Lot's of us have mental, physical, spiritual, or emotional gifts that, for a variety of reasons, are squandered or are so unbridled that they can't amount to anything. Or perhaps parents and teachers fail to recognize them or we are told over and over again that they are useless. The second component of mastery, therefore, is a "model" that arouses our curiosity. To cultivate ability we need examples that open up prospects. The man on the beach needs to see the surfer before he can be smitten. A Winton Marsallis gets his jump-start from hearing Louis Armstrong. And a young woman with sculptural instincts must see (and more likely feel) the art of a Henry Calder or Jean Arp before she can grasp that the mind's eye can create beautiful and enduring forms. Models create possibilities. Mediators and facilitators are no different. We require a picture or schematic of that which intrigues us. In effect, the model says "look, here's someone doing something unusual to help make an

[14] Gardner, H, *The Disciplined Mind* (Simon & Schuster, 1999); *Intelligence Reframed: Multiple Intelligences for the 21st Century* (Basic Books, 1999)

agreement and I want to do that."

In the realm of conflict resolution, there are no lack of models. In fact, most of us in the profession tend to delimit our thinking, settle on one approach, and then put on blinders to others. Finding something that works and getting good initial results, we tend to forget that biological necessity and social ingenuity have, over 40,000 years, created thousands of interesting, and artful ways of mediating disputes. The Big Man tradition in New Guinea is one. Hawaiian Ho'oponopono is another. So too are the Leopard Chief traditions of Central Africa, the disentangling ceremonies of Melanesia, the traditional Lok Jirga in Afghanistan, the peace pipe rituals of Native America, and the song duels of certain Eskimo people. All of these (including our peculiar obsession with only two forms of mediation -- "transformative" and "evaluative"), are part of a broad tapestry of ideas, models, and tools for managing controversy. They are "models."

The third component is "repetition." Said in everyday language, practice helps move us towards "better" and then pushes us on towards "perfect." Cellist Yo-Yo Ma rehearses every piece in his mind. He does this on the plane, in his dreams, and while he's brushing his teeth. Jack Nicklaus never took a swing with his golf clubs that he didn't go over in his mind beforehand. And Charlie Wilson, the best pituitary surgeon in the country, does half a dozen operations during the day and then practices on rats and mice before he goes home for dinner. The result is a knack for working smoothly, quickly, and with economy of motion. Repetition is also the breeding ground of innovation. Through continual exercise, we can experiment in private and study the failures.

Extended, successive, and disciplined training is probably the root source of the fourth component of mastery: "chunking." [15] Chunking refers to the storing of arrangements and sequences, sometimes exceedingly subtle ones, in long term memory. Wayne Gretsky, says Malcolm Gladwell, remembers certain positionings and configurations in the hockey rink that the rest of us merely mortal hockey fans

[15] The word "chunking" is sometimes used by language theorists to describe a way of parsing a text into syntactically correlated parts of words. It is also used by some communication trainers as a variation of active listening, unpacking, and then reframing complex and emotion-charged statements. In this article, chunking refers to mental sequences that are stored in long term memory and that can be used to guide the short term procedures we use in our work as mediators.

may briefly observe and even possibly hold in short term memory for a moment or two, but then quickly let go. Non-hockey players have no reason to remember such stuff. Wayne does. When Gretsky says he "skates to where the puck will be," he is literally calling up a chunk of memory that can keep the coordinates of the puck, the goal, himself, his teammates, and his opponents in mind. To use a different metaphor, "chunks" are the mental instructions Wayne uses to triangulate the "X" on the ice where everything converges for a good shot at the goal.

The same idea -- chunks of mental instructions that can be called up in complicated situations -- is true of Michel Jordan sweeping towards the basket, Julia Child cooking a souffle, Winton Marsalis taking us to dizzying heights on the horn, a skilled fork lift operator laying pipe in a trench, or a gifted mediator holding off on asking people for their positions while he or she sets up the political face-saving move that will break an impasse. In each case, you are intuitively and sub-consciously pulling a strand, clump, nugget, or sequence of previous experience out of long term memory, unconsciously inspecting it to see if it is the right one, holding the image steady, and applying it to the particular circumstance or fact pattern that you face across the table with disputants.

All of this takes place in nano-seconds. Ironically, if we asked Michael Jordan, Julia Child, Winton Marsalis, Harry the dentist, or Bill Steinhoff the arborist to explain their brilliant moment to us, they will probably say: "I dunno." It is not because they are being modest. Without being aware of it, they are doing something which they think is instinctive or intuitive and that the rest of us assume is intentional and strategic. And even though it defies precise description and measurement, their mastery is apparent to people in the know. Colleagues who are watching them and who are also skilled and effective at what they do can pick the real masters out and see their ability.

This kind of internal, possibly subliminal visualization gives rise to a fifth layer of mastery: critique. Real experts -- unlike the incompetents Dunning studies at Cornell -- are intellectually honest and brutally self critical with themselves. They examine their mistakes squarely, deconstruct them, and relentlessly search for the impeccable. Some professions force this contemplation, even if isn't welcomed or pleasant. Lawyers must be able to argue alternative theories of both sides of their case in depth. Doctors routinely have to bring their failures before scowling panels of colleagues and defend their practices. Scientists are expected to undergo the banging and bruising of peer review for their research. Child welfare workers must

do death reviews and confront the failures of their prevention efforts.

Using somewhat different terms, Don Schon in his book *The Reflective Practitioner* studied engineers, architects, managers, urban planners, and therapists and showed how high accomplishment in these professions involves building visceral competencies that are beyond strictly rational and technical proficiencies.[16] Mental preparation -- learning the theories and practices of diagnostics, analysis, and intervention -- sets the stage for the kind of unconscious absorption that Thomas Wilson is discovering through his experiments. When we are data, fact, and theory "sodden", other things kick in. Critique, appraisal, and criticism, hard as it may be at times, sharpens our discipline and creates mental toughness. But more than building character, it extends and deepens practice, builds intuition and instinct, and sets the stage for building the hunches, anticipations, and premonitions that Don Schon finds to be an integral part of professionalism.

Finally, there is something in the realm of mastery and excellence that happens at apex moments when strategy, impact, problem, solution, cause and effect, and intervention and result converge. Think of it as a moment of "grace." Although religious people speak of grace as unmerited divine assistance given to humans, grace has other collateral and derivative meanings. Grace is also the effortless beauty of a maneuver or movement, the eye-pleasing proportions of a form, the favor or gift given by someone who is under no obligation to do so, a disposition towards kindness, and the state of being protected.

As they rise to the top of their game, masters of smaller and larger things – from football to flower selling -- develop a "feel" that comes to be more important than head-knowledge and that leads to those efficient, clean, and graceful moments. Sometimes we describe this as being "in the zone," a time, space, or place that is beyond conventional notions of success and failure and that seems to be a complete convergence of knowledge, skill, experience, intuition, and inspiration. I've heard mountain climbers talk about it as a kind of "auto pilot" in which you are thinking like chess and moving like ballet. Other athletes refer to it as raw, basic "muscle memory." Baseball pitchers talk about "finding the groove" and jazz musicians try to "get their mojo working." For mediators and facilitators, the perfect golden moment is when substance, process, and relationships all come together "in sync",

[16] Schon, D.A. (1983). *The Reflective Practitioner: How Professionals Think in Action*, New York: Basic Books, Inc.

when the participants or disputants accomplish their goals, and when there is a result that you and they find salient and valuable. To paraphrase Harvard ADR professor Frank Sander, we mediators get our mojo working right when the forum we helped create or manage fits perfectly for the fuss that was at hand and the commotion is tamed, streamlined, or resolved.

One final aspect of mastery is worth noting. The rigors of training, practice, and critique may be the inevitable preparation that is required to exercise ingenuity and judgement but imagination is the connective tissue. It develops and grow over time and links the analytic and emotional, the moral and pragmatic, and the cooperative and the competitive aspects of our work. It builds off all the data dots and enables those occasional leaps of insight which bridge to solutions. Imagination, says David Brook, is "amphibious." It constructs both the visionary inspirations as well as the dark forebodings which inform analysis, strategy, and calculation.[17] Einstein was correct when he opined that imagination is more important than knowledge. Unwitting, unintentional, and unconscious excellence is the exercise of both fantasy and reason.

4. Struggling Upstream...Forever

It's the end of the month. I'm shuffling through papers on my desk looking for time sheets and invoice forms to close accounts. Paperwork is part of the yin and yang of being a full time practitioner. Some days it's the dark side, some days the light. At this particular moment I'm looking at two files. One contains papers about a water dispute that has two developers at each others' throats accompanies by their respective phalanxes of lawyers and technical experts. The other file is my running record of a group of scientists, lawyers, fishermen, and cultural experts that has been meeting for months to break a legislative logjam regarding the creation of new marine protected areas. In my mind, the cases couldn't be more different from each other. One of them represents frustration and failure. The other is full of magic and light.

With hindsight, I can see my mistakes on the first case and the general contours of some things I did right on the second. After a round of initial meetings on the first, I misjudged the nature of the dispute between the two property owners. In joint

[17] David Brooks, "Light Shows of the Mind," *The Atlantic Monthly*, pp. 30-31, December, 2002.

session, it was all about "principle." In separate caucuses, and in different ways, both of them then assured me their dispute wasn't personal nor was it about money. It was about contractual duties to purvey water through the pipes on each of their properties. As it turns out, their conflict was all about the money and their concomitant mutual desires to inflict competitive pain on each other. It wasn't for personal satisfaction that they were doing this but because of the contention between their respective future business ventures once they each have secured the water they need. I missed this entirely. Actually, I was beguiled or failed to get them to reveal their real interests. I accepted at face value their initial representations. Its not a fatal mistake and I suspect we will get to a negotiated conclusion eventually. Yet, in the process, I have probably unnecessarily consumed more of their time and stamina than is necessary and foreclosed certain windows of opportunity that might have opened earlier.

The second case has proven to be entirely different. The process of getting people to reveal their fears, hopes, and interests over several meetings, coupled with the infusion of high quality technical data into discussions about fish stocks, local community practices, and ocean regenerative capabilities has brought us very close to a solution. Unlike our previous meetings, this last session turned a corner and created what Malcolm Gladwell calls a "tipping point." People were focused, civil, helpful to each other even when they disagreed, and oriented towards finding answers.

These kinds of reflections on personal cases are useful to me as a way of sorting things out but I am also aware that they may be completely delusional. One of the hard realities doctors face is how little they actually know about cause, effect, prevention, intervention, and healing. In many cases, they can't actually explain why many patients live when they are supposed to die, or die when the norm says they are supposed to live. The logic of their nostrums and therapies gives them the comfort of method but it doesn't explain what's going on. Similarly, I'm aware of the disconnect between how we mediators and facilitators look at our work and how our work is seen by the mediated and facilitated-upon.

Several years ago my colleague and friend Kem Lowry of the University of Hawaii Department of Urban and Regional Planning did an analysis of some thirty successfully mediated cases that had been mediated by a program I directed at the time. His study drove the point home for me. First Kem asked the mediators in our cases to explain what they did to bring about success. Then he asked the parties in

those same cases what they actually observed the mediators doing. The mediators – myself included – gave elaborate explanations of strategies, timing, and tactics. We identified how we went about conducting our conflict analyses and circumscribing issues to be worked on. We deciphered the breakdowns, breakthroughs, and the windows of opportunity both lost and found.

The participants in our cases had a very different view. The only thing they recalled us doing was opening the room, making coffee, and getting everyone introduced.

If our goal is seamlessness and invisibility, Kem's study suggests we succeeded brilliantly. There may be other explanations though. Maybe we don't know as much as we think we know. Or maybe we give what we do know too much weight and credence. Or maybe its all placebo and Hawthorne effect and we are really just setting up a time and place for people to act out their own rituals of making war or peace. In the end, it may really be about room keys and cookies.

For myself, I will keep tussling and fuddling and muddling my way towards the highest perfection I can, whether it be refreshments, door opening, data management, or the politics of face-making. It's my life work and a quest. Meanwhile, I take a certain refuge in the words Gertrude Stein barked at a young Earnest Hemingway while they were hanging out in Paris and living the big life. "There ain't no answer, there's never been an answer, there never will be an answer, and that's the answer."

View of the Mediator & Mediation Process

Mediation – Alchemical Crucible for Transforming Conflict to Resolution

By: Simeon H. Baum

Mediation in Context – Negotiation & Dialogue

Day in and day out, we encounter one another, make deals and resolve disputes. Whether it is setting a bedtime with a recalcitrant five year old, making dinner plans with a narcissistic couple, setting up a distributorship, breaking a lease, working out credits and offsets in a requirements contract, accounting for changes and delays in a construction job, or the host of issues that might make their way into court if not otherwise resolved –we negotiate. Negotiation is so common, we barely notice it. We are like fish not noticing the water in which we swim. We communicate with others, offering trades where needed, to obtain the cooperation of the other to achieve satisfaction of our needs and interests. Cooperation might come in the form of offering goods, land, information, intellectual property, services, cash, securities, some other form of property, right, permission, or agreement of non-interference or cessation of offending activity,

Sometimes, all that is sought is understanding and acknowledgement. Beyond the trades of negotiation, there are times when, at home or at work, we meet one another in the depth of our humanity, sharing time together in a manner that breaks the mold of social expectations or joint projects, celebrating the wonder of life and mutual existence. Conversely, there are times when we cannot recognize one another, when all we can see is the bundle of needs and obligations that lie upon us. The “other” is an impediment, failing to assist in the achievement of our ends. Or, the other reads us this way, ignoring

our humanity. There is a crisis in our relationship, and with it, as said by the Captain of Road Prison 36 to Paul Newman's character in Cool Hand Luke: "what we got here is a failure to communicate."

Escalation to Agents and Authorities

When there is a snag in negotiations or in communications, one option is to seek the help of others. We turn to agents to negotiate or intercede on our behalf, including lawyers. We turn to authority figures to help us – such as the boss or HR department in an employment setting or, G-d forbid, a mother-in-law for help at home. And, of course, when we get nowhere, and the problem merits the financial outlay, time, disruption, negative impact on our relationship with the other, and reputational risk, we, or our counsel, turn to the Courts, or to arbitrators, to render a decision that will resolve the dispute and bear with it the force of law.

Mediation Defined by a Developing Profession

Even before reaching the courthouse, there is another time honored practice: turning to a trusted, neutral third party to help us in our negotiation. In its simplest form, mediation is a negotiation, or dialogue,[1] facilitated by a neutral third party. As early as

[1] As discussed *infra*, proponents of transformative mediation do not see the mediator's role as assisting in problem solving or in settlement of a dispute. Rather, the role is to foster empowerment and recognition. Similarly in Himmelstein and Friedman's model, understanding is the key. Accordingly, for those schools, non-utilitarian "dialogue," as an encounter of persons, might be a better description of the mode of communication that is facilitated by the mediator. A rich description of dialogue is found in the writings of Martin Buber, such as "I and Thou." *See, e.g.*, Martin Buber: The Life of Dialogue by Maurice S.

medieval Japan, one Zen master acted as intermediary bringing about peace between warring lords. Mediation has been used informally in many contexts and many lands. Today, with substantial growth in the U.S. over the last two decades, mediation is used as a dispute resolution process both through court-annexed panels and through private mediation providers. Mediation has increasingly become professionalized. There are associations of mediators,[2] rules of ethics, like the Model Standards of Conduct for Mediators prepared jointly by the AAA, ABA, and SPIDR during the early 1990s and revised in 2005; mediator training programs, like the three day Commercial Mediation training offered through NYSBA's Dispute Resolution Section last Spring; mediation practice reflection groups; and legislative initiatives, like the effort to enact in New York the Uniform Mediation Act to provide for a mediation privilege adopted by eleven other states.

Mediation, as a confidential, facilitated negotiation, unlike its dispute resolution cousins arbitration and litigation, does not involve a neutral third party's making a determination, award, verdict or judgment that is binding on the parties. Rather than to evaluate or tell the parties what to do, the mediator facilitates the parties' own communication and decision making. Mediation is binding only to the same extent that any negotiation is binding: when a deal is struck and memorialized in writing, that becomes a binding agreement. As with the settlement of any matter, the agreement can have bells and whistles – requiring the filing a stipulation of dismissal or discontinuance,

Friedman, (The University of Chicago Press, 1955, reprinted 1960 by Harpers, N.Y. as a First Harper Torchbook edition, and available online at: http://www.religion-online.org/showbook.asp?title=459).

[2] E.g., The Association for Conflict Resolution (ACR), a merged entity of SPIDR, CreNet and ACR.

papers attendant to a security agreement, including an affidavit of confession of judgment, if appropriate, notes, liens, mortgages, or any other document that the parties and their counsel might require to complete or enforce the agreement transaction.

Evaluation & Facilitation Considered

Mediation has also been distinguished from neutral evaluation. In the latter process, parties, typically with counsel, present a preview to the mediator of what their case might be like at trial. The neutral evaluator, after discussion that can include caucus, gives the parties a preview of the judicial outcome. This is a predictive exercise in which it is best that the evaluator draw on meaningful expertise. The parties can then use that prediction to clarify the "shadow of the law" under which they are bargaining and, in its light, strike a deal. In former Magistrate Judge Wayne Brazil's model, before sharing the prediction, the evaluator advises the parties that he or she has written it down and offers, before delivering the message, to facilitate their negotiation of a settlement, essentially shifting to the role of mediator. If the parties reach an impasse, at that point, the evaluation can be shared, and the mediation can continue.

During the 1990s there was significant debate in the mediation field on whether it is ever appropriate for a mediator to provide the parties with an evaluation. This debate was prompted by a seminal article by Professor Len Riskin,[3] which presents a "grid" for

[3] Riskin, L., *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, Harvard Negotiation L. Rev., vol. 1:7, Spring 1996, available online at: http://www.mediate.com/pdf/riskinL2_Cfm.pdf. An earlier version of this piece was published by Riskin,

classifying mediator orientations, types and strategies. Riskin's grid identifies two major spectrums: broad/narrow focus, and evaluative and directive/facilitative approach. A narrowly focused mediator might attend only to the legal question, ignoring, discarding, or directing discussions away from "irrelevant" emotions, values, business considerations, or even broader societal concerns – all of which are recognized as meaningful by those who maintain a broad focus. The other spectrum distinction shows some mediators as being more evaluative and directive – sharing with parties their own views on the merits of a case, or even, where broadly focused, their views on the moral, just, fair, economically sound, or appropriate thing to do and urging the parties to take a particular course of action. Other mediators, Riskin found, tended to refrain from sharing their view or telling the parties what to do. Their function was primarily to facilitate the parties' own reflection and analysis, decision making and communication. Responding to Riskin's article, Professors Kimberly Kovach and Lela Love published a piece calling "evaluative mediation" an oxymoron.[4] Their view was that the mediator's role is to help the parties with their own problem solving, facilitating their own thinking and communication, but not to drive them to the mediator's solution or, especially, to act as a private judge.

Adding Transformation and Understanding to the Mix

L., *Mediators' Orientations, Strategies and Techniques,* Alternatives to the High Cost of Litigation, at 111, September 1994.

[4] Kovach, K. K. and Love, L. P., *"Evaluative" Mediation is an Oxymoron,* CPR Institute for Dispute Resolution, Alternatives, Vol. 1, no. 3, at 31 et seq., March 1996.

This debate was enriched by the transformative mediation and understanding based mediation schools. The transformatives urge that the mediator's role was not even to be a problem solver or to get a settlement. Rather the mediator's purpose is twofold, fostering empowerment and recognition.[5] Transformative mediators take a micro focus, following the parties with reflective feedback wherever their discussion leads, and, as they proceed, noting opportunities along the way to make choices (empowerment) or for understanding and acknowledging the other. Transformative theory sees disputing parties as feeling embattled, weakened, and even "ugly," and as uncomfortable with the condition of dispute. Disputes are crises in relationship affecting the quality of the parties' communication. The theory is that when parties begin seeing opportunities to make choices, they feel more empowered. As empowerment increases, parties can shift from defensiveness to recognition of the other. The growth of empathy is the "transformation" for which this school bears its name. As this occurs, relationship and communication are enhanced and disputes tend to resolve themselves. This approach has particularly taken hold for use in family, neighbor, and embedded employment disputes – where there are obvious continuing relationships.

The understanding based model emphasizes that parties are in conflict together and can resolve it together, by a growth in understanding.[6] The most controversial aspect of this approach is Himmelstein's and Friedman's insistence on using joint session only in mediation, eschewing caucus. Caucuses are confidential meetings of fewer than all

[5] The transformative mediation manifesto is "The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition", by Bush, R. A. B. and Folger, (J. P., Jossey-Bass, Inc. 1994).
[6] *See*, Friedman, G. and Himmelstein, J., Challenging Conflict: Mediation Through Understanding (ABA 2008)

participants in a mediation. Himmelstein's and Friedman's concern is that caucus takes parties away from jointly resolving their conflict and makes the mediator the bearer of critical information unknown to one or more of the parties. A caucus process might produce a "fix" with a settlement. But it risks being one imposed from without, maintaining the barriers between the parties. It might not resolve their fundamental conflict in the way that occurs with mutual decision-making as a result of deepened understanding, which produces a shift in the parties' understanding of their "own" reality. Critics of Himmelstein and Friedman observe that disputing parties might prefer to express certain views independently or to maintain separateness for the sake of reflection and decision making. Moreover, caucus enables the mediator to give feedback in a manner that does not put the recipient of the mediator's comments in an awkward spot. In caucus, mediator and party can metaphorically sit on the same side of the table and wonder together about possible outcomes of a case or possible deal packages – all of this without putting that party on the spot.

The 360 Degree Mediator

Many providers today consider themselves 360 degree[7] mediators, maintaining a broad focus, utilizing facilitative skills, raising opportunities for empowerment and recognition, facilitating the parties' own evaluation, even giving evaluative feedback when appropriate, and utilizing both joint sessions and caucus.

[7] I first heard this term used by Lori Matles,.

Case and Mediator Selection as Guided by an Understanding of Mediation

Understanding the debate and divergences in mediation theory and practice and the opportunities available in mediation, enables counsel to make sophisticated choices in designing mediation clauses for contracts, selecting a mediator, determining if and when a matter is appropriate and ripe for mediation, and in effectively representing parties in the mediation process. If the matter is an embedded employment dispute, primarily involving an ongoing relationship with significant communication problems and low economic stakes, transformative mediation might be the best way to go. In these circumstances the form of the settlement might matter far less than healing the relationship and improving the parties' communication. The United States Postal Service set up a program to handle Equal Employment Opportunity complaints using transformative mediation.[8] In other matters where ongoing relationship is important and where both parties are willing to invest in the greater time that a joint session only approach might take, counsel might opt for the Himmelstein Friedman understanding based model. In a scenario where a partnership dispute has devolved into a costly accounting proceeding that threatens to kill the goose that lays the golden egg, restructuring of their business relationship might be the most effective path to resolution. Wise counsel might then seek a mediator who will have a broad enough focus to shift from legal to business considerations, put on a "business head," and activate the parties to develop creative options. If two commercial parties – with little emotional investment in

[8] The USPS program is known as REDRESS (Resolve Employment Disputes Reach Equitable Solutions Swiftly). Instituted over a decade ago when the Postal Service had nearly a million employees, this program significantly reduced costs of administering EEO claims, and produced settlement of the vast majority of claims with a very high user satisfaction rate and enhancement of employee morale.

the dispute by party representatives and counsel alike, and ample capacity to bear the cost of litigation – have a *bona fide* difference of opinion on how a point of law affects their respective rights, it might make sense to select a mediator with capacity and credibility to facilitate the parties' analysis of this legal point, or, when and if appropriate, add some reliable evaluative feedback.

Disputes are complex social animals. At times parties might believe they are stuck on a point of law when, in fact, it is a point of pride. For this reason, it is often wise to seek a mediator with "360" capacity, who can make insightful assessments on all fronts, work with the participants to design an appropriate process, and adapt as the mediation process and circumstances require. It is not a bad idea for counsel to determine the mediator's background or orientation through talk with others who have used that mediator or an initial, frank discussion with the mediator at time of selection or in the initial pre-mediation conference.

What Mediators Can Do for You

Mediators may play many functions to lubricate the wheels of a negotiation or to fine tune the channel of dialogue. Whether it is a hard core commercial dispute or a family or employment relationship matter, parties – and even counsel – might have strong feelings about the matter or their counterparties. Mediators are trained to facilitate difficult discussions and to use "active listening" skills – validating, empathizing, clarifying, summarizing and reflecting back statements by the participants. Good

listening engenders satisfaction in the speaker, a sense of being heard, acknowledged and understood. From a utilitarian standpoint, permitting emotional expression enables people to get past feelings of frustration, disappointment, anger and despair and engage constructively in problem solving to get a dispute resolved. From a non-utilitarian standpoint, good listening creates opportunities for realizing meaning and humane regard for one another. Either way, where emotions are drivers in a dispute, mediation is the process of choice – a richer forum for expression than the witness chair under cross-examination, with objections on relevance and materiality, motions to strike, and directions to limit the answer to just the question that was asked.

Mediators can also assist the parties with a joint problem solving, mutual gains approach – the "win/win" popularized by Fisher & Ury's book "Getting to Yes." Also known as integrative bargaining, this approach seeks to expand the pie by identifying the issues, the needs and interests of *all* parties, and then seeking options that will meet as many of those needs and interests as fully as possible, thus resolving the issues in dispute. Options proposed during this process can be judged and supported by identifying or developing standards – principles with which all parties can agree and which take the matter away from a subjective battle. Standards can include fairness, legality, doability, equity, empathy, durability or whatever principle the parties can adopt. Good communication and cooperation enables parties to learn about one another's needs and interests and be effective in brainstorming and generating options, Thus, Fisher and Ury recommend separating the people from the problem, being "soft" on the people and hard

(focused and analytic) on the issues. Counsel might seek mediators who are effective in facilitating this problem solving.

Another Fisher and Ury concept is the BATNA, the best alternative to a negotiated agreement. Considering what might happen if a party does not take a proposed deal is a good way to judge whether the deal is worth taking. In the legal context, the litigation alternative can also be analyzed with a focus on risk and transaction cost. Here, effective mediators might gather information in advance of the mediation session, through phone conferences with counsel and review of pre-mediation statements laying out key facts, any critical law, settlement history and proposals, and annexing useful documents. These pre-mediation communications can also address process issues, making sure the right people with full authority attend, and learning about inter-party dynamics to be sure the process is designed to maximize its effectiveness. Thus, finding a mediator who can be adept at gathering the key information, facilitating a good analysis of the case at the mediation, and helping the parties assess risk and transaction costs (fees for lawyers and witnesses and related costs) can be key. At times, where one's own client, or the other party, is having difficulty hearing tough news about litigation prospects from its legal champion, "reality testing" by a mediator might open the client's eyes to legitimate case risks and prompt more realistic settlement discussions.

Benefits and Promise of Mediation

Properly conducted, mediation offers parties a host of benefits. It can dramatically cut the cost of litigation. This confidential process can reduce some litigation side effects, such as reputational damage through the play of the press and media, and the more localized disruption of griping at the water cooler or removing key employees from work to answer discovery demands, undergo witness preparation, and appear to testify or observe in depositions or trial. It provides a forum for much richer communications, and for addressing a host of feelings, issues, principles and concerns that could never directly be considered or respectfully and humanely given their due at trial. It provides opportunities to improve or restore relationships. Moreover, mediation, like negotiation, permits parties to design their own creative solutions, taking into consideration economic and other factors, to arrive at more doable, durable and mutually acceptable resolutions than a judgment that cannot be collected due to evasion or the lack of funds.

Ultimately, mediation, which has at its core the principle of party self-determination, wrests decision making from third parties – judge, jury, arbitrator – and restores it to the parties. Indeed, while lawyers can still play a very significant role in mediation – as process guides, counselors, and even advocates in opening session or later in laying out the litigation risk to the other side – parties do not live or die on competence of counsel, witnesses, or other agents in presenting a case; again power lies with the parties in the mediation outcome.

Mediation offers a depth of possibility and sensitivity to truth and values consistent with the philosophical resources and developments in our history of ideas. An underlying humanism puts people, not external systems or things, in the driver's seat. With a valuing of people, comes recognition of all aspects of the person, not just that which is legally relevant. Yet, to quote Frank Sander and Robert Mnookin, we bargain in the shadow of the law. The mediation sphere is a place where the norms of both justice and harmony can work themselves out in a manner that fits the actual parties and their circumstances. With recognition of the significance of all parties' perceptions, the philosophical advances of phenomenology come into play. The individual, business and circumstantial focus bears with it the influence of pragmatism. Business considerations embrace our theories of economics. Ultimately, by affirming the parties' joint decision making, mediation celebrates our freedom and our interdependence and our relatedness. It supports compassion, creativity and realism as parties work together to understand each another and their needs, constraints, and context. It offers the possibility of holistic solutions. Fundamentally non-coercive and fostering party responsibility, mediation offers participants a chance to be their best selves and to arrive at superior resolutions.

The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three

Stephen B. Goldberg and Margaret L. Shaw

In a survey of 216 advocates in mediation, the successful mediator's ability to gain the confidence of the parties was cited as important to his or her success more frequently than were any of the skills used by the mediator to bring about agreement. This article discusses the means by which mediators gain the confidence of disputing parties. The article also discusses the different skill and attribute profiles of different successful mediators and the advocates' views of the reasons for mediator failure. The article considers the implications of its findings for mediators, trainers, and advocates, and concludes with suggestions for future research.

Key words: mediation, mediator success, mediator failure, mediator skills and attributes, successful mediator profiles.

Stephen B. Goldberg is professor of law at Northwestern University and has been a mediator for more than twenty-five years. His e-mail address is stephengoldberg@law.northwestern.edu.

Margaret L. Shaw is a mediator with JAMS. She has twenty-five years of ADR experience and teaches negotiation and ADR at New York University Law School. Her e-mail address is mshaw@jamsadr.com.

10.1111/j.1571-9979.2007.00152.x

Introduction

This article reports the results of the second and third studies in an ongoing research project designed to determine how mediators succeed in assisting disputing parties to achieve settlements and why they sometimes fail. The research seeks:

- to assist mediators in resolving disputes;
- to improve mediator training by informing trainers of which mediator attributes and skills are most important to successful dispute resolution; and
- to help users of mediation services select mediators by delineating the mediator skills and attributes that mediation users in general regard as important for mediator success.

Participants in mediation can have many different goals. As a result, there are many possible definitions of mediator success. Among the possible goals of mediation are:

- settlement of the dispute that brought the parties to mediation;
- resolution of the underlying conflict that led to the dispute; and
- empowerment of the parties and their mutual recognition of each other.

As a result, a successful mediator may be defined either as

- one who obtains frequent settlements;
- one who typically enables the parties to resolve their underlying conflict(s); or
- one whose mediations typically result in empowerment of the parties and their mutual recognition of each other.

For purposes of this research, we use the first of these definitions — a successful mediator is one who obtains frequent settlements — understanding that regardless of the mediator's talents, disputing parties will not agree to a proposed settlement unless it satisfies the core interests of each and is perceived by each as preferable to its best alternative to settlement (Brazil 2007). While we lack data to measure the number and frequency of settlements achieved by the mediators in this research, we do know that in the commercial, labor, and employment disputes in which these mediators were most frequently involved, parties usually select mediators known for their success in facilitating settlement. Thus we use frequent selection to serve as a mediator as a proxy measure of mediator success.

This is not the first effort to determine why mediators succeed in dispute settlement (see Herrman, Hollett, and Gale 2006 and Wissler 2006 for a wide-ranging summary of existing mediation research; see also Swaab and Brett 2007). It is, however, among the few empirical studies that draw upon the views of both successful mediators and their clients in order to determine the extent to which their views coincide — or do not — with respect to the reasons for mediator success (see also Hiltrop 1989). It is also the first empirical study of which we are aware to determine, from the perspective of mediation users, which behaviors lead to mediator failure.

In Study One, we asked thirty experienced mediators, nearly all of whom had mediated more than one hundred disputes, how they accounted for their success. "What skills and techniques," they were asked, "enable you to get settlements? . . . What [do] you view as your essential strengths and techniques?" Seventy-five percent of the mediators responded that their ability to achieve rapport with disputing parties — a relationship of understanding, empathy, and trust — was central to their success in bringing about settlement (Goldberg 2005). A majority of the mediators attributed their ability to achieve rapport to empathic listening, through which they conveyed the message that they truly cared about the parties' feelings, needs, and concerns. Other mediators attributed their success in achieving rapport to their honesty, ethics, and trustworthiness.[1]

The surveyed mediators also reported that once having achieved rapport, their most useful techniques for achieving settlements were to generate novel or creative solutions to the dispute, to display patience and persistence in encouraging settlement, and to use humor to reduce tension.

Study One was limited in that it was based entirely upon the personal observations and reflections of the mediators, with no participation from those who had used their services. Accordingly, in Study Two, we surveyed people who had participated in mediation as representatives of disputing parties (e.g., attorneys) to determine their responses to the question of what led to success in mediation. Then, in Study Three, we asked the same group of disputants' representatives about what constituted unsatisfactory mediator behavior, reasoning that this, too, might illuminate both the key ingredients of mediator success as well as what pitfalls should be avoided.

Study Two Methodology

In order to collect Study Two data, we asked each of the thirty mediators who participated in Study One to provide us with the names of the disputants' advocates (typically attorneys) in six mediations they had conducted — a total of twelve advocates per mediator. Seventeen of the original mediators agreed to do so; thirteen did not.[2] We replaced those mediators who chose not to participate in the follow-up study with equally experienced mediators who were willing to provide us with client names.

Of the thirty mediators who participated in the original study, twenty-eight had mediated at least one hundred disputes; two had mediated between fifty and one hundred disputes. Of the eleven mediators who participated in Study Two but not Study One, ten had mediated at least one hundred disputes and one had mediated between fifty and one hundred disputes. The mediators who participated only in Study Two are thus as successful in the marketplace as were those who participated in both studies.

Most of the twenty-eight mediators who participated in Study Two deal primarily with commercial, labor, and employment disputes. Two focus on divorce disputes and two on environmental and public policy disputes. Sixteen of the twenty-eight are male, twelve are female. Four are former judges. The twenty-eight mediators are based in eleven different states. Many of them have nationwide practices, so their clients are even more widespread.

The twenty-eight mediators in Study Two provided us with the names of 329 people who had represented disputants in mediations they had conducted.

Participants and Procedures

Each of the 329 disputant representatives (who will be referred to hereafter as "mediation advocates") was sent a letter stating that we had received his or her name from a named mediator as having been counsel or spokesperson in a recent mediation conducted by that mediator. We asked each recipient of the letter to respond to two questions, with the assurance that we would not share those responses with the mediator in question:

- Thinking back to your most recent mediation with [the named mediator], and any other mediations that you may have had with him/her, what personal qualities, skills, or techniques did [the named mediator] demonstrate that helped move the parties toward settlement?
- How would you account for [the named mediator's] success as a mediator?[3]

Of the 329 people we surveyed, 216 responded, for a response rate of 66 percent. Seventy percent (152 of 216) of the respondents are lawyers, 22 percent (48 of 216) are union or management representatives in labor dispute mediations, and 8 percent are either representatives of government agencies or public interest organizations in environmental and public policy disputes, or people who represented themselves in the mediation.[4]

We received 47 percent (102 of 216) of the responses in written form and collected 53 percent by telephone. Nearly all the telephone interviews were prearranged. In the course of the telephone interview, which we conducted only if the respondent had not submitted a written response to the questionnaire, the interviewer asked the two questions on the questionnaire, which the respondent had previously received, and transcribed the

respondent's remarks directly into the computer. No additional questions were asked, but the respondent was allowed as much time to respond as he/she wished. The only statistically significant difference between the content of the written and telephone responses was that the latter were more likely to refer to the importance of the mediator's evaluation skills.

Coding

To code the data we followed several steps. First, Stephen Goldberg read one hundred respondents' answers to both questions, identifying fifteen distinct skills or attributes mentioned by at least one respondent. Goldberg then coded all questionnaires to determine the extent to which those fifteen skills were attributed to each mediator by each advocate who commented on that mediator. In doing so, Goldberg identified five additional skills. He then reread all previously coded responses, noting and coding the additional skills if mentioned.

Next, Margaret Shaw, who knew neither the identity of the respondent nor the mediator, nor how Goldberg had coded the comments about that mediator, independently coded all responses using the same list of twenty skills and attributes developed by Goldberg. Approximately 80 percent of Shaw's coding matched Goldberg's coding; where there were differences, we discussed and resolved them. (To this day, Shaw does not know which responses applied to which mediator nor who provided those responses.)

We next grouped the twenty skills/attributes into three categories in order to place similar skills and attributes together for discussion and analysis. The three broad categories, listed in Table One, are confidence-building attributes (those mediator attributes that enable a mediator to gain the trust and confidence of the parties), evaluative skills (the mediator's ability to encourage agreement by evaluating a party's likelihood of achieving its goals outside of mediation, typically a prediction of the likely outcome if the matter were decided by a court or an arbitrator), and process skills (those skills by which a mediator seeks to encourage agreement, not including evaluative skills).[5]

Data Reduction

We analyzed the Study Two data with a view to answering two questions:

- Which mediator skills or attributes do those who represent disputants in mediations regard as most important for mediator success?
- Are all mediators successful for the same reasons, or are different mediators successful for different reasons?

To accurately measure the advocates' views concerning the skills and attributes of successful mediators, we had to take into account certain data set characteristics. First, some skills or attributes might be mentioned repeatedly by the same respondent. We handled this by counting only a

Table One
Reasons for Mediator Success — Average across All Respondents and All Mediators

Description	Average %
Confidence-building attributes	
Friendly, empathic, likable, relates to all, respectful, conveys sense of caring, wants to find solutions	60
High integrity, honest, neutral, trustworthy, respects/guards confidences, nonjudgmental, credible, professional	53
Smart, quick study, educates self on dispute, well prepared, knows contract/law	47
Process skills	
Patient, persistent, never quits	35
Asks good questions, listens carefully to responses	28
Diplomatic, makes both sides feel they are winning, softens the blows of bad news, makes suggestions tactfully	21
Proposes solutions, creative	18
Candid, firm as necessary (other than in pointing out legal/contractual strength/weakness)	17
Keeps parties focused on issues, manages issue ordering	16
Understands people, relational dynamics	13
Calm, deliberate	12
Flexible, capable of varying process to fit situation	10
Understands organizational culture(s)	9
Good sense of timing, knows when to set deadlines/apply pressure	8
Uses humor	8
Allows venting, manages emotion	8
Reframes issues	7
Confident, optimistic	5
Persuasive	2
Evaluative skills	
Does useful reality testing regarding legal/contractual weaknesses, evaluates likely outcome in court/arbitration, candid regarding same	33

single mention. For example, if a respondent describing Mediator X gave two different examples of Mediator X's being empathic, or one example of empathy and one of friendliness (both of which are in the same code category), Mediator X received only one point for the empathy attribute.

Second, some mediators were reported on by more advocates than were other mediators. To prevent the greater number of respondents from increasing a mediator's skill or attribute score, we generated a mean score for each mediator on each skill/attribute. For example, if eight advocates reported on Mediator X, and four of those advocates said that among the reasons for X's success was that he was empathic, X's mean score on empathy would be 50 percent. Similarly, if six advocates reported on Mediator Y, and three of those mentioned Y's empathy as a reason for her success, Y's mean score on empathy would be 50 percent. As a result, the mediators' ratings on each skill or attribute were unaffected by the variation in number of respondents reporting on them.

Next, to determine which skills and attributes were most characteristic of successful mediators in general, we calculated the mean scores of the entire sample of successful mediators on each skill and attribute. This was done as follows. Assume, as noted in the prior paragraph, that both Mediator X and Mediator Y received mean scores for empathy of 50 percent. Assume further that Mediator Z's mean score on empathy was 60 percent, and Mediator A's was 80 percent. If these were the only mediators in the study, the mean score for empathy across all successful mediators would be 60 percent. Thus, 60 percent of the advocates who commented on the average successful mediator thought that being empathic was one of the reasons for mediator success. The results of this calculation are set out in Table One, which shows on average how frequently (the average across all mediators of the average for each mediator) respondents reported a skill or attribute as being characteristic of a successful mediator. These data were used to answer our first research question: which skills or attributes do mediation representatives view as most important for mediator success?

Study Two Results

Reasons for Mediator Success

As shown in Table One, the most frequently cited behaviors correlated to mediator success involved the mediator's ability to gain the confidence of the parties, albeit by different means. Tops on the list — referred to by an average of 60 percent of the mediation advocates commenting on the average successful mediator — was that the mediator was friendly, empathic, likable, etc. Examples of the respondents' comments include:

> He is a genuinely nice guy. People like to be around other people whom they like — especially someone you have to spend hours with in a high-stakes situation.
>
> Because of his sincerity and likeability, he is able to keep people talking when other mediators might lose them.

> She demonstrates compassion for the client, which makes the client feel that she is working hard on her behalf and tends to make the client trust her.
>
> His style as a mediator is one of patience and empathy — projecting a sympathetic understanding of the party's concerns and positions.

The next most frequently cited reason for mediator success — referred to by an average of 53 percent of the mediation advocates — was that the mediator had high integrity, as demonstrated by his/her honesty, neutrality, trustworthiness, protection of confidences, etc. Examples of these comments include:

> He has honesty and integrity. We had absolute confidence that he would not reveal information we did not want revealed to the other side.
>
> Another essential quality is her personal integrity — as it is essential to any mediator. Both sides trust that the information she relays is accurate, and that she's not putting a spin on things to help her get where she needs to go.
>
> She was exceedingly professional and balanced in meeting with the parties. . . . This is critical. If the parties sense imbalance or that the mediator is unsure of what he/she is doing, they tend to dig in their heels and won't settle.

Rounding out the top three most frequently cited reasons for mediator success — referred to by an average of 47 percent of the mediation advocates — was that the mediator was smart, well prepared, and/or knew the relevant contract or law. Examples of the responses include:

> She's extremely smart. That plays out in several ways, such as creativity in finding solutions.
>
> She has a knack for quickly grasping the factual situation and the legal issues involved, and they become the focus of her efforts, rather than the legalities that one side or the other may be pushing.
>
> He was an extraordinarily quick study who was able to master the underlying facts and issues of a complex case well enough to be credible in his discussion of the strengths and weaknesses of each party's position.
>
> The first quality that he had was knowledge of the case. Knowledge of the facts and law is what I consider to be the prime personal quality — although most wouldn't think of that as a personal quality. You would be surprised at the number of mediators who do a "once-over lightly," and expect to be educated by the parties, but

> who make so many *faux pas* before they get their full education that the mediation fails because the parties have no confidence in the mediator.

The results in Table One support the conclusion that an essential attribute of the successful mediator is his/her ability to gain the confidence of the parties. This result, based on advocates' responses, is consistent with the views of the mediators themselves, as reported in Study One (Goldberg 2005). But in Study One a majority of the mediators attributed their ability to gain the confidence of the parties to their ability to listen empathically, which led the parties to like and trust them, and only a few mediators attributed their ability to obtain the confidence of the parties to their honesty and/or integrity. In the present study, advocates regarded *both* attributes — empathy and integrity — as central to mediator success.

Another difference between the responses was the greater frequency with which advocates in Study Two mentioned the mediator's intelligence and preparedness as factors in his/her success. We think a possible explanation for these differences is that successful mediators, the respondents in Study One, may assume that integrity, intelligence, and preparation are so obviously and self-evidently crucial for achieving success as a mediator that such traits are not worth mentioning.

Table One also indicates that the mediators' confidence-building attributes were cited by respondents more frequently than were the various skills used by mediators to bring about agreement. The most frequently mentioned mediator skills/attributes were patience and persistence (referred to by an average of 35 percent of the mediation advocates), providing useful evaluations or reality testing regarding the likely outcome of the dispute in court or arbitration (33 percent), and asking good questions and listening carefully to responses (28 percent).[6]

Some comments relating to the mediator's patience and persistence include:

> Her patience was outstanding. The parties were very far apart: we didn't give this case a chance for success. . . . The parties kept insisting, "mediation is not going to resolve this matter." However, her patience resulted in a settlement.

> Most important . . . is that he has unlimited tenacity, is indefatigable, is always working, phoning/e-mailing night and day, weekends, from wherever he is and wherever you are in the world.

> She *never* gives up, never. Some mediators will walk out at the end of the day, and say call me if I can help in the future. In contrast, at the end of the day she will get contact numbers and call each lawyer separately, and continue to sort out the problems. . . . I've had many conversations with her at nine and ten o'clock to try and settle some element of a case.

Comments involving the mediators' provision of useful evaluations or reality testing regarding likely outcomes in court or arbitration include:

> She will analyze (and help the parties analyze) the strengths, weaknesses, and probabilities for success or failure.
>
> She readily identifies — and expresses in a non-confrontational fashion — the most significant weakness or downside in each party's position.
>
> I think the first thing that is great . . . is that he is a retired judge and knows the risks of litigation and is able to communicate those risks to my clients with confidence. For me as an attorney, trying to get people to settle for a reasonable financial offer is incredibly difficult — I could do it all day, but my clients tend to believe his opinions, and glean a firm understanding of the risk of taking a case to litigation and the possibility of spending more money than what you could get in a pre-trial settlement.

Comments involving the importance of asking good questions and listening carefully to responses include:

> The most important asset with us is that he is very methodical with his questions, and gets to the root of the issue nearly every time.
>
> I think primarily he's a good listener, which is key for a mediator to be successful. He validates everyone's position in a way that is not wishy-washy, but is responsive to the concerns of the various constituencies.

The respondents also valued the following skills/attributes:

- *Diplomacy and tact* (21 percent):

> He is often able to work the parties into compromises that are their own ideas, and therefore acceptable.
>
> She points out the positive points in each round of negotiation, such that both sides feel they're winning.
>
> She has a nice way of telling you bad news.

- *Proposing solutions/being creative* (19 percent):

> She's creative. She thinks outside the box. She hears the problem, listens well, and will push people to create their own resolution.
>
> When he interjected himself, he was creative. He bounced ideas off the parties that he thought we might like. He tested his ideas out, and backed off if he thought they were losers. He pushed us to do the work that he knew we could do.

- *Keeping the parties focused* (15 percent):

> He helped us focus on issues more. He made us ask what we really needed.
>
> She is good about keeping us on point.

- *Being candid/firm as necessary* (15 percent):

> She is very patient and inherently likeable, but she is also very direct when she needs to be.
>
> His straight-talking, frank input makes him one of the most successful mediators we've used.
>
> He is very skillful in friendly confrontation.

- *Understanding people and/or relational dynamics* (13 percent):

> His insight into people is phenomenal. He knows what buttons to push, when to push them, and how hard.
>
> Not only does she understand people's behavior and motives, she also remembers everyone. She scopes out my clients like a good trial lawyer with a jury.
>
> He knows the roles of the various parties in the process — clients and attorneys. He knows what our [the lawyers'] needs are, and what our clients' needs are. He doesn't put us down in front of the client.

- *Being calm and/or deliberate* (12 percent):

> Her ability to remain calm and keep the parties calm kept the parties together
>
> He has a calming and peaceful demeanor. Each client who's there feels comfortable. He creates a safe zone.

A comparison of the advocates' views as shown in Table One with the views of the mediators who participated in Study One reveals both similarities and differences. The two skills that both the mediators and the advocates agreed were important were being patient and persistent, and proposing solutions and being creative. They differed notably in the importance they assigned to mediator evaluation skills, a factor regarded as important by 33 percent of the advocates but by fewer than 10 percent of the mediators. Advocates then, appear to regard evaluation skills as more relevant to mediation success than do the mediators themselves.

Components of Individual Mediator's Success

In order to generate an overall score for each mediator, we aggregated across process skills to create a single category labeled "process skills." To do this, we summed a mediator's mean scores on each of the sixteen process skills and divided by sixteen. This gave us a score on the process skills category that was comparable to the mediator's scores on evaluation skills and each of the three confidence-building attributes (friendly/empathic, high integrity/honest, and smart/well-prepared).

We next standardized all mediators' scores on the five skills and attributes, summed the standard scores and restandardized. Standardization generates a mean of zero and a standard deviation of one across mediators on each of the five skills and attributes and on the overall performance score.

Standardizing the mediators' scores on each skill and attribute enabled us to

- compare a single mediator's scores on each of the five skills and attributes in order to see where he/she was strongest;
- compare different mediators on the same skill or attribute;
- create an overall score for each mediator that was equally weighted for each of the mediator skills and attributes.

Table Two lists the skills/attributes profile and relative standing of twenty-six of the twenty-eight mediators in Study Two.[7] Relative standings are based upon each mediator's standardized score on each of the skills and attributes: friendliness/empathy, honesty/integrity, intelligence/preparedness, process skills, and evaluative skills.

The symbols in Table Two indicate, for each skill or attribute, whether the mediator was at or above the mean for all twenty-six mediators on the skill or attribute (+), at least one standard deviation above the mean (++), or below the mean (0). For example, Mediator G was at or above the mean on friendly/empathic, smart, and evaluation skills; at least one standard deviation above the mean on honesty/integrity; and below the mean on process skills.

We must make two important points regarding the results displayed in Table Two. First, we considered the possibility that a high overall score for one mediator, when compared to another mediator, might mean that the respondents who commented on the higher-rated mediator were simply more verbose than those who commented on the latter. If there had been only one or two respondents per mediator, this would have been a legitimate concern.

As noted, however (see Note 7), the average number of respondents per mediator was eight, and no mediator whose assessment was included in Table Two was commented on by fewer than four respondents.

Table Two
Mediator Profiles and Rankings

Mediator	Friendly	Integrity	Smart	Process	Evaluation
A	++	0	++	++	++
B	++	+	0	+	++
C	0	0	++	+	++
D	+	++	++	++	0
E	0	++	+	0	++
F	+	+	++	0	++
G	+	++	+	0	+
H	++	0	+	+	0
I	0	+	++	0	0
J	0	+	+	+	+
K	+	+	0	++	0
L	++	0	0	++	+
M	0	++	+	+	+
N	0	+	0	0	++
O	0	0	0	0	++
P	0	+	0	+	0
Q	0	+	+	+	+
R	+	0	+	0	0
S	+	+	0	+	0
T	0	+	+	0	0
U	+	0	0	+	0
V	++	+	0	0	0
W	++	+	0	0	0
X	0	0	+	0	+
Y	++	0	0	0	0
Z	0	0	0	+	0

0 = below mean score for all mediators; + = at or above mean; ++ = at least one standard deviation above mean.

Furthermore, the responses for each item in Table Two were averaged across respondents. Thus, a mediator could not receive a high comparative score on a Table Two skill or attribute unless a high proportion of his/her respondents credited the mediator with possessing that skill or attribute. Accordingly, we are confident that the differences in the mediators' overall scores do not reflect differences in the verbosity of the respondents, but represent genuine differences in the respondents' perception of each mediator's skills and attributes. We are similarly confident, because of the substantial number of respondents per mediator, that a high score on a

particular skill or attribute does not merely reflect the fact that individual respondents might be particularly sensitive to certain skills or attributes, such as intelligence or "niceness."[8]

Second, the mediators with the highest overall Table Two scores are not necessarily "better" or "more successful" than the other mediators — they are all successful in marketplace terms and, we believe, all successful in dispute resolution terms. Table Two does, however, explain *why* the mediators in that table are successful. We know, for example, that, in addition to Mediator B's other qualities, a high proportion of the advocates who commented on him/her view Mediator B as friendly/empathic and providing useful evaluations. Similarly, we know that Mediator L is viewed by a high proportion of his/her respondents as friendly/empathic and possessing process skills. Indeed, as one moves down Table Two, one can discern, from the respondents' perspectives, the reasons for the success of nearly all the mediators in Table Two. To be sure, some of the mediators lower down in Table Two were only at or above the mean on one or two skills and attributes, but in this select group of highly successful mediators, that may be enough to be successful — or the lower-ranked mediators may possess skills or attributes of which their respondents were unaware or that they failed to note in our study, but which account for their success.

What we find most striking in the results displayed in Table Two is that no single profile characterizes each and every one of the successful mediators, much less of those mediators whose overall scores were the highest. Nor are the highest-ranked mediators outstanding with respect to *all* skills and attributes. Mediators A and D are the only mediators who were outstanding — more than one standard deviation above the mean — in more than two categories. Only seven (including A and D) of the twenty-six mediators in Table Two were more than one standard deviation above the mean on more than one skill or attribute.

We found no significant correlation between a mediator's gender and that mediator's overall score or that mediator's scores on any of the five skills or attributes. Female mediators were not cited significantly more or less often for being friendly and empathic than were male mediators, nor were female mediators cited significantly more or less often for their process or evaluative skills than were their male counterparts.

Nor do our results reveal any significant difference between the overall evaluations or individual skills/attributes scores of the four mediators who were former judges compared to those mediators without judicial experience. The former judges were neither significantly more often cited for their evaluation skills nor significantly less often cited for their process skills than were other mediators. To be sure, neither the four former judges who participated in this study nor the other mediators who did so are representative of all practicing mediators. Each of the mediators in Study Two is highly successful, and it seems likely that the process skills of the

four former judges play some role in their success. In brief, whatever merit there may be to the view that former judges are more highly valued as mediators for their case evaluation skills than for their process skills, we found no support for that view among this small sample of highly successful mediators.

The only significant correlation between a mediator's score on one skill or attribute and that mediator's score on another skill or attribute is found in the relationship between the mediator being viewed as smart, well prepared, knowledgeable about the relevant contract or law, and the mediator being viewed as providing useful outcome evaluations. Not surprisingly, those mediators who received high scores on smart/well prepared/knowing relevant contract or law were significantly more likely to receive high scores for providing useful outcome evaluations — typically a function of knowing the relevant contract or law.

We also note that eleven of the thirteen mediators (Mediators A through M) whose overall scores are above the standardized overall mean score (all except for Mediators J and K) are more than one standard deviation above the mean on at least one of the confidence-building attributes. This, we think, corroborates the Study One finding about the importance of confidence-building attributes for mediator success.

Summary

Study Two indicates that, from the perspective of mediation advocates, the most important attributes of successful mediators are those that build the disputants' confidence in the mediator. These are:

- friendliness and empathy;
- honesty and integrity; and
- being smart, well prepared, and/or knowing the relevant contract or law.

The most important of the successful mediators' process skills from the advocates' perspective, are:

- proceeding with patience and persistence;
- providing useful evaluations and/or "reality checks"; and
- asking good questions and listening carefully to the responses.

We also found in Study Two that the advocates view different mediators as achieving success as a result of different combinations of skills and attributes. Some of the mediators with the highest overall scores were rated as outstanding — more than one standard deviation above the mean — in the categories of being friendly/empathic and possessing excellent process skills or evaluative skills; others were rated as outstanding for possessing

high integrity and excellent process or evaluative skills; while still others were rated as outstanding in the categories of being smart, well prepared, knowing the relevant contract or law, and possessing excellent evaluative skills. The sole characteristic shared by nearly all the thirteen mediators in the top half on the overall advocate scores was that eleven of the thirteen were a standard deviation above the mean on at least one of the confidence-building attributes.

Study Three Methodology

The fact that all the mediators in Studies One and Two are successful can be seen in some respects as a weakness of those studies. In Study One, we could not compare the views of successful mediators concerning their skills and attributes with the views of less-successful mediators. Nor, in Study Two, could we compare the respondents' views of the skills and attributes of successful mediators with their views of the skills and attributes of unsuccessful mediators — no unsuccessful mediators were included in Study Two. Study Three is, therefore, an attempt to compensate, at least in part, for this weakness, by exploring the views of mediation advocates concerning the ways in which some mediators (not those participating in Study Two) failed to satisfy their expectations.

Methods

Each of the 216 mediation advocates who responded to the Study Two questionnaire was sent a second letter, which contained two additional questions:

- Have you ever participated in a mediation in which the mediator engaged in conduct that you thought was counter-productive, that reduced the likelihood of settlement? If so, what was that conduct?
- Have you ever participated in a mediation during or after which you decided that the mediator was so unsatisfactory that you would never again use that mediator? If so, why? What personal qualities or behaviors of the mediator led you to that conclusion?[9]

This letter did not refer to the mediator who had originally provided us with the respondent's name. Additionally, the respondent was requested *not* to report the name(s) of the mediator(s) whose behavior was described. This request was almost universally honored. In the few instances in which the respondent did include the name of the mediator to whom he/she was referring, the mediator was not one included in Study One or in Study Two.

Of the 216 persons to whom the Study Three questions were sent, ninety-six responded for a response rate of 44 percent. Seventy percent of the respondents were lawyers, 23 percent were union or management representatives in labor dispute mediations, and 7 percent were either

representatives of government agencies or of public interest organizations in environmental and public policy disputes, or people who represented themselves in mediation. The distribution of respondents among these three groups — lawyers, union/management representatives, and others — was almost identical to the Study Two distribution.[10]

We received 73 percent of the responses in written form; we obtained the remainder in telephone interviews in which, as in Study Two, the interview took place on a prearranged date and time, the interviewer repeated the questions on the questionnaire previously sent to the respondent, asked no questions other than those on the questionnaire, allowed the respondent as much time to answer as he/she wished, and transcribed the respondent's remarks directly onto the computer. The 73 percent proportion of written responses was greater than in Study Two, in which 47 percent of the responses were written. We suspect that the difference is attributable to the fact that the people to whom we sent the Study Three questionnaire had already participated in Study Two; hence, fewer of them needed the prodding of a follow-up telephone call to respond.

The only statistically significant difference between the content of the written and telephone responses was — as in Study Two — that the latter were more likely to refer to the mediator's evaluation skills. Neither here nor in Study Two can we account for this difference. The questions asked in the oral interview were exactly the same as those in the written questionnaire; nothing was asked during the oral interview that was not asked on the written questionnaire. Why there were more references to evaluation skills in the responses to the oral interview than in the responses to the written questionnaire in both Studies Two and Three remains a mystery — happily not one that would appear to undercut the results of either study.

Coding

In coding the Study Three criticisms of mediators, we used antonyms of the positive skills/attributes codes developed in Study Two. For example, the Study Two code "friendly/empathic" becomes "self-absorbed/not empathic" in Study Three. Similarly, the Study Two skills/attributes groupings — confidence-building attributes, process skills, and evaluation skills — become lack of confidence-building attributes, lack of process skills, and lack of evaluation skills.

As in Study Two, all coding was done initially by Stephen Goldberg, then independently by Margaret Shaw. Approximately 80 percent of Shaw's coding was the same as Goldberg's; disagreements were resolved by discussion. Both Goldberg and Shaw knew the identity of the respondents; neither, except in one or two instances, knew the identity of the mediator whose conduct was described. As noted previously, the few mediators who were mentioned were not among the mediators involved in the earlier studies.

Study Three Results

Approximately one quarter (23 percent) of the respondents reported that they had never observed a mediator engage in counterproductive conduct and had never used a mediator whose conduct was so unsatisfactory that the respondent would never again use that mediator. As shown in Table Three, the most common criticism of the unacceptable mediator, reported by 48 percent of the respondents, was that the mediator lacked integrity.[11]

Some of the reported behavior struck us as nearly incredible:

> I had one mediator . . . disclose information provided in confidence. . . . Once it surfaced that the mediator had breached confidence, clients and lawyer were outraged and mediation failed.
>
> Dishonesty in reporting the other side's position — confirmed later in conversation with counsel.
>
> I've had mediators come in and say to both sides that their case stinks. No credibility there.
>
> One mediator . . . had his view of the appropriate settlement, and appeared not to be interested in entertaining any other resolution.
>
> I've had mediators with a predisposition toward [the other side]. . . . When this happens, you tend to hold back information and deal with the mediator as a biased party to whom I would not disclose sensitive information.
>
> A bad characteristic of a mediator that I have experienced is the "settlement at all costs" mentality. I have had a mediator push me to settle a matter at an excessive cost. . . . This shows too much adherence by the mediator to the notion that his or her success is measured by whether the case settles or not.

The absence of other confidence-building attributes was also the basis of considerable criticism. Twenty percent of the advocates criticized mediators who lacked empathy, and appeared more interested in themselves than in the parties. Respondent's comments included:

> When a mediator shows disinterest it becomes readily apparent to the attorneys and the parties. . . . The disinterest can be expressed with both language and actions or inaction.
>
> Mediators who are more interested in listening to themselves talk rather than the parties are always counter-productive and frustrate the parties. We spend way too much time coming up with strategies to shut them up or keep them out of our conference and/or discussing what pompous asses they are.

Table Three
Reasons for Mediator Failure

Description	Percentage of Respondents ($n = 96$)
Lack of confidence-building attributes	
Lack of integrity, not neutral, disclosed confidential information, failed to accurately convey position, inconsistent evaluations, interested in settlement at all costs, too quick to reach conclusions	48
Self-absorbed, self-important, not empathic, not respectful, did not care, not interested, did not listen	20
Did not understand issues/applicable law, not well prepared	16
Lack of process skills	
Not firm/forceful, just went through the motions, just delivered messages	24
Lack of patience/persistence, quit too easily	11
Not flexible in approach, had his/her approach and would not vary to fit situation	7
Failed to propose solutions, not creative	3
Did not keep the parties focused	2
Poor sense of timing, did not know when to push/when to back off	2
Lack of evaluation skills	
Faulty/no evaluation	7

> Endless talk about themselves; expressing frustration on a personal level when clients would not relent to arm twisting.
>
> A mediator who thought he was important. He lost sight of the fact that it was someone else's case, and he engaged in a lot of tricks and games which were counterproductive to the process.
>
> Attitude that mediator "knows what is best" for the parties.

Sixteen percent of the respondents commented that the mediator did not understand the issues or the law, and/or was not well-prepared. Among their comments:

> It was clear that the mediator didn't understand either side's position, and could not convey those positions effectively.
>
> The mediator did not understand the legal issues in the case.
>
> The mediator did not understand the case, had not done his homework, and thought that with a coterie of some fifteen or sixteen attorneys, merely saying, "Why can't you fellows get together and settle the case?" was going to be a successful tactic.

The process skills failure that was far and away the basis of the most criticism, referred to by 24 percent of the advocates, was that the mediator was not forceful in seeking a settlement, but just went through the motions of mediation, doing little more than carrying messages back and forth between the disputing parties:

> I have participated in several mediations with mediators who merely relayed offers and counter-offers to the parties. The utter passivity of those mediators did not provide any reality checks for the parties and did nothing to assist the parties in understanding and evaluating alternative theories, solutions, or potential for liabilities.
>
> I experienced a mediator who was so "neutral" — nothing more than a dog carrying a bone from one room to another — that I would never use that mediator again.
>
> [I would not use] . . . mediators who just shuttle between sides and do nothing else.
>
> The mediator was virtually useless. That is, all he did was relay messages without *ever* pushing either side to get off of ridiculous positions — including push us when we more than deserved to be pushed.
>
> We had a mediator who refused to take control of a mediation that was spinning out of control. We needed him to get the mediation back in control and even asked him to do so. The mediator

> responded that "you guys know the facts and parties better than I do." . . . The parties ended up further apart than before.

The most striking omissions from the Table Three critical comments, when compared with the Table One list of positive mediator attributes and skills, are the comparatively rare criticisms of mediators for not being patient/persistent (reported by 11 percent of the Study Three advocates, compared to 35 percent of the Study Two advocates who regarded patience and persistence as characteristic of successful mediators) and the similarly rare criticisms of mediators for poor evaluative skills (reported by 7 percent of the Study Three advocates compared to 33 percent of the Study Two advocates who regarded good evaluative skills as an important element of mediator success).

Similar differences are found with respect to the criticism of mediators for not asking good questions/listening carefully (mentioned by no Study Three respondents but said to be important to mediator success by 28 percent of the Study Two respondents) and not being tactful/diplomatic (also mentioned by no Study Three respondents but characterized as important by 21 percent of the Study Two respondents).[12]

We suspect that the reason for the comparatively low frequency of these criticisms by the Study Three advocates is because the absence of these skills and attributes pales into insignificance when compared to the central Study Three criticisms:

- that the mediator lacked integrity, cared more about himself/herself than resolving the dispute, or was unprepared/uninformed about the relevant issues and/or law; and
- that the mediator did not demonstrate any process or evaluative skills, but was merely a messenger, transmitting messages from one party to the other.

Faced with these behaviors, it is hardly surprising that the respondents went no further in their criticisms, and their failure to do so is not necessarily inconsistent with the views of the Study Two advocates concerning the importance of skills such as patience/persistence, tact/diplomacy, asking good questions/listening carefully, and being capable of providing useful outcome evaluations.

Discussion

Although Study Two indicates that a wide range of attributes and skills can contribute to a mediator's success, Study Three indicates that lack of success is primarily attributable to a few fundamental flaws. The most important of these flaws is a mediator's lack of integrity, demonstrated by such conduct as unauthorized disclosure of confidential information, providing the parties with inconsistent evaluations of the likely outcome of the

dispute, and showing a lack of neutrality. Other mediator conduct widely viewed as a recipe for failure includes not demonstrating genuine interest in resolving the dispute; not understanding the issues involved in the dispute and/or being unprepared; and doing little to assist the parties to achieve resolution, that is, doing nothing but carry messages back and forth between the parties.

Conclusion

The central conclusion to be drawn from these three studies is that a — if not *the* — core element in mediator success is the mediator's ability to establish a relationship of trust and confidence with the disputing parties. Most of the Study One mediators thought that achieving such a relationship was a result of their convincing both parties that they truly cared about the parties' needs and concerns; a few attributed their success to their honesty, strong ethics, and trustworthiness. The advocates in Study Two, however, assigned essentially equal importance to these different attributes as well as to the mediator's knowledge and preparedness, suggesting that mediator success in gaining the trust and confidence of the parties is equally likely to be associated with any of these attributes.

Both the mediators in Study One and the advocates in Study Two regarded persistence and creativity as important for mediator success. Neither of those skills, however, was as widely regarded as important by either the mediators or the advocates as were those attributes that we have characterized as confidence building.

Study Two also suggests that different mediators can be highly successful on the basis of different types of skill sets — process skills seem to be key for some mediators, evaluation skills seem to be key for others — and nearly all highly successful mediators are widely viewed as possessing at least one of the confidence-building attributes.

Study Three approaches the reasons for mediator success from a different perspective — asking why some mediators are not successful. The Study Three results reinforce the conclusions of Studies One and Two regarding the importance of obtaining the confidence of the parties. According to the advocates who responded to Study Three, the most common cause of mediator ineffectiveness was that the mediator lacked integrity — he/she disclosed confidences, gave inconsistent evaluations, was biased, etc.

Few of the Study Three respondents viewed a lack of mediator skill as a central element in the mediator's lack of success, with one prominent exception. Not surprisingly, the Study Three respondents reported they would be unwilling to use a mediator again if that mediator contributed essentially nothing to the search for a resolution to the parties' dispute other than to relay messages from one party to the other.

The common theme running through Studies One, Two, and Three, then, is that gaining the trust and confidence of the parties is the most important element in mediator success. The mediator's skills are also important, but these were less often cited as reasons for mediator success than were the mediator's confidence-building attributes. Finally, and of considerable importance, there is no single model of the successful mediator. Different mediators succeeded on the basis of different combinations of attributes and skills.

Implications for Mediators, Trainers, and Advocates

Perhaps the most important finding of this research for the practicing or aspiring mediator is that the key to mediation success is quite straightforward:

- obtain the trust and confidence of the disputing parties by being friendly and empathic, by demonstrating high integrity, or by being intelligent, well prepared, and/or knowledgeable in the relevant law or contract; and
- be capable of taking advantage of the trust and confidence of the parties to assist them in resolving their dispute by exercising one or more of the skills set out in Table One.

Some aspects of achieving success as a mediator can be achieved by training, but others cannot:

- The mediation trainer cannot train aspiring mediators to be smart or to know the relevant law or contract, but he or she can emphasize the importance of being well prepared for mediation. Similarly, the trainer can emphasize the importance of integrity, for example, by using simulations to put trainees in situations in which they are tempted to act inappropriately by breaching confidence in the hope that doing so will aid in obtaining a settlement.[13]
- The instructor cannot teach empathy — the mediator's genuine concern for the needs of each party — but he or she can teach ways of showing genuine concern through demonstrations and interactive exercises (Goldberg 2005).
- Many of the process skills set out in Table One can and are being taught and practiced in mediation training. Although some aspiring mediators will demonstrate greater aptitude for some of these skills than for others, it is worth remembering that the most widespread criticism made by the Study Three advocates was not of mediators who lacked a particular skill, but of the mediators who were perceived as doing *nothing* to assist the parties other than relaying messages.

Finally, the findings of these studies could be useful to advocates, such as attorneys and labor negotiators, who engage in mediator selection. It is commonplace for advocates in search of a mediator to inquire about a particular mediator from others who have used that mediator's services. Most often, the inquiry consists of asking, "How good a job did X do for you in the ABC mediation?" or words to that effect. Based on this research, however, we advise advocates to ask more pointed questions relating to the mediator's empathy, integrity, knowledge of the relevant contract or law, persistence, etc., focusing on those skills or attributes that the advocate believes would be most useful in resolving the particular dispute for which a mediator is being sought (See Sander and Goldberg Forthcoming).

In sum, a better understanding of the attributes and skills of successful (and unsuccessful) mediators can be useful in improving the practice, teaching, and selection of mediators.

Future Studies

The findings of Studies Two and Three suggest at least two future studies. In Study Two, we found that former judges were not significantly more often cited for their evaluation skills, nor significantly less often for their process skills, than were mediators without prior judicial experience. Similarly, we found no significant difference between former judges and other mediators in the frequency of respondent references to the mediator's empathy and friendliness as compared to the mediator's intelligence and knowledge of the law. There were, however, only four former judges in the Study Two sample, far too few to be entirely confident that a larger sample might not show that the success of former judges in the mediator role might be more dependent on their knowledge of the law than on their empathy and friendliness, and more dependent on their evaluation skills than their process skills. Thus, a future study that explores these questions in a larger sample of former judges might be valuable.

Another potentially valuable future study would test whether the same skills and attributes that appear to account for the success (or lack of success) of mediators in the United States are equally important in other countries in which mediation is frequently used as a dispute resolution process. Culture is a powerful factor in how people deal with conflict (Brett 2007). Is it an equally powerful factor in the skills and attributes needed by a successful mediator to resolve conflict? A future study that applied the techniques of Studies Two and Three to examine the reasons for mediator success in another culture might shed light on that question and be as useful to mediators and mediation advocates in other countries as we hope Studies Two and Three will be in this country.

NOTES

We wish to acknowledge the invaluable assistance of Melissa Cryder, who sent out more than three hundred letters to potential respondents and conducted 140 oral interviews. Her efforts provided the data on which this research is based. We also want to thank Jeanne Brett, whose assistance in both study design and data analysis was invaluable. Finally, we wish to express our appreciation to the mediators who provided us with the names of advocates for whom they had mediated and to the advocates who took the time to respond in a thoughtful fashion to our questions. Without their cooperation there would be neither Study Two nor Study Three.

1. Both of these views are supported by research that shows that a trust relationship can flow from reputation or certification, such as a law degree, as well as from demonstrations of the mediator's sincerity and concern for the parties (see Doney, Cannon, and Mullen 1998).

2. The reasons for the refusals were varied. Some of the mediators feared that providing us with the names of their clients, followed by our contacting those clients, would be resented by the clients and would lead to an unwillingness to engage the mediator in the future. Others had not mediated in some time and asserted either that they had no existing records of their past mediation clients or that the passage of time would render their clients' views unreliable.

3. The answers to these two questions were essentially the same. Hence, they were combined for purposes of reporting and analysis.

4. Among the nonrespondents, 75 percent (85 out of 113) were lawyers, 21 percent (24 out of 113) were union or management representatives in labor dispute mediations, and 4 percent (4 out of 113) were representatives of government agencies or public interest organizations in environmental and public policy disputes. There are thus no substantial differences between those who responded and those who did not.

5. While we had little difficulty in deciding in which of these three categories to place most mediator skills and attributes, we had considerable difficulty deciding in which category to place mediator intelligence and preparedness. In our view, it is neither a process skill nor an evaluation skill but rather provides a foundation for exercising these skills. We considered placing it in a separate category but concluded, on the basis of the context in which most of the comments relating to intelligence and preparedness appeared, that this was best treated as a confidence-building attribute. However categorized, it is apparent that intelligence and preparedness are seen by the advocates as among the most important attributes of the successful mediator (see Table One).

6. When good questioning and careful listening were referred to by an advocate as evidence of the mediator's empathy, the response was coded as a confidence-building attribute, "friendly/empathic." When good questioning and careful listening was referred to as accounting for the mediator's success in encouraging settlement, it was coded as a process skill. In order to avoid biasing the results in favor of supporting the conclusion of Study One that confidence-building attributes are central to mediator success, doubts were resolved *against* coding a reference to good questioning and careful listening as "friendly/empathic."

7. Two mediators are omitted from Table Two because we received too few advocate responses for those mediators — one response for one mediator, three responses for the other mediator — for us to be confident that those few responses provided a valid profile of those mediators. Each of the mediators included in Table Two was commented on by somewhere between four and eleven advocates; the average number of advocate responses per mediator was eight.

8. We also considered, and checked for, the possibility that the union/management representatives, who were not lawyers, were less verbose than the lawyers, thus reducing the comparative scores of those mediators whose practices were primarily in the labor-management arena, but that was not the case. Those mediators with primarily or exclusively labor-management practices did not receive significantly fewer (or more) citations to their skills and attributes than did other mediators. We also compared telephone responses to written responses, and found, as previously noted, that the only significant difference between the content of the written and telephone responses was that the latter were more likely to refer to the importance of the mediator's evaluation skills.

9. The answers to these questions were essentially the same. Hence, as was also the case with the two Study Two questions (see Note 3), they were combined for purposes of reporting and analysis.

10. The distribution of the nonrespondents was also similar to that of the Study Two nonrespondents (see Note 4) and to that of the Study Three respondents: 75 percent were lawyers, 18

percent were union or management representatives in labor-dispute mediations, and 6 percent were representatives of government agencies or public interest organizations in environmental and public-policy disputes. In neither study, then, is there a significant risk that the respondents represent a skewed sample of those to whom the questionnaire was sent.

11. All percentages in Table Three are based on the total number of Study Three respondents (96) rather than the total number of Study Three respondents who criticized mediator behavior (74).

12. While these percentage differences are great, they are not exactly comparable because the Study Three data are averages across all advocates, and the Study Two data are averages across all advocates and all mediators. For this reason, we have not tested the significance of the differences between the Study Two and Study Three percentages.

13. For an excellent discussion of the risks to mediator integrity resulting from the mediator's view that it is his/her responsibility to get a case settled, see Brazil (2007).

REFERENCES

Brazil, W. 2007. Hosting mediations as a representative of the system of civil justice. *Ohio State Journal on Dispute Resolution* 22: 227–276.

Brett, J. M. 2007. *Negotiating globally*, 2nd edn. San Francisco: Jossey-Bass.

Doney, P. M., J. P. Cannon, and M. R. Mullen. 1998. Understanding the influence of national culture on the development of trust. *Academy of Management Review* 23: 601–620.

Goldberg, S. 2005. The secrets of successful mediators. *Negotiation Journal* 21: 365–376.

Herrman, M., N. Hollett, and J. Gale. 2006. Mediation from beginning to end: a testable model. In *The Blackwell handbook of mediation*, edited by M. Herrman. Malden, MA: Blackwell Publishing.

Hiltrop, J. 1989. Factors associated with successful labor mediation. In *Mediation Research*, edited by K. Kressel and D. Pruitt. San Francisco: Jossey-Bass.

Sander, F. and S. Goldberg. Forthcoming. Selecting a mediator: An alternative (sometimes) to a former judge. *Litigation*.

Swaab, R. and J. Brett. 2007. Caucus with care: The impact of pre-mediation caucuses on conflict resolution. Presented at the 2007 Annual Meeting of the International Association for Conflict Management, Budapest.

Wissler, R. 2006. The role of antecedent and procedural characteristics in mediation: a review of the research. In the *Blackwell handbook of mediation*, edited by M. Herrman. Malden, MA: Blackwell Publishing.

The Myth of Mediator as Settlement Broker

Brer Rabbit Falls Down the Well

retold by
S. E. Schlosser

One day, Brer Rabbit and Brer Fox and Brer Coon and Brer Bear and a lot of other animals decided to work together to plant a garden full of corn for roasting. They started early in the morning and raked and dug and raked some more, breaking up the hard ground so it would be ready for planting. It was a hot day, and Brer Rabbit got tired mighty quick. But he kept toting off the brush and clearing away the debris 'cause he didn't want no one to call him lazy.

Then Brer Rabbit got an idea. "Ow!" he shouted as loudly as he could. "I got me a briar in my hand!" He waved a paw and stuck it into his mouth. The other critters told him he'd better pull out the briar and wash his hand afore it got infected. That was just what Brer Rabbit wanted to hear. He hurried off, looking for a shady spot to take a quick nap. A little ways down the road, he found an old well with a couple of buckets hanging inside it, one at the top, and one down at the bottom.

"That looks like a mighty cool place to take a nap," Brer Rabbit said, and hopped right into the bucket.

Well, Brer Rabbit was mighty heavy - much heavier than the bucket full of water laying at the bottom. When he jumped into the empty bucket, it plummeted right down to the bottom of the well. Brer Rabbit hung onto the sides for dear life as the second bucket whipped passed him, splashing water all over him on its way to the top. He had never been so scared in his life.

Brer Rabbit's bucket landed with a smack in the water and bobbed up and down. Brer Rabbit was afraid to move, in case the bucket tipped over and landed him in the water. He lay in the bottom of the bucket and shook and shivered with fright, wondering what would happen next.

Now Brer Fox had been watching Brer Rabbit all morning. He knew right away that Brer Rabbit didn't have a briar in his paw and wondered what that rascal was up to. When Brer Rabbit snuck off, Brer Fox followed him and saw him jump into the bucket and disappear down the well.

Brer Fox was puzzled. Why would Brer Rabbit go into the well? Then he thought: "I bet he has some money hidden away down there and has gone to check up on it." Brer Fox crept up to the well, listening closely to see if he could hear anything. He didn't hear nothing. He peered down into the well, but all was dark and quiet, on account of Brer Rabbit holding so still so the bucket wouldn't tip him into the water.

Finally, Brer Fox shouted down into the well: "Brer Rabbit, what you doing down there?"

Brer Rabbit perked up at once, realizing that this might be his chance to get out of the well.

"I'm a fishing down here, Brer Fox," says he. "I thought I'd surprise everyone with a mess of fresh fish for lunch. There's some real nice fish down here."

"How many fish are there?" asked Brer Fox skeptically, sure that the rascally rabbit was really counting his gold.

"Scores and scores!" cried Brer Rabbit. "Why don't you come on down and help me carry them out?"

Well, that was the invitation Brer Fox was waiting for. He was going to go down into that well and get him some of Brer Rabbit's gold.

"How do I get down there?" asked Brer Fox.

Brer Rabbit grinned. Brer Fox was much heavier than he was. If Brer Fox jumped into the empty bucket at the top, then Brer Rabbit's bucket would go up, and Brer Fox's bucket would go down! So he said: "Jest jump into the bucket, Brer Fox."

Well, Brer Fox jumped into the empty bucket, and down it plummeted into the dark well. He passed Brer Rabbit about halfway down. Brer Rabbit was clinging to the sides of the bucket with all his might 'cause it was moving so fast. "Goodbye Brer Fox," he shouted as he rose. "Like the saying goes, some folks go up, and some go down! You should make it to the bottom all safe and sound."

Brer Rabbit jumped out of the well and ran back to the garden patch to tell the other critters that Brer Fox was down in the well muddying up the waters. Then he danced back to the well and shouted down to Brer Fox: "There's a hunting man coming along to get a drink o' water, Brer Fox. When he hauls you up, you'd best run away as fast as you can!"

Then Brer Rabbit went back to the garden patch. When the thirsty hunter hauled up the bucket full of water, a wet and shaky Brer Fox sprang out and ran away before the hunter could grab for his gun.

An hour later, Brer Fox and Brer Rabbit were both back in the garden, digging and hauling away debris and acting like nothing had happened. Except every once in a while, Brer Fox would look sideways at Brer Rabbit and grin, and the rascally rabbit would start to laugh and laugh 'cause both of them had looked so silly plummeting up and down in that ol' dark well.

The Myth of the Mediator as Settlement Broker

Many commercial mediators see their primary role as a settlement broker. Due to perceived market pressures, they believe they are engaged by counsel to get the deal done. As a result, mediators measure their work by whether a settlement was achieved. Paradoxically, many mediators do not keep track of their settlement rates even though they are highly sensitive to their "failures." Against the apparent imperative to get the deal done, many have argued that settlement is not the name of the game. Folger and Bush made this case in their 1995 book, "The Promise of Mediation." Fourteen years later, as more lawyers have become mediators, the focus has not changed: settlement is still the principal objective of mediation.

One result of this focus on outcome is that mediators lose sight of the many other services they provide to counsel and parties. Since settlement is the considered highest good, these other services receive less attention in training and in practice. Yet these services establish the groundwork for the possibility of settlement in the first place.

Constructive Deception as an Example of Outcome-Focused Mediation

Outcome-focused mediation can lead to practices and processes that inherently lack integrity. If settlement is the epitome of good, getting there through anything other than outright fraud may be permissible. As an example, Robert Benjamin has argued that mediators should consider the use of constructive deception to move parties towards settlement. He invokes the metaphor of the Trickster as a model for mediators to consider.

The traditional Trickster, usually portrayed as a small, clever, male animal, subverts or defeats more powerful animals through cleverness and cunning, rather than with fangs, claws, or strength. Thus, the Trickster rebalances power through deception. The Trickster includes the fox in Japan, the mouse deer in Southeast Asia, the coyote and the spider among the Native Americans, the tortoise and spider in West Africa, and the mantis in Southern Africa. Br'er Rabbit was the trickster of the American slaves, who morphed into Bugs Bunny and the never-ending battles of wit between Road Runner and Wiley Coyote.

Who Holds the Power?

Br'er Rabbit decides to go off on a frolic of his own to avoid more farm work and, being overly clever, ends up at the bottom of the well. He tricks Br'er Fox into the bucket by claiming that there were lots of fish to be had in at the bottom of the well. Br'er Rabbit obtains his outcome—freedom—at the expense of Br'er Fox. Fortunately, the story ends well as Br'er Fox is able to escape from the surprised hunter. Br'er Rabbit's power lies in his ability to persuade and influence by exploiting Br'er Fox's greed. Br'er Rabbit lies about the fish, and induces Br'er Fox to get some for himself. The outcome arises from manipulation and deceit.

Convential wisdom says that the parties hold the power in mediation. What is not recognized is that power comes in many forms and is exercised in many ways. Power is always relative and limited. It may be real or apparent. It exists to the extent it is perceived and accepted by the other party. In mediation, the parties have the ultimate decision-making power. However, the mediator has many subtle powers conferred by virtue of the process. The question of constructive deception really asks whether a mediator should use these powers—most of which the parties and counsel are either ignorant about or, consciously or unconsciously, cede to the mediator for the sake of getting a deal done—to manipulate the parties to a settlement? Further, should a mediator hide constructive deception from the parties or should the mediator be open and transparent?

For example, while the parties may hold decision-making power, mediators hold significant information power. Game theorists refer to an information state as the knowledge the parties hold concerning the nature of the game, the next available move, and the range of potential outcomes. Information states include common knowledge, perfect vs. imperfect information, symmetric vs., asymmetric information, and certain vs. uncertain information. These will be discussed in more detail below.

The Services of Mediation

The idea of constructive deception through the metaphor of the Trickster focuses our attention on outcomes, not services. That is, settlement as a desired outcome may take precedence over the quality of "services" the mediator provides. If we focus solely on settlement, that becomes the end game, regardless of means. Some mediators may see "the magic of mediation" as manipulating the information flow, negotiation communication, and decision-making. Constructive deception is therefore considered by some to be permissible if it helps make the deal. Its emotional simplicity may appeal to mediators who feel pressured to make a deal or who are looking for the "killer app."

The larger question hidden here concerns the services a mediator provides to counsel and parties. These services include convening, psychological anchoring, compassion, empathic communication, leadership, de-escalation, reality-checking, facilitation, identification of interests, needs, goals, and desires, acknowledgement of injustices, decision-making assistance, negotiation brokering, and so forth.

If mediators understand, identify, and focus on the levels of services that counsel and parties cannot provide for themselves, the need to focus on outcomes is minimized as settlement simply becomes one of the many services mediators provide, not the sole, all-consuming focus. A good outcome will always flow from great mediation services, making tricks and trickery unnecessary. We therefore believe that a deeper analysis and consideration of the roles of the mediator will help mediators resist the temptation to resort to constructive deception.

Convening

Strangely, lawyers seem to have a hard time broaching settlement with each other. Perhaps this is because adversary ideology compels lawyers to think of settlement as a sign of weakness. However, settlement becomes much easier to discuss when one lawyer says to another, "Let's

get this case into mediaton." Mediation has become a mainstream practice and suggesting mediation, especially knowing that the court may require it, is no longer a sign of weakness. Instead, suggesting mediation is often seen as a sign of pragmatism.

Once the mediator has been selected, counsel generally leave the details of the mediation to the mediator. Thus, by acting as a convenor, the mediator actually removes items of potential prodecural dispute from the table. The mediator can define what should be disclosed in submissions, when the submissions are due, the time and place of the mediation, and who should be present. While counsel could no doubt negotiate these housekeeping items between themselves, the more complex the case, the more challenging the problem becomes. The mediator solves this problem for counsel by taking the tasks away.

By paying careful attention to convening, a skillful mediator can work the parties towards a successful outcome. Meeting individually with parties and counsel ahead of the mediation conference, for example, can build trust and help with the design of the conference. Making certain that people with authority are physically present or have granted sufficient authority to those who will be present can be useful. Talking to counsel jointly or individually before the mediation to gain a sense of expectations can be helpful.

Leadership

Mediators often overlook the fact that they have been conferred the power of leadership. Counsel and parties look to the mediator to set the agenda, keep the parties on task, and control the process. The service of group leadership is vital to an efficient and constructive mediation process.

Creating Safe, Confidential Space

Mediation works within a psychological space that is safe and confidential. Mediators have the duty and responsibility to create this space for counsel and the parties. Because lawyers are advocates for their clients, they cannot create a safe space for the opponent or opponent's counsel. Thus, lawyers must turn to the mediator for this service. For example, the parties may be extremely angry with each other and barely able to sit in the same room together. The lawyers may be reluctant to have their clients speak to one another for fear of losing emotional control. The mediator, on the other hand, can create a controlled environment that permits a productive, emotionally safe conversation between the parties. Feelings can be expressed without fear of the process devolving into a shouting match or other chaotic behavior.

Empathic Communication

Many litigated disputes arise because people have not been heard. Mediators can either establish an empathic relationship with the parties or coach the parties, if the relationship is important, on building empathic communications without intervention. In disputes where both disputed issues and damaged relationships are in play, resolution of the issues is no resolution at all if there has been no reconciliation of the relationship. In addition, the mediator can create an empathic connection to let each side know it has been heard, even if the mediator may disagree with what has been said. Being heard is a powerful experience for both lawyers and their clients. Rarely are lawyers able to provide this service to their clients, opposing counsel, or opposing parties.

De-Escalation

Conflict escalates predictably and in inverse relationship to psychological integration. That is, the higher the level of escalation, the less integrated psychologically the parties are. In other words, as conflicts escalate through various stages of intensity, the parties show behaviors indicating regression of their emotional development.

There are five stages of conflict escalation.

Stage I forms part of normal everyday life. Even in good relationships there are moments of conflict. These can only be resolved with great care and mutual empathy from true perspective taking.

Stage II occurs as the parties fluctuate between cooperative and competitive positions. They are aware that they have common interests though one's own wishes predominate and increase in importance.

Stage III occurs as interaction becomes more hostile and irritable. All logic has focused on action, replacing fruitless and nerve-wracking discussions. This is typically where people will retain lawyers and mediation is viewed as weak, ineffective, or impractical.

Stage IV occurs when a party's core sense of identity has been attacked or threatened. At this stage of conflict, cognitive functioning regresses substantially—the executive function of the brain is overridden by dominating emotions.

At Stage V, sacred values, convictions, and superior moral obligations are at stake. The conflict assumes mythical dimensions and the process of dehumanization may begin to occur at both the individual and group levels.

Successful problem-solving and negotiation only occurs when all counsel and parties are at Stage I. Therefore, the bulk of a mediator's work is de-escalating everyone from Stage III to Stage II to Stage I in an orderly manner.

Mediators often experience the frustration of calming parties and counsel down all day long, wondering if there will ever be productive discussions, only to watch a deal being made in minutes at the end of the day. While time pressure has something to add to this phenomenon, the mediator has moved the parties into a psychological place where they are able to resolve their dispute quickly and efficiently. Sometimes, the lawyers will wonder why they needed the mediator at all, not realizing that the mediator was the cause of the de-escalation that allowed the negotiation to occur in the first place.

Building Trust

Agreements only come about because people believe that promises will be kept. In a litigated dispute, trust is the first aspect of the relationship to be lost and the last aspect to be gained. Mediators provide trust-building services by creating small agreements that build to larger agreements. At the end, a skillful mediator has restored sufficient trust between the parties that everyone feels reasonably comfortable that a deal will stick. Because of the adversary roles lawyers find themselves in, they are hard-pressed to build this type of trust with opposing counsel and parties, hence the value of the mediator providing this service.

Compassion

Especially in emotionally difficult cases such as sexual abuse, harassment, violence, or traumatic injury, the mediator provides a service to the parties by showing compassion. Sometimes, the mediator's compassion is the only emotional support available for a party. Compassion is not limited to the plaintiff. In a drunk driving death case, the mediator may have compassion for the defendant who suffers from extreme guilt and shame at having killed someone. Lawyers will comment favorably on a mediator's compassion for their client, and more than one mediator has gained the respect and repeat business of counsel for this service.

Acknowledging and Witnessing Injustice

People in conflict often seek justice in the form of validation, vindication, and vengeance. Justice has many definitions and meanings, making it difficult to measure and quantify. Justice is also subjective to the people personally involved in the conflict. The social psychological research into justice reveals a powerful fact: People experience justice, regardless of outcome, if three elements are present. First, they have an opportunity to tell their story their way. Second, they can tell their story to a respected, impartial authority figure. Third, that authority figure treats them with respect, dignity, and compassion. Thus, a mediator can be a powerful instrument in providing a sense of personal justice to people in conflict. For many people, mediation will be their "day in court" and mediators should be sensitive to the need for perceived justice.

In addition to providing justice, mediators have the opportunity to witness obvious injustice and challenge parties to acknowledge it, reconcile it, and work to makes things as right as possible. Sometimes, this is not possible or practical. However, mediators have a moral imperative to look for opportunities to reconcile parties and help them, if they so desire, to restore their sundered relationships.

Problem-Solving

Conflicts present complex, multi-layered problems. Mediators create the space, organize the tasks, and keep parties focused on those tasks. Parties and counsel can often be distracted and deflected by strong emotions and advocacy. The mediator can allow a certain amount of deviation from the task, then gracefully bring the parties back to work. In addition, conflict can be chaotic and overwhelming to the parties. The mediator can take back the complexity, chaos, and disorganization of conflict and hand back smaller, digestable pieces to the parties to work with so that the process of peace is not overwhelming. The experienced mediator has probably seen the same issues, problems, and emotions many times before. Drawing on that experience, the mediator can help the parties formulate solutions and agreements that they might not be able to see for themselves. However, the mediator must keep in mind that self-determination is the hallmark virtue of mediation and therefore exercise great care in not imposing solutions where they are not wanted, desired, or useful. Settlement for settlement's sake is not a virtue in mediation.

Assisting in Decision-Making

Ultimately, the parties and counsel must make decisions. Frequently, the decision is between bad choices that are emotionally, financially, and pragmatically difficult to accept. The mediator assists the decision-making process by helping the parties look at their choices and the deep

consequences of their choices. The mediator helps the parties look at their prospective decisions in a longer term of years and decades to help them come to grips with the choices they face today. The mediator is well-aware of the cognitive limitations of the human brain in the decision-making process and can warn, guide, teach, and coach parties and counsel about those limitations and biases.

Coaching

The mediator is also a coach and teacher. In many conflicts, the mediator may coach the parties in communication skills and empathic connection. The mediator may stop a conversation from escalating into unproductive and escalatory argument by asking the parties to restart the conversation in a different way. The mediator may set ground rules that remind the parties how to be truthful, civil, and respectful to one another despite intractable differences. The mediator may coach the parties in problem-solving and negotiation skills. The mediator brings a large toolbox to the table and may help the parties select and use those tools necessary to transform the conflict into peace.

Information Management and Exchange

Mediators provide an important service in managing the information and exchange of information between the parties and their counsel. Lawyers often have a hard time exchanging information because they are afraid of exploitation or simply wish to avoid giving advantages to the opponent. This is what discovery battles are typically about. In mediation, unlike litigation, information exchange is crucial. Information helps parties and counsel understand the facts, perceptions, and motivations surrounding the dispute and provides important information about how the dispute might be resolved. In addition, information assists in evaluating the potential outcomes of the matter should it proceed to trial.

Game theory provides a useful and practical way of defining the kinds of information that mediators deal with. As mentioned above, game theory describes information states by what the parties know they know and by what they know the other side knows. Obviously, information is a form of power. Most attorneys would like to know all and have their opponents in blissful ignorance. This may lead to good trial outcomes, but not necessarily good mediation outcomes. Understanding and using information states is therefore an important part of what a mediator provides to the parties. For more information about information states and game theory, read the material in Appendix A.

The mediator provides many services to the parties around information management and exchange. First, by convening the mediation, the mediator provides some level of confidentiality protection for the parties so that information can be exchanged more freely without fear of exploitation or undue advantage. Second, the mediator creates a degree of trust between the parties that might not otherwise exist. This trust facilitates frank exchanges of information. Third, the mediator, by asking questions, probes the facts and stories. Frequently, the parties learn about facts that they have never heard or understood when the mediator seeks clarification and deeper understanding. Fourth, as the mediator de-escalates the conflict, the parties are able to listen and hear information that they previously may have been unconsciously filtering out of their processing. Fifth, the mediator can frame information in a way that minimizes further escalation and helps parties manage their emotions and feelings.

In mediation, parties and counsel are have secret information unknown to the other (an assymetrical information state--see Appendix A). For example, one side does not know what the other side's the next offer or counter-offer will be. In caucused mediation, the mediator obtains private information from both sides and knows or can intuit what their next move will be, and generally, where the crunch or impasse will occur. This information power is valuable and extremely useful as a mediator can craft communications, both express and implied, that send signals to each side without the other side knowing what is being communicated.

Ideally, a mediator wishes to move the parties to a full, honest, and complete mutual disclosure of information (a complete, perfect, symmetrical information state—see Appendix A). because that is where the best decisions are likely to be made. Lawyers resist mutual honest disclosure because they believe that disclosure will give the opponent an advantage, do not always trust that disclosures will be mutually honest, fear being exploited, and finally can just be adversarial for the sake of being adversarial.

Thus, information management is where the mediator is most likely tempted to engage in constructive deception. By shading, framing, withholding, selectively disclosing information, the mediator can shape the perceptions of the parties and counsel and thereby influence the outcome of the mediation.

Managing the Auction

Many lawyer and mediators believe that the key service provided by mediation is management of the auction when a settlement by payment of money is required. This is an important service and is more subtle than most lawyers realize. Experienced mediators will usually be able to ascertain the range in which a case should settle very quickly into the process. However, they will recognize that the parties and counsel have to find their own way to resolution rather than jump to the likely settlement number immediately. Although the auction can be a painfully slow and apparently inefficient process, as offers and counter-offers are exchanged, the mediator helps the parties formulate their next move, anticipates reactions in the other room, uses information to explain offers, and keeps the parties focused on the task at hand. The mediator deals with emotional issues such as the insulting first offer, disappointment over counter-offers, the fear of bidding against one's self, unrealistic expectations, and negotiation strategy on a daily basis. The mediator models patience and forbearance and provides encouragement and hope for the parties even when, to the parties, settlement seems improbable and distant.

Reality-Checking and Psychological Anchors

During normal decision making, individuals rely on a specific fact, belief, or value and adjust their thinking to account for other elements of the circumstance. This process is called anchoring and once the anchor is set, there is a bias toward that fact, belief or value.

Take, for example, a person looking to buy a used car. She may focus excessively on the odometer reading and model year of the car, and use those for evaluating the car, rather than considering how well the engine or the transmission is maintained. Mileage and model year have become psychological anchors. In a pre-mediation conference, counsel may tell his or her client that the case should settle for $475,000 to $550,000. The anchor will be $550,000 and the client may be hard pressed to move lower.

The focusing effect is a cognitive bias that occurs when people place too much importance on one aspect of an event, causing an error in accurately predicting a future outcome. Defense counsel may focus on one aspect of the case, ignoring the risks if his assessment is wrong.

"Anchoring and adjustment" is a psychological heuristic that influences how people assess probabilities. According to this heuristic, people start with an implicitly suggested reference point (the "anchor") and make adjustments to it to reach their estimate.

The anchoring and adjustment heuristic was first theorized by Tversky and Kahneman. In one of their first studies, the two showed that when asked to guess the percentage of African nations which are members of the United Nations, people who were first asked "Was it more or less than 45%?" guessed lower values than those who had been asked if it was more or less than 65%. In another experiment, an audience was first asked to write the last 2 digits of their social security number, and, second, to submit mock bids on items such as wine and chocolate. The half of the audience with higher two-digit numbers typically submitted bids that were between 60 percent and 120 percent higher than those with the lower two-digit number, far more than a chance outcome. The simple act of thinking of the first number strongly influenced the second, even though there was no logical connection between them.

The pattern has held in other experiments for a wide variety of different subjects of estimation.

Anchoring and adjustment profoundly affects settlement discussions with some saying that parties should begin from extreme initial positions. Advocates are often trapped by their own anchors and are often unable to escape this bias without the assistance of the mediator.

A skillful mediator is well-aware of the bias around psychological anchoring and has methods and tools for re-setting anchors that are realistic and possible. For example, a mediator might say that in recent similar cases, the settlement range has been in the low six figures. That apparent off-hand comment may set a psychological anchor about expectations in the present case.

Accountability

Mediators provide accountability to agreements by brokering the specific terms of agreement, helping the parties and counsel deal with issues that were not negotiated, but arise in the drafting phase. Experienced mediators will often recommend that the parties agree to return to mediation before resorting to other procedures if future disputes arise. Mediators can also create accountability through social norming processes such as securing mutual verbal and written commitments to perform. The concept of honoring one's promise is sometimes value that can lead people to do what they say out of a sense of honor. When the mediator witnesses the commitment, the value of honor may outweigh the self-interest of reneging on the promise.

Conclusion

The services a mediator provides are extensive, subtle, and deep. Most parties and lawyers are unaware of the scope of these services and therefore only focus on the outcome as a measure of effectiveness. Mediators who understand, master, and consciously engage in all of services

described here do not have to worry about outcomes. While not all cases will resolve immediately, the mediator will have plenty of referral business based on the quality of the process and experience.

APPENDIX A

INFORMATION STATES AND GAME THEORY

Game theorists are interested in understanding how information affects decision making. Thus, information states describe who knows what and when. These states are

- Common Knowledge
- Perfect vs. Imperfect Information
- Certain vs. Uncertain Information
- Symetrical vs. Assymetrical Information
- Complete vs. Incomplete Information

Mediators unknowingly use these information states every day. A deeper understanding of information states can help mediators understand what separates the parties, what information should be disclosed and when, and where potential impasse might lie. The following is a description of these information states taken from Noll, *Peacemaking: Practicing at the Intersection of Law and Human Conflict* (Cascadia Publishing House 2003).

Common Knowledge

Information is common knowledge if all the parties know it, if each party knows that all the parties know it, and if each party knows that all the parties know that all the parties know it. This condition exists in a dispute when everyone has a complete grasp of the facts and knows that everyone else knows the facts as well. In other words, there are no secrets. For a mediator, this information state is useful because arguments over information are eliminated and the parties can focus on solutions.

Perfect vs. Imperfect Information

A condition of perfect information means that a party knows every choice made by the other party. Imperfect information would exist if a party knew that the opponent had made Choice A or Choice B, but did not know which specific choice had been made. This condition might exist, for example, if defense counsel knew that plaintiff's counsel had retained two experts, but did not know which expert might testify at trial. The defense would be said to have imperfect information. In contrast, the mediator might be privy to that information and therefore have perfect information on the subject.

Certain vs. Uncertain Information

Moves by Nature are pieces of information that remain outside the control of the parties. Essentially, Nature is the probability of the occurrence of an outside event. If Nature has made its last move, the information state is defined as certain. Otherwise the game is one of uncertainty. In the context of a lawsuit, the information condition is uncertain until the verdict is read. The jury's decision is, in game theory, a move by Nature because the disputants cannot control or predict it with certainty. After the verdict, the information condition becomes certain. Of course, the judgment is appealable, so the information state might still be uncertain because another move by Nature (the appellate court) is possible. The uncertain information state is used by

mediators to move people towards resolution because the anxiety of the uncertain outcome can be replaced by the certainty of settlement.

Symmetric vs. Asymmetric Information

In a game of symmetric information, at each decision point, a party's information is identical to every other party. Otherwise, the game is asymmetric. The essence of asymmetric information is that it is useful, private information available to one, but not all parties.

Asymmetric information is a primary reason for impasse in mediation. Nearly every conflict is an asymmetric information condition because each party knows privately how he or she desires resolution. Unless the parties somehow communicate their private information to each other, settlement is difficult. If resolution is reached in an asymmetric information condition, parties will wonder if they made the correct decisions. This can lead to buyer's remorse, recriminations, and renewed hostility. Consequently, transforming a conflict from an asymmetric information condition to a symmetric information condition is an important service provided by mediators.

Complete vs. Incomplete Information

In a game of incomplete information, Nature moves first and is not observed by at least one of the parties. Perhaps, the court has issued a tentative ruling that one side knows about, but the other is ignorant of—this would constitute complete information on one side and incomplete information on the other. Notice the difference between complete/incomplete and certain /uncertain information conditions. In uncertain conditions, Nature makes the last move and no one knows what it will be. In incomplete conditions, Nature makes the first move, but that information is not known to at least one of the disputants.

Here is how poker can help us understand the concept of information states:

All cards are dealt face up.	Perfect, certain
All cards are dealt face down and a party cannot look at her cards before betting.	Incomplete, symmetric, certain
All cards are dealt face down, and a party can look at her own cards.	Incomplete, asymmetric, certain
All cards are dealt face up, but each party then scoops up her hand and secretly discards one card.	Complete, asymmetric, certain
All cards are dealt face up, the parties bet, then each party receives one more card face up.	Perfect, uncertain
All cards are dealt face down. Each party scoops up her cards without looking at them and places them on her forehead so everyone can see them but her (Indian Poker).	Incomplete, asymmetric, certain

In case number one, all cards are face up, everyone sees everyone else's cards, so the information is perfect. Because no more cards will be dealt (i.e., nature or luck will not act), the information is also certain.

In case number two, all cards are face down, the information is incomplete because no one knows what she holds. The information is symmetric because everyone is equally ignorant, and the information is certain because all the cards have been dealt—nature or luck will not act again. Notice that the information content is not important here. Rather, it is the state of knowledge of the parties. Even though all of the parties are ignorant of the hands, the information is symmetric because everyone is equally ignorant.

In case number three, standard draw poker, the information is incomplete because the parties do not know what the other parties hold. The information is asymmetric because each party has private information about her own hand. Finally, the information is certain because no more cards will be dealt.

In case number four, cards dealt face up with a secret discard, the information is complete because everyone has seen everyone else's hand. The information becomes asymmetric when each party secretly discards a card, and the information is certain because no further cards will be drawn.

In case number five, cards are dealt face up, with a last card face up after the bet, the information is perfect because everyone sees all the hands, but the information is uncertain because Nature (luck) will act once more to deal out another card.

Finally, in case number six, Indian Poker, the information is incomplete because the parties do not know their own hands. The information is asymmetric because they have private information (each party's information is unique and personal), and the information is certain because no further cards will be dealt.

In Defense of Party-Based Mediation

Susan T. Mackenzie*

Presentation at the ABA Section on Dispute Resolution Meeting
Panel: "The Myth of the Mediator as Settlement Broker"
April 17, 2009
New York City

We resort to dispute resolution processes to find solutions to controversy. Unlike judicial and arbitral forums that bind parties to formal rules of procedure, limitations on remedies and decisions by third parties, the process of mediation provides disputing parties with flexibility in approach and outcome, and control over both. Mediation opens up the issues than can be addressed and litigation narrows them. The practice of mediation may vary from case to case, but the focus remains on the parties and their decision on how best to advance their mutual and individual interests.

Parties and attorneys who might otherwise find themselves before a judge or an arbitrator presumably select mediation because it presents such a clear alternative to litigation and arbitration. Recently, however, certain commentators, and certain parties and mediators, appear to sanction a drift away from party control to a mediator-dominated process that focuses on mediator-generated settlements.

This results-driven approach redefines the role of the mediator. The mediator is no longer viewed as assisting the parties in the process but rather as the informal decision-maker. In one of the "new" scenarios, the mediator merely conducts an analysis of claims and the parties accept that analysis as the proper basis for settlement. In another, mediators are even encouraged to engage in "constructive deception" in order to "get the job done." In this scenario, mediators use "magic"---sleights-of-hand, subterfuge, undue pressure---to "force" a settlement the mediator is championing. "Do your magic," they say, "we don't care how, just get a settlement. You tell us what to do."

The notion that it is appropriate for a mediator to "do magic" is, in and of itself, troubling. And equally troubling is a focus on settlement at any cost, where the interests of the parties become a secondary concern, if a concern at all. While at first blush such an approach may shortcut and simplify the process, experience tells us that a mediator-focused, results-focused process does not permit for the degree of flexibility that encourages and fosters creative settlements. Mediation relying on magic or tricks also has the potential for running afoul of professional responsibility and ethical standards. Mediation focused on brokering *any* settlement rather than on an outcome reflecting the interests of the parties, is wrong-headed and counterproductive.

By contrast, in focusing on establishing a framework and tone conducive to open dialogue, on understanding and exploring less ostensible factors in addition to initiating legal or contractual issues, on clarifying party perspectives and correcting

misunderstandings, the mediator assists the parties in shifting from an adversarial posture to one that permits them to craft a mutually acceptable outcome, and frequently at a substantially lower financial and psychological cost. Examples from my experiences illustrate these points.

Information Gathering and Structuring the Mediation Process

What can mediators do to foster the development of a productive mediation? Gaining insight into the parties' and the attorneys' relationships and receiving and sharing information prior to the "initial" mediation session is extremely valuable. Information on the nature, context and complexity of the dispute, not just substantive legal and contractual issues, permits the structuring of a process that best fit the needs of the particular disputants. Early identification of individuals indirectly as well as directly affected by the dispute and those who may be necessary or helpful in advancing the process at various stages is also helpful. Areas that might be addressed preliminarily can be identified, and factors that might prove most difficult to address can be parsed.

Generally, one or both attorneys representing parties or an administrative agency contact the mediator about mediating case. Once disclosures have been shared, the mediator can schedule a joint conference call with both or all counsel as quickly as possible. In addition to having each attorney describe and present an overview of the matters in dispute, the mediator sseek information about its genesis and background on the entities and individuals involved and the decision to seek mediation.

Questions considered at this early stage include: What experience have the attorneys had as adversaries in other matters, and what if any prior efforts at settlement have they explored? Have the attorneys identified the same or different obstacles to settlement? Do the attorneys view the issues in dispute as primarily legal or factual in nature, and have the attorneys, or the parties, identified any "relationship" issues in addition to the contractual or legal issues? What information would best be held in confidence until later in the mediation process? Other initial inquiries include identification of documents – court filings and rulings, administrative agency filings, internal and personal records – that might be readily available for mediator review.

Timing is another key consideration for the mediator in structuring the mediation process. Have the parties participated in informal efforts at settlement, filed formal complaints, or engaged in discovery? Are there any self-imposed or judicially imposed deadlines for mediation? What time frameworks need to be established to advance the process?

If at all practical and well before the initial session, a more detailed, written submission by each party, setting forth that party's position on the issues in dispute is preferable These submissions can include each party's perspective on obstacles to

settlement as well as that party's perspective on what the other parties may consider obstacles to settlement. If time constraints suggest a different approach, the mediator can schedule a phone conversation with each attorney to elicit the same information. Some information may be held in confidence at that time.

In one initial conference call with counsel involving a single plaintiff and four defendants – three related entities and an individually named defendant – each of whom had separate counsel in addition to counsel for two insurance companies, it became clear that the plaintiff was concerned about the balance of power given the constellation of attorneys on the side of the defendants. After some extended discussion with the mediator and negotiations among counsel on the defendant side, all the parties, their counsel and the mediator agreed to the appointment of a co-mediator with extensive experience as a plaintiff counsel, selected by the plaintiff.

In mediating a class-action claim of race discrimination against a major employer, it became apparent during the initial stage of mediation that the claim, and the relief sought, was similar to other pending claims against the same employer involving different races in different courts. The parties reached out to counsel in the other matters. After some negotiations and meetings with mediator, the two other main plaintiff groups joined in the mediation with the goal of achieving a "global" resolution of the systemic issues. The parties and the mediator also established a procedure for the resolution of the individual damage claims in all three pending matters.

For example, in preliminary discussions between the mediator and counsel for the parties in one matter involving a claim of a violation of a non-compete clause, it became clear that a primary concern of the claimant/employer was the potential for a "raid" on other employees. There were also widely divergent views on the potential damages but no actual figures had been generated or shared. The scheduled mediation session was adjourned with a set schedule for submission and review of financial information, and the matter settled before the rescheduled session based on a commitment that other employees would not be raided. Similarly, in a mediation involving the breakup of a partnership, the mediation session was postponed until an independent evaluation of the assets was conducted by an outside firm mutually selected by the parties. That evaluation served as the basis for settlement.

In another matter it became clear in discussions in the pre-mediation stage that one party was unfamiliar with the processes suggested by the other party as part of a settlement. As a result, the mediator postponed the mediation session, and the mediator, all counsel and high-level administrators of one of the parties participated in lectures and other "field trips" to gain information on the range of alternative processes that might be part of a settlement package. Once that education process was completed, the parties engaged in mediation and resolved the litigation, and other related workplace issues as well.

In a case involving a multinational corporation and the participation of high-level

executives from three different countries, the parties and the mediator agreed that the mediator would hold separate caucus sessions with two individual executives at different times before the first joint mediation session because of the time constraints and schedules of those deemed to be necessary to resolution. The matter settled at the joint session.

These examples demonstrate that eliciting information at early stages of the mediation process not only educates the mediator but also guides the structuring of the mediation process and begins the process of building trust and refocusing the parties away from an adversarial perspective. The timing of the mediation session and identification of certain obstacles to settlement at the pre-mediation stage can also promote early and mutually beneficial resolutions -- and at times to settlement before the "formal" mediation begins.

Setting the Tone and Promoting Active Participation and Open Dialogue

Mediators are appropriately active in ensuring all parties are consulted in structuring the mediation and setting the tone for the conduct of discussions throughout the course of the mediation to enhance open dialogue and effective resolution. Frequently addressing non-legal concerns resolves, or permits the parties to resolve, the legal issues and to craft settlement terms not even identified at the start of the process.

First, the parties , not just counsel, must agree on a location considered neutral or appropriate by all participants, and time frameworks must take into account all participants' schedules. An example of an avoidable error was one instance where not every participant had been consulted, and a plaintiff's spouse would not set foot in opposing counsel's law firm where the mediation was to take place. The mediation could not continue until a new, mutually acceptable location was located.

In a similar vein, ensuring that participants as well as counsel agree to be present for the duration of the mediation session, or to delineate limitations on availability before the mediation session itself, can serve to limit unnecessary impediments to settlement . Where one respondent, a key decision-maker, left the mediation unannounced during a caucus with the claimants, the process fell apart temporarily because of the claimants' ire over the respondent's lack of courtesy.

The presenters and content of opening statements and particularly the tenor of those presentations can be a subject of preliminary discussion. Presentations are most effective if the tone is not overly accusatory, and I generally encourage having the parties themselves speak at an initial joint session to describe their respective positions and concerns. Rather than having a party vent at an initial joint session to another party, the mediator can at times absorb frustration in a caucus, permitting discussion of the substantive issue in a subsequent, less emotionally charged joint session. Some attorneys prefer to make some opening statements on behalf of their clients, but guiding the counsel to use of a neutral tone and addressing the parties, not

just other counsel, directly is generally more effective than a belligerent presentation.

One example of the value of party presentation of opening statements involved a long-term employee who was let go by a firm without warning and escorted out of the building at the time of termination. The employee was offered a substantial severance package, but he declined to accept that package and sued the employer on the basis of age discrimination. At the time, the business was in substantial financial trouble and in negotiations for a sale. Because company representatives were bound by confidentiality regarding the sale and the negotiations, they did not disclose information about the sale to the employee at the time of termination. In his opening statement, the employee focused substantially on how hurt he was by the manner in which his termination had been affected, not on the damages he was seeking. The owners had been unaware of this treatment. In discussions between the owners of the business and the mediator about the confidential nature of the mediation process as well as the company's financial problems and how valued the employee had been, the owners agreed to share their views directly with the employee before approaching any discussion of settlement terms. In the resulting joint session, the employee gained insight into the employer's circumstance at the time of termination and was able to accept the employer's apology over the manner in which the termination had been handled. The case settled with a slightly enhanced severance package.

A former high-level executive who brought a suit for sex and disability discrimination against her former employer was deeply offended by the manner in which she was treated when she became disabled. She was also persuaded that she had been fraudulently "let go" based on her disability prior to the sale of the business shortly after her separation from employment. The matter was ultimately resolved in mediation when, after several joint sessions with all participants, the new CEO of the company asked to speak individually and alone with the plaintiff, an attorney who had to serve as COO and General Counsel of the company. The new CEO endorsed the plaintiff's feelings about the poor treatment she had received, persuaded the plaintiff that the sale was not known or anticipated at the time of her separation from the company, and the case settled in short order.

In another matter involving the "downsizing" of an executive vice president upon a merger who claimed the layoff was in fact sex-based discrimination, the claimant asked to speak to the mediator without counsel present during a caucus when claimant's counsel was pressing her to seek more than the amount offered. Claimant's counsel and the mediator agreed to the conversation with certain limitations. The claimant revealed to the mediator that she had had an affair with another high-level executive, a matter she did not want to disclose to her spouse or her attorney, who was a friend of her spouse. The matter settled at the amount offered.

The parties themselves are most knowledgeable about their circumstances. When emotional issues are acknowledged and effectively put aside, the parties begin to expand the focus of discussion away from legal issues or strictly financial terms.

For example, the parties begin to explore, for example, terms unique to their particular relationship to bridge financial gaps. Other examples of party-generated terms of settlement packages include agreements on prospective changes in workplace practices that may affect others but not necessarily the plaintiffs or claimants, use of annuities where cash requirements are not immediate, goods and services in lieu of enhanced cash settlements, and written recommendations based on performance review statements. Mediator assistance as opposed to mediator direction enhances these opportunities.

Summary

A mediation process should be structured to focus on party interests rather than on a mediator-manipulated or a mediator-generated settlement. Resort to mediator-imposed values or mediator-directed settlements can leave underlying causes and issues unaddressed. The mediator, by being informed, patient, nonjudgmental, flexible and responsive, engenders the trust of the parties in each other and in their ability to fashion a comprehensive settlement. The mediator can also facilitate setting the tone of interactions by encouraging comportment and patience throughout the process, and incorporating approaches that enhance open exchange and consideration of a range of potential outcomes. Each mediation is unique, but well-crafted procedures create an environment that permits the parties to address and resolve legal and contractual issues, and frequently other concerns as well.

*Ms. Mackenzie is a full-time mediator and arbitrator in New York City, with 35 years' experience in labor-management, employment and commercial dispute resolution. She frequently trains and lectures on dispute resolution and serves or has served on the Cornell University Institute on Dispute Resolution Advisory Board; the American Arbitration Association Task Force on the National Rules for the Resolution of Employment Disputes; the National Academy of Arbitrators Board of Governors; and, as past chair, Association of the Bar of the City of New York Committee on Labor and Employment Law. Formally an Adjunct Professor at Cardozo School of Law teaching ADR in Employment Disputes, Ms. Mackenzie was also a court-appointed Facilitator in the multi-party Breast Implant Litigation, a Dalkon Shield Arbitrator, and mediator and arbitrator under Merrill Lynch and Smith Barney Claims Resolution Processes. Ms. Mackenzie's publications include: "How Mediators View Their Role: A Mediator's View," How ADR Works (ABA/BNA, 2003. N. Brand, ed.); "Effective Mediation Advocacy," ALI-ABA's Practice Checklist Manual on Alternative Dispute Resolution (American Law Institute, January 2002); "Mediation - Civil Rights Law in Transition." Fordham Urban Law Journal (Vol. 27, April 2000). Admitted to practice in the State of New York, Ms. Mackenzie is a graduate of Smith College (BA), Cornell University (MS), and Columbia University School of Law (JD). In 1993 Ms. Mackenzie received the American Arbitration Association Distinguished Service Award.

American Bar Association – Section of Dispute Resolution
11th Annual Spring Conference

CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING[1]

by Gary Friedman and Jack Himmelstein

Introduction to the Understanding-Based Model

For more than three decades, we have worked with people in conflict and taught professionals how to deal with conflict. Understanding conflict and how it works has been our preoccupation. Studying conflict has clarified how profoundly it impacts all of us in our lives for better and for worse. We were drawn to this work from our background as lawyers, and as people often caught in the grip of conflict, struggling to free ourselves, our families and friends, our clients, our colleagues, and our students from the restrictive and stifling hold conflict can have over all of us.

Throughout our work together, we have found a stance toward conflict that has been of enormous value to us and, we would like to think, to the people with whom we have been working: parties in conflict and the professionals seeking to help them. That stance is one of dealing with conflict itself in an effort to understand how we can relate to it, not just to survive it, but to use it to improve our lives and those of the people we work with as well.

Allowing conflict to victimize us and others leaves us trapped in its grasp and diminished by it. *Challenging Conflict* itself has provided us with tools for understanding it and for opening doors for ourselves, our clients, colleagues, and students that likely would not have occurred were it not for the power of that stance.

What we have come to understand is that, if unexamined, conflict has a way of readily enveloping us and taking over our lives. When conflict takes over, it creates its own reality. It dictates the terms on which we experience a conflict as well as those on which we try to deal with it. And it often does so in insidious, unseen ways that make us and others hardly recognizable to ourselves, never mind to each other.

Its terms include the need to think, feel, and speak based on right and wrong, winning and losing. Certain emotions, such as anger, rage, and righteous indignation are evoked and readily escalate. Fear is often felt, but hidden. Hurt as well is often denied and unseen. Compassion, understanding, and caring disappear, as if they don't exist. They are simply not felt or are

---

[1] *Challenging Conflict: Mediation Through Understanding* was published in 2008 by the American Bar Association in cooperation with the Harvard Law School Program on Negotiation.

quickly repressed if they try to sneak in. "Clothe yourselves in anger," conflict demands. "You can feel fear if it helps to maintain the anger, but make sure it remains hidden."

Within conflict's grasp, it seems the only way out is to win through pressure, persuasion, or manipulation. Or dig in your heels and wait the other side out until they come around. And if you become enmeshed in a prolonged stalemate, you can at least feel the satisfaction of righteous victimization. If that doesn't work, well surely, a third party decider will vindicate you, because indeed there is one right and one wrong, and you are the one who is right.

These are the terms that conflict presents. We don't accept those terms, not because they don't capture so much of the reality that we experience, but because they lead to a dead-end or lack of resolution and because they are woefully incomplete. If we accept them as *the* reality, we are trapped in conflict. We challenge those terms. It doesn't have to be that way.

You might conclude from this that we mean to eliminate conflict because of the harm that it does. Not at all. That is neither possible nor advised. We believe that the problem is not conflict itself, but the willingness of people to accept what we have called conflict's terms and succumb to its downward spiral.

Challenging conflict's terms allows us to see it as an opportunity for people to enhance their lives and deepen their understanding of themselves, each other, and the reality that they experience. As you will see, that is an essential part of our definition of mediation—for the parties to gain understanding of their conflict and use it to enhance their lives. Not that we recommend choosing conflict. It simply means when conflict enters our lives that we face it and try to find a way to move through it with understanding.

We seek to do that by making the participants to a dispute aware of how they, both parties and professionals, can become ensnared in what we refer to as a *conflict trap*. With that awareness, we can use the conflict to bring out the best in ourselves, rather than spiral down to our worst. Seen in this way, conflict can become an invitation to accept the reality of our automatic response to it and move beyond the confines of that response, to rise to the challenge of finding within us the understanding and compassion that liberates us from conflict's hold.

The Understanding-Based Approach to Mediation

One of the keys to the power of the Understanding-based model of mediation is that it is a real alternative. Parties have a variety of choices to resolve their dispute, in particular the "legal alternative" of proceeding through the adversary system either by having their lawyers negotiate for them or, ultimately, having a judge decide the matter. The Understanding-based approach poses a very different possibility and opportunity, one that we believe deeply respects and honors parties and leads to better solutions.

Understanding-based mediation offers people in conflict a way to *work together* to make decisions that resolve their dispute. This non-traditional approach to conflict is based on a simple

premise: *The people ultimately in the best position to determine the wisest solution to a dispute are those who created and are living the problem.* They may well need support, and we seek to provide them support in helping them find a productive and constructive way to work together, to understand their conflict and the possibilities for resolving it, and to reach resolution if they are willing.

The Non-caucus Approach

Many other approaches to mediation recommend that the mediator shuttle back and forth between the parties (caucusing), gaining information that he or she holds confidential. Our central problem with caucusing is that the mediator ends up with the fullest picture of the problem and is therefore in the best position to solve it. The mediator, armed with that fuller view, can readily urge or manipulate the parties to the end he or she shapes.

The emphasis in our approach, in contrast, is on understanding and voluntariness as the basis for resolving the conflict rather than persuasion or coercion. We stress that it is the parties, not the professionals, who have the best understanding of what underlies the dispute and thus are in the best position to find the solution. Meeting together with the parties (and counsel) follows from these assumptions about people in conflict. These and other points underlying this approach are developed in greater detail in the chapters that follow.

To work in this way is challenging for both the mediator and the parties. The parties' motivation and willingness *to work together* is critical to the success of this approach. Mediators often assume that the parties (and their counsel) simply do not want to work together, and therefore keep the parties apart. In our experience, many parties (and counsel) simply accept that they will not work together and that the mediator will be responsible for crafting the solution. But once educated about how staying in the same room might be valuable, many are motivated to try it. If the parties (and the mediator) are willing, working together throughout can be as rewarding as it is demanding, as the mediations recounted in this book illustrate.

Role of Law and Lawyers

Mediators tend to be divided in how they approach the role of law in mediation. Some rely heavily on what a court would decide if the case were to go to trial, authoritatively suggesting or implying that law should be the controlling standard used to end the conflict. Other mediators, concerned that the parties might simply defer too readily to the law and miss the opportunity to find more creative decisions, try to keep the law out of mediation altogether or only bring it in at the parties' request.

As developed throughout this book, we welcome lawyers' participation *and* we view it important to include the law. We do not, however, assume that the parties will or should rely solely or primarily on the law. Rather, the importance the parties give to the law is up to them. Our goals are 1) to educate the parties about the law and possible legal outcomes and 2) to support their freedom to fashion their own creative solutions that may differ from what a court might decide. In this way, the parties learn that they can together reach agreements that respond

to both their individual interests and their common goals while also being well informed about their legal rights and the judicial alternatives to a mediated settlement.

We also want to respond to a common perception and challenge that working in this way is simply not realistic for most conflicts and most people. When we hear that critique, we are reminded of similar statements three decades ago when it was the legal profession who was directing the challenge at the very idea of mediation where parties would decide for themselves. Now, too, the challenge is from many lawyers (not all), and they are joined, ironically, by a good number of mediators. Our response now—as it was then—is that many parties in conflict, if given the opportunity, can and want to do it. That response is now backed by thirty years of our experience and that of many other professionals who have integrated this approach into their practice. And it is backed by the parties who we and many others have worked with together in mediation.

In developing this approach, we have not felt so much that we are inventing something new, but rather that we are evoking and supporting a natural impulse of people in conflict to want to be able *to work together*, even in the face of having significant differences in their perspectives. The impulse may more often than not be obscured by the feelings of dissonance that are inevitably a part of conflict. But even if not in the foreground, that impulse is for many very much there, waiting to be tapped and given room for expression, even if only in the form of a wish of what might be if things were different. The same is true for the parties' capacity to work through their conflict together. If given the opportunity and necessary support, many are both willing and able. Our work with parties in mediation seeks to tap that impulse and give expression to that capacity.

This point is crucial because, as we said, the understanding-based approach builds upon the motivations of both mediator and parties to work in this different way. That motivation is often there *once the parties see the possibility*. But they will only be open to seeing it if the mediator believes it might be there and creates a context where the possibility of working in this different way can be evoked, as in the mediations recounted in this book.

American Bar Association – Section of Dispute Resolution
11th Annual Spring Conference

CHALLENGING CONFLICT:
MEDIATION THROUGH UNDERSTANDING

SAVING THE LAST DANCE:
MEDIATION THROUGH UNDERSTANDING

A co-production of The Center for Mediation in Law
and Harvard Law School's Program on Negotiation

Excerpts from Transcript of Video

COMMENTARY

This mediation brings together Jackie who until recently served as Artistic Director for DANCE INNOVATION, or "DI,", and Mike, DI's Executive Director and Chairman of the Board who dismissed Jackie midway through her three year contract. DI is a well-known modern dance company whose mission is to support the work of new choreographers. Jackie's job was to guide that mission.

In her first year, Jackie created two of her own pieces, which were well received. She was nearing completion on a third major work, Ensemble, which was to be the centerpiece of DI's upcoming season when that piece became instead the focal point of a conflict between Mike and Jackie that culminated in her dismissal.

Jackie consulted Conrad, a lawyer who represents artists. Conrad sent a letter to DI's lawyer, Joan, saying that since Ensemble was not yet complete, it belonged to the artist and that he would go to court to prevent the dance from being performed if DI planned to complete and put on the work without Jackie.

The following excerpt is from that part of the video where the lawyers are asked to educate the parties about the law:

EDUCATING THE PARTIES ABOUT THE LAW

GARY Are you ready to...for each of you to describe your legal positions so that your clients and I can understand those?

CONRAD Let's understand that the basics here are the creator of the work owns the work. The exceptions under the copyright act are works for hire. Work for hire can only exist in its completed state. The act doesn't contemplate unfinished work. Whereas here you have a work that was never fully completed you can't claim ownership to that.

JOAN Jackie substantially completed that work or whatever work was completed is a work that which she prepared during the course of her employment with the company. She used company dancers, etc. And it is the company's position that that also clearly belongs to the company.

COMMENTARY

A critical role the mediator can play is to help the parties deepen their understanding of the risks and uncertainties of the litigation process.

GARY Just for the moment, assume the unthinkable has happened. You've gone to court and you've lost the case. And now you have to explain to your clients all the reasons why that could have happened. And if you are willing, I would like each of you to kind of flesh out the risk part of this so your clients have an appreciation of that. Is that something you would be willing to do?

JOAN One reason is that judges aren't always right. And it may be that this judge just doesn't quite see it our way.

COMMENTARY

While lawyers are often initially reluctant to acknowledge any weakness in their case, with the mediator's help, they can take this task seriously.

CONRAD And it is possible that a judge would want to see this in the narrowest possible legal terms without regard to the equities. That can happen.

JOAN A judge may be persuaded to...in a sense put the law aside not withstanding that we have the better legal argument and feel that he wanted to have a certain result come out and that result would be to support the artist in this instance.

COMMENTARY

An assessment of litigation also requires making sure the parties understand the practical consequences of going to court.

CONRAD I think it is important as you and I have discussed to know that the bringing of the case was something that was important to you. And that even if they win and we quote "lose" you will have helped your reputation in the community as you go forward by showing your pride in your work and your pride in the integrity of dancers and choreographers in the community by trying to stand up for the control that you believe choreographers ought to exercise over their work.

JOAN You've given her a completely false sense of what's going to happen at the end day.

JACKIE I'm not worried if the court says this piece cannot be put on. That is exactly what I want to have happen if I don't finish the piece. I don't want to see that piece performed in its present state. It is not completed. And I certainly don't want to see it performed with somebody else's ending on it.

GARY So it's really a high priority for you to know that that piece would never see the light of day without your being able to contribute to the finishing of it.

JACKIE Right.

MIKE And I think exactly the problem we have is that Jackie is much more concerned about her piece completed the way she wants it when she wants it than she is with acting as the artistic director of this company or of taking any concern to the needs of this company.

CONRAD And it is interesting to me because what I see happening here is you got someone from the business community who is trying to transpose what maybe business norms into an artistic setting. I don't think Mike understands that what he is essentially setting in motion is a public display of a company in turmoil. Why would other choreographers or dancers or artistic directors want to be associated with you? Why would funders want to give money to you? Why would potential board members want to be associated with what will be ultimately an unsuccessful and an unpleasant venture?

MIKE That the company is in turmoil is something that we've been aware of and in fact the dance community has been aware of. We had hoped that Jackie's coming as the artistic director would in fact reduce that turmoil. In fact she has contributed to our turmoil. She has, in my view, wasted the assets of the company. I am concerned about the presentation of works of a variety of choreographers. It was for that reason that we retained her. We were not retaining her to be a funding source for the development of her piece however marvelous it may be.

CONRAD But I think your ignorance of the artistic norms in this community are going to bring the company down pure and simple.

MIKE And if the company is brought down it will be your client and to some extent your attitude which would have contributed very significantly to it. And I don't think that that will stand your client in good stead in the dance community.

CONRAD I didn't fire my client you did. I didn't seek ownership of her rights you did and I think that's going to hurt you.

MIKE I would have been derelict in my duty had I not fired your client.

GARY I'd like to make an observation because I can see how upset you each are with what the other is saying. While there are some advantages to both sides in terms of being able to proceed in court if you win there are also some costs here to both sides no matter who wins. If you do go to court one of the consequences is clearly going to be that a division between the two of you will be escalated even further than it is already and that's going to have some consequences for both sides that I think you just need to take into account.

JOAN That's why we are here.

THE ABA SECTION OF DISPUTE RESOLUTION
11TH ANNUAL SPRING CONFERENCE
New York City, NY
April 16-18, 2009

WAR, NEGOTIATION and LEADERSHIP: LESSONS FOR MEDIATORS

Robert D. Benjamin, M.S.W., J.D.
Peter Adler, Ph.D.

Overview

As mediation practice has become legitimized and institutionalized, some of the spark, energy and original mission has been lost. Caught in the grips of too many ideological cults, schools, and orthodoxies of practice style, many mediators have become pre-occupied with titles, certificates, licenses. Not enough attention is given to the core issues and tensions concerning how conflict management strategies, techniques and skills can be applied across every dispute context to address the dilemmas of human competition and cooperation, the management of emotion and understanding of risk and decision making. This interactive workshop will suggest different thinking frames that seek to break out of the traditional notions of mediation practice.

We are continuing a tradition of presenting weird and arcane perspectives with the primary purpose to be to hear some stories, have some fun, see a movie clip or two, ponder a few things, shoot down a few pieces of accepted truths and conventional wisdoms relied upon in practice. The presenters come from diverse backgrounds: Adler is pleasant, more or less normal and has a beautiful wife and three daughters; Benjamin is a black belt curmudgeon with a great dog for a friend.

Outline

Basic premises and areas of agreement:

-Mediation has become "legit" – for better or worse, married to our legal culture and has lost some of its original energy and mission;

-There are too many cults, schools, and orthodoxies of practice---our 'boxed in thinking' about negotiation----mapping the terrain.

-Mediators are increasingly pre-occupied with titles, certificates, and licenses, when it is not clear there is a "conflict management field" at all;

-Insufficient attention has been given to the ongoing core issues and tensions: negotiation and intervention dilemmas, competition and cooperation problems, deep human emotions and impulses;

-Mediation has become increasingly institutionalized and has acquired a tarnished reputation in many quarters---something to be tolerated, only another cog in the legal machinery;

-The underlying strategies, techniques and skills of negotiation and mediation are of critical importance in managing the complex and exceptionally difficult issues and conflicts we face as a culture and in the world and that they need to be studied and practiced more widely than they have been previously.

Re-shaping our work: Four different frameworks

1.Guerrilla Negotiation: The use of warfare strategies in the management of conflict and assessing the conflict terrain.

*What mediators can learn from Gen David Petraeus and his US Army/Marine Corps Counterinsurgency Field Manual

*The importance of neuroscience and evolutionary psychology in understanding decision making and the management of risk---

Forecasting the end of Rational Decision Making Theory/and Interests/Needs-Being 'predictably irrational."

2. The Protean Negotiator: What mediators can learn from the Myth of Proteus: The dynamic, shape-shifting. The end of linear thinking.

3. **The Mediator as Leader:** Primal Roles of Shamans, Headmen, Craftsman and Warriors.

4. The Activist Mediator: Considering the limits of neutrality. The mediator as negotiation coach and approaches to creative problem solving.

Group Discussion and Organized Chaos– Answer any <u>one</u> question:

-What "school" of mediation most compels you and why?
-What are you working on now that's challenging the things you originally learned about mediation?
-What kind of problems would you love to be working on 3 years from now?

Movie Clip: Thirteen Days: What are the lessons to be learned?

Selected Bibliography

Adler, Peter, Eye of the Storm Leadership: On the Art and Politics of Managing Human Conflicts, Mediate.com, 2008

Adler, Peter, "Protean Negotiation: Rejecting Orthodoxy and Shifting Shapes," in The Negotiator's Field Book, eds. C. Honeyman and A. Schneider, ABA, 2006

Adler, Peter, "Unconscious Excellence: An Exploration of Mastery and Incompetence," in Bringing Peace Into the Room, eds. Bowling, D. and Hoffman, D., Jossey-Bass, 2003

Adler, Peter, and Fisher, Robert C., Leading From Behind: The Un-Heroic Challenge of Leading Leaders, ACR Magazine, 2007

Benjamin, Robert D., "Managing the Natural Energy of Conflict: Tricksters, Mediators and the Constructive Use of Deception," in Bringing Peace Into the Room, eds. Bowling, D. and Hoffman, D., Jossey-Bass, 2003; The Guerrilla Negotiator: Articles of R.D.Benjamin, CD Rom, 2008

Benjamin, Robert D., "The Guerrilla Mediator: The Use of Warfare Strategies in the Management of Conflict," in The Creative Problem Solvers' Handbook for Negotiators and Mediators, ed. Jack Cooley, ABA Section on Dispute Resolution, 2005; http://www.mediate.com//articles/guerilla.cfm, 1999.

Benjamin, Robert D., "Cloaked Negotiation: Necessary Back-Channel, Under the Table and Surreptitious Strategies and Techniques to Make Deals Work," http://www.mediate.com//articles/benjamin43.cfm, 2009

Benjamin, Robert D., "Of War and Negotiation: Part 3, The Allure of War: If You Want Peace, Study War," http://www.mediate.com//articles/benjamin40.cfm, 2008

Presenters Biographies:

Peter A. Adler, Ph.D., is President of The Keystone Center, located in Keystone, Colorado and Washington D.C., which provides consensus building training, education and services to private corporations, NGO's, and government agencies, nationally and internationally, in energy, environmental, and sustainable development issues, as well as health care and other public policy matters. He practiced mediation for over 25 years and has also written and taught extensively in all areas of conflict management practice. He is a former President of the Society for Professionals in Dispute Resolution and previously served as the Executive Director of the Hawaii Justice Foundation and the Hawaii Supreme Court's Center for ADR. Contact: padler@keystone.org; www.keystone.org

Robert D. Benjamin, M.S.W., J.D., has been a practicing mediator since 1979, working in most dispute contexts including: business/civil, family/divorce, employment, and health care. A lawyer and social worker by training, he practiced law for over 25 years and now teaches and presents professional negotiation, mediation, and conflict management seminars and training courses nationally and internationally. He is a standing Adjunct Professor at the Straus Institute for Conflict Resolution of the Pepperdine University School of Law, at Southern Methodist University's Program on Conflict Resolution and in several other schools and universities. He is a past President of the Academy of Family Mediators, a Practitioner Member of the Association for Conflict Resolution, and the American Bar Association's Section on Dispute Resolution. He is the author of numerous book contributions and articles, including "The Mediator As Trickster," "Guerilla Negotiation," and "The Beauty of Conflict," and is a Senior Editor and regular columnist for Mediate.Com. More information is available at his web site, www.rbenjamin.com, and he can be contacted by e-mail at: rbenjamin@mediate.com

Upchurch Watson White & Fraxedas
MEDIATION GROUP

Print Format

Guerilla Mediation: The Use of Warfare Strategies in the Management of Conflict

by Robert D. Benjamin, M.S.W., J.D.

Discussion

INTRODUCTION—CONFLICT MEDIATION AS A FANCIFUL IDEA OR REALISTIC OPTION

The real test of the acceptance of professional mediation in our society will be the sustained and regular use of those services by a substantial number of people to manage conflicts that arise in their personal and business lives in the private market.

The use of mediation in the public sector, exampled by the rapid proliferation of court programs and legislation that encourage and legitimate mediation is helpful but cannot be taken as competent evidence that people in general have accepted negotiation as a viable means of conflict management. Even so, many mediators are waiting for, or actively lobbying legislatures or courts to create to enact or implement mediation programs in the belief that they will deliver mediation work to their doorstep. However, the steady stream of mediation business has not materialized for many mediators. In fact, ironically, some court sponsored mediation programs have engendered an unintended consequence—the increased resistance to mediation, especially from those people who have felt coerced to participate. Anecdotal reports hint that an increasing number of people are voicing resentment at being forced to mediate.[3] In any event, the private demand for mediation services remains underwhelming in most of the country with only a few areas and contexts being of modest exception. For the most part, it appears that most people in our culture remain leery of negotiation as a means of settling disputes.

Some suggest the reason mediation is underutilized is because the marketing of those services has been minimal. While that may hold some truth, it could also be that the marketing message of many mediators is ineffectual. Mediation is often portrayed as the "kinder-gentler" alternative. The common operating assumption is that if people knew about the mediation process and how it could save them time and expense and give them greater control over their lives, that consumers, as thoughtful and rational people, would prefer mediation over the more traditional process—reliance on lawyers, judges, and other experts—for the settlement of disputes. The presumption is that consumers, faced with conflicts, will apply a cost/benefit analysis and act out of their self interest to choose the most efficient means of dispute resolution. Some do, many do not.

It should come as no surprise, that logic alone does not necessarily sell even the best product. If people were to act based purely on objective data, none would smoke, all would wear seatbelts in their cars, none would be entrepreneurs, many would not marry, and not many would have children.

Few purchases, whether it is a car, a house, or a doctor's, lawyer's or mediator's services are made solely on a rational basis. A strictly rational marketing approach often fails to effectively reach many prospective consumers.

Marketing experts have long appreciated the importance of taking into account human nature and emotion in sales and advertisement. A significant part of any promotional strategy is deciphering how the service/ product enhances consumer self image or alleviates fears and insecurities. Choosing to mediate a dispute remains for many, a non-traditional, untested and risky business. When faced with conflict, the emotion many experience is fear, specifically, their fear of being taken advantage of or being played for a fool if they negotiate for themselves. The rational reasons to mediate do not easily overcome that overriding fear and an effective marketing message must address that underlying emotion directly.

Beyond just selling a product however, marketing strategy reflects how mediation is professionally understood and practiced. Currently, many mediators view their work as a thoughtful, humanistic enterprise intended to help others resolve conflict; their process relies on trust and good will. Some well-intentioned practitioners even find marketing distasteful or unseemly. However, while human beings have the capacity to act rationally and collaboratively, they don't necessarily start there when faced with a conflict. The resistance to negotiation and mediation are long standing and deeply seated in our culture.

There are two significant sources of resistance to mediation. First, the idea of mediation or negotiation of a conflict is a difficult one for many people to accept, especially in our culture where there is a strongly ingrained sense of being right and a belief that the truth will prevail. Case in point: John Wayne, a cultural icon, who never negotiated in any of his many and varied movie roles. He remains a hero for many people and professionals alike, who have taken from his modeling the belief that to negotiate is to compromise, "give-in," or even sell-out your principles. Note that the resistance to mediation follows directly from the resistance to negotiation; mediation is merely a negotiation between three (or more) people. The mediator essentially negotiates his or her authority with each of the participants. For all intents and purposes, the terms negotiation and mediation are interchangeable, mediation being only a more formalized, third party facilitated negotiation process.

To consider mediation requires a break with traditional thinking patterns as a means of managing conflict. Mediation, like negotiation, requires that people take responsibility for their own decisions. Many people are afraid, or simply do not want that responsibility. They prefer to believe, or are conditioned to think that professionals—lawyers, judges, doctors, therapists, etc.— know more and are better able to make decisions for them.[6]

There has, however, been some breakdown of this resistance, albeit slowly. People are becoming more aware that conflicts are complex and that there are not simple, formulaic right answers. As well, people are increasingly cautious, skeptical and critical of professional services, advice and directives.[7] This is reflected in the increased use and availability of alternative sources of information, products and services in both health care and law. The Internet is, no doubt, a significant contributor to this dynamic.

The second source of resistance is more troublesome because mediators themselves often bear responsibility. Mediation is often presented in an overly simplistic manner that makes it all the more difficult for prospective consumers to take seriously. Mediation is described in misleading and Pollyannaish terms, such as: "a win/win process," or as "a collaborative problem solving process." The implicit suggestion is that all parties will be satisfied with the outcome, respect each other or even be friends. Many mediators see themselves as peacemakers and mediation as a healing or "transformative" process.[10] While that might occur on occasion, it is by no means the rule and in any case not the purpose of mediation.

There is a still greater risk: the expectations of the mediation process are, by those simplistic descriptions, set unrealistically high and in many cases unobtainable. The terms belie a quasi-utopian vision that conflicts can be, not just managed, but finally and completely resolved. The result may be the increased likelihood of failure, which in turn can generate even greater resistance to mediation.

Many parties already do not consider mediation because they believe the process requires a level of trust, reasonableness and goodwill that they have predetermined the opposing party lacks. Common refrains heard from consumers in ruling out mediation are: "(s)he is not trustworthy" or "I'm reasonable, but (s)he is not." The risk is exacerbated by the presentation of the mediation process in fanciful and idyllic terms.

Countering this resistance will require a shift in the thinking of mediators from a soft, idealized approach to conflict management to a more rigorous, strategic approach. To encourage the acceptance of mediation in the real world, it must pass the test of being cost effective, efficient and, most important of all, be safe. Mediation cannot be limited to those rarefied situations that rely and depend on all parties being reasonable, rational, acting in good faith, trusting or even trustworthy. If mediation services come to be viewed as applicable only to those matters where all parties concerned exhibit a collaborative, cooperative and humanistic demeanor at the same time, then mediation might as well await the simultaneous alignment of the stars and planets. The number of available cases susceptible to mediation will be reduced to a fraction of one percent. To flourish, the mediation process must be recast as good business that need not rely on trust or good will. Mediators must work in the real world, not in an idealized world of their own concoction.

THE SOURCES AND RATIONALE FOR GUERILLA MEDIATION

For mediation to work in the real conflicts of everyday life and be accepted as a viable mode of conflict management, then the approach taken must be active, strategic and calculated to constructively redirect the energy of the conflict. Human nature must be confronted directly. Instead of hoping for, or expecting people to be reasonable and thoughtful in the face of conflict, mediators must non-judgmentally accept their more base motivations for power and control as well. While messengers (Machiavelli, Kissinger, et al.) and methods might be criticized, the primary postulate of "realpolitik" is as applicable today as it has been throughout human history: "Those who desire peace, should prepare for war." For mediators, the corollary axiom is: "Those who pursue settlement, should be prepared for conflict."[16]

Perhaps ironic, but not surprisingly, warfare strategies and tactics offer parallels in thinking and approach that are useful to a mediator. If conflict is understood as a lesser form of warfare that left unchecked can quickly escalate into open warfare, then the strategies and techniques effective in war may also be applicable in the negotiation of conflict. Only the purposes remain fundamentally different. Parties in conflict are not an enemy to be subdued or defeated; for the mediator, the purpose will be to carefully hone their thinking and skills to effectively manage the jungle of fears that seize many parties in conflict. The purpose of scrutinizing warfare practices is to strip out from that higher intensity conflict circumstance the thinking and strategies that are useful in order to apply them preemptively to avoid the escalation of conflict. What is common to both war and negotiation, and essential for success in either field of engagement is the recognition of the basic nature and behavior of the opponent or parties. In short, not to underestimate your opponent and to accept him on his own terms

The term and concept of guerilla mediation is derived in some measure from the writing of Sun Tzu in *The Art of War*. He was a Chinese general who, by varying accounts, recorded his approach to warfare sometime between 500 and 300 B.C., and has been studied throughout the centuries up to and including the present. The principles he enunciated for the preparation for war, apply to the management of conflict by other means, including negotiation and mediation. In fact, early on and often, Sun Tzu emphasizes that to fight and conquer is not "supreme excellence"; that excellence is reserved for breaking the enemy's resistance without fighting.

While there could be some quibbling over the exact meaning intended in the phrase "breaking the enemy's resistance," the writing provides good instruction for the practicing mediator. It is neither cynical nor utopian, but instead is soberly realistic. He reflects an appreciation for the human rhythms of conflict: "In peace prepare for war, and in war prepare for peace." Not unlike the warrior, the mediator necessarily relies on strategic planning, tactics and maneuvering, observing the terrain of

the conflict and the use of deception. Specifically, the analogy of mediation to guerilla warfare, as distinguished from more formalistic approaches to warfare, highlights the parallels between mediation and the non-traditional, more fluid and mobile form of combat that guerilla tactics conjure.[17] The mediator, as does the guerilla fighter, must creatively use the resources immediately at hand and cannot depend on outside reinforcements or the traditional sources of authority (e.g., a court) to impose an outcome on conflicting parties.

The risk of using guerilla warfare as a metaphor for mediation is for some perilously close to encouraging the combative and argumentative nature of many disputes that most mediators want to disavow and distance themselves from. In fact, Deborah Tannen gives a searing critique of the language of our culture that encourages argument instead of dialogue in *The Argument Culture*.[22] Yet, while her observations are valid and useful, they fail to sufficiently take into account the reality of our human circumstance. While human cooperation occurs and is evident to greater or lesser extent in many circumstances, war, violence and conflict are not likely to be extinguished any time soon by social engineering. The proof is in our history, biology and psychology.[9, 17, 18, 21] The extent to which conflict and warfare can be mitigated or averted, may be a function of looking directly at what war and conflict are about, not merely pretending it could be otherwise.

George Lakoff and Mark Johnson, in *Metaphors We Live By*,[20] observe that our ordinary conceptual system is metaphorical in nature; linguistics—our words and metaphors—are how we experience one thing in terms of another. In short, in disputes where argument is the preferred tactic, argument is a subspecies of war and while argument is not war, it is partially structured, understood, and performed in terms of war. A dispute is metaphorically structured as a battle; our language reflects this reality: one party "attacks" another's position, a claim is considered "indefensible," or the comments are "on target." With the war metaphor so deeply ingrained, to pretend mediation is about peace and good will, when people are thinking in terms of war and distrust, disregards reality and is blatantly naive. The way to shift a dispute away from open warfare toward settlement is not to deny this reality and pray for peace but to strategically re-deploy and re-align our argument metaphors in ways that encourage constructive dialogue. The first step however, is for the mediator to relinquish the notion that parties in conflict can be expected to be reasonable and trusting. Managing conflict in a hostile terrain requires all of the wit and wile a mediator can muster.[4]

For most people faced with conflict, mediation is not their first thought or a term on the tip of their tongue; in fact, even settlement is a remote idea, especially at first. More likely than not, they are thinking "lawyer" and "fight." At the outset of a conflict, whether it is a personal or business dispute, the idea of settlement is an anathema, the mere suggestion of which is taken by them to be indicative of a lack of resolve in their position or a moral sellout of their principles.[6] Most people faced with a dispute of almost any kind or level of seriousness, take it personally; while negotiation may make perfect sense and be in their self interest, they have an abiding fear of being played for a fool that trumps rational thinking. Parties in conflict can move to a place where they can consider more thoughtfully what decisions make sense and how they want to handle difficult situations, but not until they feel safe. That safety is not gained by merely being told to trust the mediation process, or the mediator, and certainly not the opposing party; the process is, at least at the outset, an abstraction, and trusting the other party is simply too far a reach. The first task of the mediator, then, is to manipulate the situation in such a way that the parties need not be required to trust, but to believe they will not be left at a disadvantage.

Notwithstanding this reality, many mediators insist on presenting and approaching disputes out of preset principles and belief in reasoned discussion and collaborative values. They proceed to carefully and methodically analyze the interests and needs of the parties and try to explain to the warring participants why their positions are not sensible or in their self interest.[14] To read the literature in the field and listen to mediators discuss their craft, it is quickly apparent that many encourage and some even insist that the participants in mediation be reasonable, calm and collaborative if they are to negotiate successfully. Mediators often disregard that many people in conflict, when they are facing the loss of their dreams and life as they know it is disintegrating before their eyes, are not able to be calm and trusting on command. For a mediator to presume parties can or should be so is patronizing at best, and may be down right insulting. Few of us, mediators included, could maintain the equanimity seemingly required, when directly faced with a personal conflict.

The irony is that guerilla mediation, though the term may sound antagonistic and harsh, may well be more respectful of parties in conflict than the more conventional approaches to mediation. If there is an assertive sensibility to this approach, it is because the force and energy that most conflicting parties bring to a dispute must be met by a sufficient counter force if the energy is to be redirected constructively.

THE BASIC TENETS OF GUERILLA MEDIATION

There are three basic tenets of guerilla mediation: (1) respect for human nature as it is, not as we would like to believe it could be; (2) a realistic understanding and acceptance of conflict; and, (3) the effective use of strategic planning. Assuming the acceptance of these basic tenets, the techniques for implementation and the requisite skills necessary to accomplish the purpose of mediation, can be more readily clarified and applied. Notwithstanding the use of a warfare metaphor, the purpose of mediation and the role of the mediator remains to facilitate the substantially informed and consensual management of issues or conflicts by disputing parties.

Respect for human nature as it is, not as we would like to believe in could be.

Borrowing from the principles of evolutionary biology and psychology, the human animal has ingrained multiple kinds of behavior patterns that are sometimes contradictory. Generally, humans can be (1) altruistic, good natured, and trusting [13]; (2) rational, analytical, and objective, acting more or less predictably out of self-interest [1]; and, (3) fearful, spiteful, deceptive and manipulative, acting in ways that appear to be anchored in pure emotion and seemingly irrational. [22]

The most prevalent approaches to the mediation of conflict, the rationalistic and humanistic, are premised on the belief that parties in conflict are capable of being collaborative in the reasoned pursuit of an outcome that meets the needs of all parties. Humanists believe people are basically good at heart, rationalists believe they essentially operate out of predictable patterns of self interest. Short shrift is given to that part of our human nature that is deceptive or manipulative and there is often attached an implicit negative moral judgment of that behavior. There is nothing wrong with the conventional approaches, they just do not systematically and holistically account for the whole repertoire of human behaviors that are commonly displayed in human interactions and especially in conflict.

To round out the field, there is the competitive/opportunistic approach to negotiation and mediation, that most people popularly tend to associate with negotiation. This style is typified by the used car dealer; it is essentially Machiavellian, and operates from the belief that humans are basically evil, self-interested, deceitful and manipulative, and bent on the accumulation of power and control. Once again, it is not so much that this approach is inaccurate as it is incomplete; it fails to account for the prospect that humans are able to cooperate and might be able to negotiate collaboratively. In short, none of the prevailing negotiation approaches take into account the whole range of the human behaviors, and to the extent they do not, the approach will be found lacking.

The naturalistic/pragmatic approach to negotiation is premised on the belief that humans operate out of the full range of ingrained human behavior patterns. The approach is not intended to dismiss or denigrate the prevailing approaches, but rather to provide an integrative framework that includes them all to offer a more comprehensive view of humans' behavior in the negotiation of conflict. It is premised on the belief that to effectively negotiate issues or disputes, parties must be accorded the respect that they will be simultaneously desirous of reasoned communication and at the same time likely to be fearful, deceptive and manipulative. Deception is a natural behavior common to all animal species, including humans, which has evolved over time to foster procreation and survival. It cannot be dismissed and should not be morally judged.[21] The naturalistic approach does not presume to dictate how people should behave for negotiation to proceed and takes full account of all human behaviors.

The naturalistic approach to negotiation is well suited to guerilla mediation, reflecting the same views of human nature and conflict. Thus, while communication and empathy between parties are necessary and important, and the reasoned analytical discussion of issues and options are helpful, both approaches are incomplete in themselves. The guerilla mediator, in sizing up the conflict terrain, does not rely upon reason, trust and good will to manage a dispute; he or she may well have to employ constructive forms of deception to accommodate and counter the anticipated fears and resulting manipulations of the parties. The mediator is obligated to accept the parties as they are, not how he or she would like for them to be.

A realistic understanding and acceptance of conflict.

Conflict is part of the natural terrain, and unless one subscribes to the millennial belief that with the coming of the messiah, where "the lion will lay down with the lamb," likely to continue to be so. Too often, however, conflict mediation is confused with peacemaking. Many mediators accept conflict only grudgingly in theory and are even less tolerant of its open expression in practice.

Conflict is a basic ingredient in our evolutionary biology and psychology; it is part of our human makeup and chemistry. Analogically, conflict is to the body politic what cholesterol is to body physiology; some cholesterol, the LDL, constricts the arteries, immobilizes the body and can ultimately kill. Other forms of cholesterol, the HDL, helps the body metabolize and cannot function without it. Likewise, some forms of social conflict are peripheral, unnecessary and destroys the body politic, while other conflict is substantive, that is, necessary and useful, encouraging the growth and development of society.

In our Western, techno-rational culture, there is a strong tendency to suppress and dismiss emotion in general and conflict in particular. The mind-reason/body-emotion dichotomy, postulated originally by Plato and articulated by Descartes, reflects the traditional pejorative notion of conflict. The conventional wisdom posits that conflict results from the absence of reason and from being overrun by emotion. Many mediators of the rationalist persuasion use techniques derived from that view. For instance, establishing communication ground rules in mediation are ostensibly calculated to preclude or limit unhelpful emotional outbursts by a party which are thought to impede the calm discussion of substantive issues. The reigning conventional wisdom is that emotion unchecked will likely or even predictably lead to physical aggression. The technique may have the reverse effect: suppressing the expression of emotion may lead to an escalation of the conflict.

By contrast, the guerilla mediator accepts the expression of emotion as a natural and necessary part of the conflict, not to be suppressed but constructively managed. Ironically, current studies in neuro-biology suggest that reason and emotion stem from the same area of the brain and it is difficult, if not impossible, to separate the two; reason cannot be accessed without emotion.[12] In the same way physical pain or discomfort is symptomatic of an underlying body dysfunction or illness, emotion is the expression of underlying personal or interpersonal stressors. As health care providers are coming to understand, treating the pain without assessing the underlying circumstance makes no sense, nor does managing the illness without addressing the pain. Likewise, quashing the emotion in a dispute may serve to cosmetically cover up the underlying stressors without effective management of the conflict.

The guerilla mediator redirects and uses the energy the conflict generates constructively. Conflict contains within it considerable natural force and energy. To liken some conflicts to a "class 5" river (serious white water), the force of the water flow can easily sweep away the unprepared. In rafting that river, and negotiating the rapids, the pilot understands the necessity of bringing his or her own energy to bear on the river; if he puts the paddle down , he will be swept away. There is no quiet, calm way to face a wild river; the pilot will never control the river and there is no suppressing or containing the river's energy. The only hope will be to deal with the river on its terms, which means to paddle hard and fast enough to approximate the rivers speed, thereby allowing the pilot to position him or herself to use the river's energy. The trick is to stay centered, off the rocks and out of the sinkholes. Like a good pilot reads the river and sometimes must calculate bouncing off of one rock to avoid a more perilous one or a worse situation. Similarly, a good mediator reads the conflict between the parties

and devises a strategy that effectively uses the parties force and energy to negotiate the conflict.

The effective use of strategic planning.

Strategic planning is the key to both winning wars and the effective negotiation or mediation of conflict. Curiously, the etymology of the word strategy is from the Greek, "strategama", translated as a trick or ruse, and still commonly defined as a military maneuver to deceive or surprise an enemy.[23] The notion of being strategic has also long been associated with business and negotiation and carries with it a pejorative connotation. This is so, especially in the Western cultural tradition where humanism and rationalism are highly valued. From the rationalist and humanist perspective, strategy is unnecessary if the argument is rational and the motives genuine; the ower of logical reasoning, communication and empathy should theoretically, at least, obviate the need for tactical presentation.[6] Unsavory strategic devices are associated with "spinning the story" in politics, or being disingenuous, inauthentic, or outright deceitful in personal relationships.

Ironically, despite the disinclination to accept the human necessity of being strategic, there is little doubt that most people, successful in managing their public and private affairs, are careful to consider how and when to most effectively present themselves and their ideas in pursuit of their goals and to obtain a desired result. Most mediators, as well, even those of the rationalist and humanist persuasion, as a practical matter, are forced to be strategic at some point. Therein lies the gap or incongruence between what they say is there approach to mediation and how they are observed in their actual practice.[19]

. The naturalist/pragmatic mediator understands from the outset that he or she will not be likely to overpower the parties by the strength of argument, overwhelm them with a brilliant solution previously unconsidered, or that talking alone will resolve difficult conflicts. Drawing from that understanding, the guerilla mediator must rely on finesse and other stratagems to redirect the conflict energy constructively toward settlement. There are countless examples of techniques that effectuate strategy in the negotiation/mediation of conflict. Three, in particular, are among the most basic: the use of confusion, the structuring of the process and, the use of time.

Far from being calm, rational and patient, the mediator must use "hit and run" tactics to confuse entrenched parties and undermine their belief that their cause is just and they are right.[5] If they are allowed to remain sanguine in their in their original entrenched positions, there will be little motivation to negotiate. People function less by rational calculation than by ritual and operative myths—stories they tell themselves to make sense of the world around them. Their myths of Justice, Truth, Rationality, Finality and Objectivity, disincline them to consider other alternatives to managing conflict. Most parties in conflict want to be vindicated in the belief that they are right and that any fair minded, impartial and neutral review of the matter at hand will so determine their cause to be just. The quest for the truth of the matter, however, is of little relevance in the mediation of conflict.[8]

A mediator must pierce that operative mythology. Sometimes reflective questions can do the trick, confusing and unsettling one or both party's certainty that justice will prevail. For example, the reflective question, "Are you sure that your position can be proven and that the court will agree with you?" insinuates into the discussion a measure of doubt. The purpose is to throw them off guard and dislocate their thinking, to make just enough space for the consideration of other options that can possibly open the door for agreement.[2] By contrast, a frontal, straightforward logical statement, such as, "I don't think the court will agree with you," is likely to be viewed as confrontation or attack which summons argument and rebuttal, "Yes, they will, it's the law, and I'll win." Logic, of course, is the least effective means of convincing anyone of anything. The mediator does not want to be caught in an argument, which are, by definition, unwinnable—even if you win, you lose. Thus, he or she merely plants the seeds of doubt and moves on—the hit and run.

In structuring the process, the mediator may strategically use deception to delay and avoid direct discussion of the key issues until the parties are ready. Many negotiations break down because people begin to discuss the ultimate issues too soon and negotiate out of fear, without sufficient or accurate information; they want to begin by discussing the hardest issues first, which may be self-defeating. Without a negotiation strategy, or game plan, it is common to "cut to the chase"—"what do

you want/what will you give." Conventional wisdom and the logical approach often encourages direct discussion of the issues in the belief that the shortest distance between the problem and a solution in a dispute is a straight line. Few conflicts are that simple or linear.

In contrast to the conventional wisdom, a surreptitious, surprise approach may be more effective. Strategically, using paradoxical logic, the shortest distance in a dispute between the stated problem and possible outcomes is not a straight line. A more circuitous route allows time for the parties to reflect on their perspectives, communicate with each other, and to assure all parties are working with sufficient and accurate information in preparation for the ultimate negotiation.[23,2] The more complex and difficult the issues, the more important the structuring of the process will be in the management of the conflict. The mediator must first build a solid foundation, first slowly gaining commitment to the process, next gleaning the story, then clarifying the issues, and finally assuring all options are available and considered. The mediator uses techniques that are calculated to delay and avoid the actual discussion of key issues until the parties are ready—"no conflict before it's time". By initially sidestepping the hardest issues in a dispute, the mediator defeats what conflicted parties think they want to do, in favor of a more productive approach, that allows him to effectively sneak up on the hardest issues.

Finally, as in warfare, in mediation time is of critical strategic value. For most disputing parties the conflict did not arise overnight and is not likely to be resolved quickly. Notwithstanding that reality, most expect the matter to be resolved immediately, and if not, to presume it cannot be resolved at all, let alone in mediation. With that thinking, it is easy to see how so many people slip-slide into the more traditional, formalized and extreme modes of conflict management such as litigation. Time allows for the parties to shift in their perspective and consider alternatives. Therefore, the mediator often stalls for time: parties cannot shift in their perspective faster than it takes for them to assimilate that change.[15] Thus, sometimes it is what the mediator does not do that is more important than what he or she does do. Setting the pace of the negotiation process, knowing when to stop a session after there has been some progress, but before the parties become too tired, are critical timing skills. The mediator must sense the point of diminishing returns; moving too quickly to "close the deal" can unduly risk any progress that has occurred, bring on "buyers remorse", or even place the whole negotiation process in jeopardy. Contrary to conventional wisdom, "holding peoples' feet to the fire" to obtain an agreement is likely to be counterproductive. There is a Zen aspect to negotiation: the less parties feel pushed to agree, the faster they may decide to settle in their own time.

A guerilla fighter does not seek to win the war in one skirmish, likewise a mediator does not expect reach agreement in one fell swoop. In fact, for the mediator, the purpose may not be for the parties to come to agreement at all—that is for them to decide. The purpose of the mediator is merely to give them every opportunity to reach an understanding and not defeat themselves. The process especially in difficult matters, must be drawn out to allow the parties sufficient time to re-appraise their negotiation perspectives. Time allows for them to save face and accept some measure of the reality that one does not necessarily win because they are right or lose because they are wrong. Settlements in hard cases are not so much forged as they are allowed to emerge in due course. Just as in guerilla warfare there are no clear victories, in mediation parties don't win or lose, they merely find a means to survive.

CONCLUSION—THE PROMISE AND FUTURE OF MEDIATION

In the last quarter of this century, conflict mediation has gained a small foothold in the cultural and legal landscape of the United States and numerous other countries around the world as a means of managing conflict. At core, the promise of the mediation process is the opportunity it gives people to settle their own disputes without the undue interference of government authorities or others. In an age where people often feel they are losing control over their lives, faced with an ever increasing onslaught of rules and regulations, and assailed by countless professionals who presume to know better about how they should live their lives, mediation is one way they can re-assert themselves and seize back some measure of control in the decisions that most affect their personal relationships and business dealings.

But the footing of mediation is precarious at best. If the success and acceptance of the mediation process is left to the courts and other public authorities, and mediators wait for it to be legislated into existence, then it risks becoming just one more cog in the institutional machine and the heart of the process may be fundamentally compromised. For mediation to flourish, it must be because it makes sense to consumers and it works, not just because it is a good or worthy idea.

To that end, guerilla mediation is not a regression to a primitive, "win at all costs" approach to negotiation; nor is it in anyway intended to suggest that the mediator should design the outcome of a dispute. It does however, pointedly intend to suggest that for mediation to survive as a viable form of conflict management, then mediators must look directly into the heart of conflicts in the real world and manage them. Force fitting hard issues and stressed parties into mediation approaches that are based on wishful thinking about what human beings could become, does not sufficiently take account of the power and energy of human emotion. This limits and impairs the effectiveness and validity the mediation process could have in our culture.

Ultimately, if mediation can not be demonstrated to work outside of hothouse conditions, where parties meet preset standards of reasonableness and cooperative demeanor, then the process will remain a marginal mode of conflict management, or worse, relegated to history's trash heap of good ideas and good intentions that did not work or were not accepted. If mediation is to effectively become part of our cultural pattern of managing conflict, then mediators must adopt a rigorous, reality-based approach that can manage conflicts as they present themselves, not as we might hope for them to be.

BIBLIOGRAPHY

1. Axelrod, Robert. *The Evolution of Cooperation*, New York: Basic Books, 1984.

2. Benjamin, Robert D. "The Constructive Uses of Deception." *Mediation Quarterly*, vol. 13, no. 1, Fall 1995. Jossey-Bass Publishers, San Francisco, Calif.

3. ——. "Mediation as a Subversive Activity." *DCBA Brief (DuPage County, Illinois Bar Journal)*, vol. 11, issue 2, September 1998; also published by Mediation Information & Resource Center (MIRC),< www.mediate.com>.

4. ——. "The Mediator as Trickster: The Folkloric Figure as Professional Role Model." *Mediation Quarterly*, vol. 13, no. 2, Winter, 1996. Jossey-Bass Publishers, San Francisco, Calif.

5. ——. "The Natural Mediator," *Mediation News*, Winter 1999, Vol 18., No. 1. Academy of Family Mediators.

6. ——. "Negotiation and Evil: The Sources of Religious and Moral Resistance to the Settlement of Conflicts." *Mediation Quarterly*, vol. 15, no. 3, Spring 1998. Jossey-Bass Publishers, San Francisco, Calif.

7. ——. "The Physics of Mediation: The Reflections of Scientific Theory in Professional Mediation Practice." *Mediation Quarterly*, vol. 8, no. 2, Winter, 1990. Jossey-Bass Publishers, San Francisco, Calif.

8. ——. "The Quest for Truth and the Truth of Lies," *Mediation News*, Fall 1999, Vol 18, No. 3. Academy of Family Mediators.

9. Bloom, Howard. *The Lucifer Principle: A Scientific Exploration into the Forces of History*, New York, Grove/Atlantic, 1995.

10. Bush, Robert. A. Baruch and Joseph P. Folger, *The Promise of Mediation*, San Francisco, Jossey-Bass Publishers, 1994.

11. Cleary, Thomas (Trans. with commentary). Sun Tzu II, *The Art of War*.. HarperSanFrancisco, 1996.

12. Damasio, Antonio R. *Descartes Error: Emotion, Reason and the Human Brain*. New York: Grossett & Dunlap, 1994.

13. deWaal, Franz. *Good Nature: The Origins of Right and Wrong in Humans and Other Animals*. Cambridge, Mass.: Harvard University Press, 1996.

14. Fischer, Roger, William Ury. *Getting to Yes*, (2nd ed.) Boston: Houghton Mifflin, 1991.

15. Haynes, John M. and Gretchen L. *Mediating Divorce: Casebook of Strategies for Successful Family Negotiations*. San Francisco: Jossey-Bass Publishers, 1989.

16. Kagan, Donald. *On the Origins of War and the Preservation of Peace*. New York: Anchor Books, 1995.

17. Keegan, John, *A History of Warfare*. New York: Knopf, 1993.

18. Keeley, Lawrence H. *War Before Civilization*. New York: Oxford University Press, 1996.

19. Kolb, Deborah. *When Talk Works: Profile of Mediators*, San Francisco: Jossey-Bass Publishers, 1994.

20. Lakoff, George and Mark Johnson, *Metaphors We Live By*. Chicago: The University of Chicago Press, 1980.

21. Niehoff, Debra, Ph.D. *The Biology of Violence: How Understanding the Brain, Behavior, and Environment Can Break the Vicious Circle of Aggression*. New York: The Free Press, 1999.

22. Rue, Loyal. *By the Grace of Guile: The Role of Deception in Natural History and Human Affairs*. New York: Oxford University Press, 1994.

22. Tannen Deborah, Ph.D. *The Argument Culture: Moving from Debate to Dialogue*. New York: Random House, 1998.

23. van Creveld, Martin. *The Transformation of War*. New York: The Free Press, 1991.

Robert D. Benjamin, M.S.W., J.D., has been a practicing mediator in St. Louis, Missouri, since 1979. He mediates in most dispute contexts, including civil/commercial, personal injury, environmental, health care, organizational, employee grievance/workplace, land use, and family/divorce conflicts. He provides training seminars and consultation services in mediation, negotiation and conflict management nationally and internationally. He is a past president of the Academy of Family Mediators and a member of the Society of Professionals in Dispute Resolution.

WHEN AND HOW TO USE MEDIATION TO YOUR ADVANTAGE

I. Why Should You (and Your Client) Submit Your Dispute to Mediation?

A. Possible Benefits of Mediation Compared to Settlement Negotiations

1. Mediation enhances the ability of each party to communicate *directly* to the other party (*e.g.*, avoids communicating only through their respective attorneys)

    a. Parties can vent their feelings, put emotions behind them and then focus on a rational cost/benefit analysis of the difference between litigating and settling

    b. Mediator has more credibility than opposing party in pointing out the weaknesses in each party's case so as to assist each party in making an *objective* risk/reward analysis

    c. Mediator can help parties focus on (i) their *real* needs and interests and (ii) the difference between the best alternative to a negotiated agreement and the worst alternative to a negotiated agreement (*i.e.*, BATNA vs. WATNA)

2. Mediator has a different agenda than the parties

    a. A party's agenda may be (i) to get (or keep) as much as possible in a zero sum negotiation or (ii) to "win," "get even," be vindicated or satisfy a similar non-economic need

    b. Mediator's sole agenda is to assist each party in finding a way to settle on terms that (i) meet its real needs and interests and (ii) are preferable to the litigation or arbitration alternative

3. Mediator can facilitate the ability to create added value

    a. By suggesting ways to enlarge the pie (*e.g.*, non-monetary benefits which cost one party less than the benefit to the other, the difference being the "added value")

    b. A neutral mediator suggesting a method for adding value is more likely to permit the added value to be shared, whereas when one

party (*e.g.*, a seller) suggests directly to the other (*e.g.*, a buyer) a method of creating value (*e.g.*, seller will give buyer a discount on future orders), the latter (buyer) may feel entitled to keep all of the added value since it (the discount) costs little or nothing to the party suggesting it

4. Mediator, by communicating directly to the person with settlement authority, can minimize the risk of a conflict of interest between the party and its negotiating representative

    a. Litigator may have financial and ego needs to focus on advantages to litigating over settling, but such needs may differ from the needs of his or her client (who may wish to avoid Pyrrhic victory)

    b. A party's negotiating agent may have different needs from those of its principal or employer (*e.g.*, a credit manager may wish to avoid a write-off)

5. Mediator can help parties overcome perceptive differences

    a. Which issues are relevant to (i) the eventual outcome of the litigation or (ii) the real needs of each party in a settlement

    b. How the relevant issues are likely to be resolved in the litigation

    c. The effect that each possible litigation outcome will have on the vital interests of each party

    d. Risk aversion (*e.g.*, 25% chance of getting $100 may be preferred over getting $20 for sure, but some may prefer paying $25 for sure rather than taking a 20% chance of paying $100)

    e. Decisions may be affected by the way the issue is framed

6. A proposal suggested by a mediator may avoid a knee-jerk negative reaction, which might have been the reaction if it were made by the other party (*e.g.*, if other side offers x, they are probably willing to pay x + y), but if the proposal is made by a neutral, each party is more likely to *discuss* it rather than *suspect or attack* it

B. <u>What Kind of Cases Are Most Suitable For Mediation</u>?

1. Which types of cases are appropriate for mediation and which are not?

2. Are all cases that are capable of being settled appropriate for mediation – i.e., all cases except those where a judicial determination is needed because:

   a. One party needs a judicial precedent (*e.g.*, civil or human rights cases);

   b. There is a need to bind non-parties (*e.g.*, actions to foreclosure a mortgage or establish title to property); or

   c. The defendant considers the claim frivolous and wants to discourage others who might bring similar claims by sending the message of "millions for defense but not one cent for tribute."

C. When is the Best Time to Mediate?

1. Before litigation commences

2. Before or after motions or discovery

3. On eve of or during trial

D. How Can You Get Your Adversary to the Mediation Table?

1. Direct approach to adversary (attorney to attorney or party to party) -- *e.g.*, one party suggests a list of mediators and the other can choose from the list

2. You can ask a neutral person or forum to suggest mediation to both parties (with blind responses from each)

3. You can request the court to order the parties to mediate

E. Possible Reasons a Party May Not Want to Mediate – Are they Valid?

1. Suggesting mediation to your opponent is a sign of weakness

2. Mediation is merely a ploy by one party to discover the other side's case

3. Mediation won't work because complex legal issues or strong emotions are involved

4. It's premature to mediate (*e.g.*, it's better to wait until after summary

judgment motion or more discovery)

5. The costs and delay inherent in litigation will enable a deep pocket defendant to achieve a better settlement on the eve of trial than a settlement negotiated at an early stage

6. The parties cannot agree on a mediator, and one party should never accept the other's recommendation of who should be the mediator

II. The Different Styles of Mediation and How to Choose a Mediator

A. The Different Styles of Mediation

1. Transformative

2. Facilitative

3. Evaluative

4. A continuum from facilitative to evaluative

B. How to Find an Effective Mediator

1. Consider the background of the mediator

   a. Ex-judge

   b. Litigator with evaluative skills

   c. Business lawyer with evaluative and negotiating skills

   d. Non-lawyer (e.g., accountant, industry specialist or other person with expertise in the subject matter of the dispute)

   e. Two neutrals – one perceived as being understanding of plaintiff's side of the dispute and the other perceived as being understanding of the defendant's side, or one lawyer and one non-lawyer with expertise in the subject matter of the dispute.

2. Consider the training and experience of the mediator (including the number of prior mediations and the percentage of those which settled in the mediation)

3. Consider the Skills of the Mediator

   a. Ability to apply standard mediation techniques after having completed appropriate training

   b. Ability to be (and be perceived as) fair and impartial, gain the trust and respect of the parties, control the process and listen attentively

   c. Ability to analyze the issues in dispute and prioritize them to facilitate resolution

   d. Ability to communicate effectively in a non-adversarial tone and effectively explain each party's position to the other party

   e. Ability to evaluate the relative strengths and weaknesses of each party's position

   f Ability to persuade each party to realistically evaluate its weaknesses and the other party's strengths and to make an objective cost/benefit analysis of the advantages of settling early rather than litigating

   g. Ability to recognize and satisfy the ego needs and hidden agendas of each party and to validate the feelings of each party and convey empathy, compassion and understanding

   h. Ability to be creative in suggesting ways to create value (where the cost to one party is less than the benefit to the other)

   i. Ability to perceive the real needs and interests of each party and to convince the parties to be flexible in order to meet such needs and interests

   j. Ability to be patient, persistent, indefatigable and "upbeat" in the face of difficulties and frustrations

Negotiation & Mediation

PROTEAN NEGOTIATION
Rejecting Orthodoxy and Shifting Shapes

Being also some Musings on Evolutionary Impulses, a Minor Greek God, the Literatures of Negotiation and Mediation, Cooperation and Competition, Morality and Pragmatism, Paradox and Dilemma, the Bushmen of the Kalahari, Sun Tzu's Strategy, and the Management of Four Contradictory Imperatives, All of Which and Each of Which are Perfectly Correct Things to do. [1]

Peter S. Adler, Ph.D.

---

1. Ancient Imperatives

In classrooms, board rooms, and waiting rooms, the theory and practice of negotiation is awash with advice on bargaining and problem solving. Much of it is simplistic and some of it contradictory. One writer implores us to know our bottom line. Another urges us to ignore it and focus on needs. A third says to wait until the last moment to do a deal when the situation is ripe. A fourth counsels us to get in early. At best, the many lists of "dos" and "don'ts" serve as reference points and modest road maps for certain situations. At their worst, they misdirect us into thinking there is some single model or approach that if we master it, will carry us seamlessly through every conflict, deal, and dispute.

More worrisome among the fashions of the moment is the trend towards fundamentalism in the practice of mediation and facilitation which is closely allied with negotiation theory. While there are many different styles, schools, and brands with names like "collaborative law," "extreme facilitation," and "transformative mediation," most of these seems to devolve to four basic schools of thinking about how humans behave in the face of real or imagined conflict, how they negotiate, and how we might help them. One presupposes that all of us are fundamentally competitive. A second assumes we are, at core, cooperative. A third takes for granted that all of us will seek to do what is morally correct. A fourth assumes we are rational and pragmatic.

---

[1] My thanks to friends and colleagues Bob Benjamin and David Newton each of whom separately helped stimulate some of the ideas described in this paper.

These four impulses – pursuing your own fair share, uniting with others to achieve a common end, insisting on doing what is right, and using logic and reasoning to solve practical problems – seem to have evolutionary roots that date back to our differentiation from other species and our origins on the African savannah.[2] The impulses also lead to different ideologies of negotiation and mediation that descend from, embody, and personify these impulses. But there is also a fifth way, one that acknowledges the universality and importance of all of them but is not explicitly and strictly any of them. It too has ancient roots. Let's call it "Protean Negotiation."

2. Rumble in the Jungle

Imagine you are a senior official at Pulsar Pharmaceuticals International ("PPI"), a mid-sized drug manufacturer that is seeking bio-prospecting rights in the central Brazilian rainforest. PPI has a standing corporate pledge to "create enterprise that is socially desirable, economically profitable, and ecologically sustainable." Pulsar has several Brazil-originated medicines it seeks to develop: an extract from the taruma leaf which could treat degenerative arthritis; a slime mold which may yield new therapies for allergies; and the root of the muirapuama, considered an aphrodisiac by certain tribal healers and known locally as "Amazon Viagra."

In the last six months, however, your job has become more complicated. You have learned that you closest competitor, Consolidated Biological Science ("CBS"), is also pursuing the same three drugs. Brazil's Ministry of Trade has recently proposed new regulations and royalty rates that could add huge risks to Pulsar's investment. The government sees pharmaceuticals as a logical part of its economic strategy and wants to control and profit from them. They are also sensitive to bio-piracy from foreign countries. The Amazonian tribes and their "shaman knowledge" are another potentially volatile issue. They have been the subject of United Nations inquiries into human rights abuses, are an increasingly important cultural icon for South America's tourism industry, have the sympathies of many urban voters, and control large tracts of land in the interior some of which government would like to see opened up for logging and farming.

You undertake a series of exploratory discussions beginning with Minister of Trade, Carlos Mendoza. In public pronouncements, Mendoza has let it be known that the government favors a centralized permitting system and a data bank that

---

[2] See Ridley, M., 1996. *The Origins of Virtue*, Penguin Books, New York; Dawkins, R. 1976. The *Selfish Gene*. Oxford University Press, Oxford; Ardrey, R. 1961. *African Genesis*, Collins Books, New York.

will store the knowledge accumulated by "traditional scientists," as the shamans are called. Prospecting rights will then be licensed to accredited drug manufacturers. Privately, Mendoza says he is looking for a reputable pharmaceutical manufacturer to help set up Brazil's system and hints that whoever undertakes this will have an inside track on early and perhaps discounted permit applications. He also lets you know that he is talking with your competitor, CBS.

You are also in contact with Arturo Terena, one of several elder spokesmen for the Council of Amazon Tribes. Terena says his people would prefer to set up their own system of patents, permits, and royalties and wants PPI to support their effort and help them form a corporation. They have little regard for the Brazilian government and would much prefer to maintain dominion over their own lands. Terena says that Brazil has committed many historical atrocities against the people of the forests and owes them this last chance at preserving their culture and heritage and benefiting from it in a modern world.

Not long after and over a dinner in Rio de Janeiro, you talk with John Henderson, your counterpart at CBS. The two of you have known each other for many years, even though your companies compete. You exchange family news, swap stories about baseball and politics, and then the talk turns to bio-prospecting in South America and the challenges of working with the government on one hand and the tribes on the other. In discrete terms, Henderson telegraphs signals that CBS might be willing to explore some kind of joint venture to help both companies deal with the situation. You thank him for a nice evening and tell him you will raise it with your people.

Back in your office, you comb through your books on negotiation. The problem seems to come down to a series of not very clear-cut strategic choices. Assuming the numbers pencil out, do you trust CBS enough to join forces for what could be a complex and long-term set of challenges with unclear payoffs? Can PPI cooperate on this venture but compete in other places? Would the strains turn the relationship toxic? Either way, and regardless of whether you do or don't join forces, should you pursue the inside track with Mendoza? Can the government really be trusted? Might they use you to help set up their management system and then have contracts awarded elsewhere? And what about Terena? You know that the tribes have been treated badly but can you and should you ally yourself with them? Is a company that prides itself on "creating enterprise that is socially desirable, economically profitable, and ecologically sustainable" obligated to do so? What would be the impacts of that on the government of Brazil, and on CBS if you are competing with them?

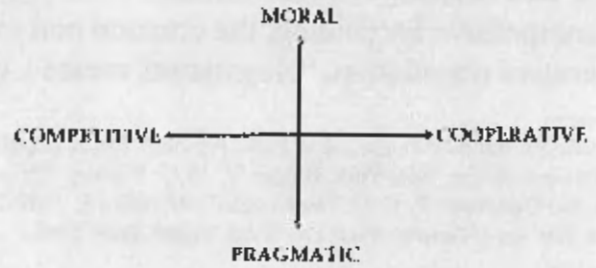
3. Four Pathways to Problem Solving

If I were advising PPI, I think I might, as a starting point, offer up Elder Olson's 1959 poem called *Directions to the Armorer*.

All right, armorer,
make me a sword---
not too sharp,
a bit hard to draw,
and of cardboard, preferably,
on second thought, stick
an eraser on the handle,
somehow I always
clobber the wrong guy.
Make me a shield with
easy-to-change
insignia. I'm often
a little vague
as to which side I'm on,
what battle I'm in.
And listen, make it
a trifle flimsy,
not too hard to pierce.
I'm not absolutely sure
I want to win.
Make the armor itself
as tough as possible,

but on a reverse
principle: don't
worry about its
saving my hide:
just fit it to give me
some sort of protection---
any sort of protection---
from a possible enemy
inside.

The literatures on negotiation, including those in this volume, suggest other factors. For PPI to engage the challenge of discovering new products and bringing them to market, it might want to examine various cultural considerations, keep an eye on escalation dynamics, have a passing knowledge of the complexity and chaos concepts, understand agency and representation, hone its skills at in-team bargaining, manage the tides of emotion and affect, and have a good grasp of the slightly different challenges of negotiated dispute resolution (untangling the past) versus negotiated deal-making (crafting the future). Directly in the telescope of this negotiation, however, are some major collisions between the cooperative, competitive, moral, and pragmatic imperatives. The crosshairs look like this:



Played out in the realm of negotiation, each of these imperatives has its own logic, its own bargaining pattern, its own outlook and style, its own assumptions about

human nature, its own explanation of conflict, its own theoreticians, and its own zealots. Each also stands in tension with at least one other.

In popular writing, competitive negotiation is often considered a natural extension of sport, warfare, Darwinism, and the long and sometimes gruesome struggles between individuals and individuals and groups and groups. In his book *Rules for Radicals*, for example, Saul Alinsky, a community organizer and champion of underdogs, argued that power derives from money, position, and privilege and since poor people have little of any of these, they must band together and push their way in. His negotiation advice included formulating a clear enemy, causing confusion, fear, and retreat, making the enemy live up to their own espoused book of rules, and infuriating the opposition through strategic ridicule.[3] As different as they may be substantively, Alinsky is not that far away procedurally and psychologically from his counterparts in the business world, someone like Donald Trump, who says: "I don't do it for the money. I've got enough, much more than I'll ever need. I do it to do it. Deals are my art form."[4]

In scholarly and professional literatures, Alinsky's rules are a colorful variation of distributive bargaining which focuses on allocating the value at play and maximizing one's own gains. The themes of distributive bargaining deal with target and resistance points, the dance of demands and offers, the role of position taking and concession making, and the use of tactics such as low-balls, nibbles, bogeys, good guys/bad guys working in tandem, and many more. Distributive negotiation tends to be about hard bargaining and substantive winners and losers.[5]

In these same professional and popular literatures, cooperative negotiation is often thought of (and criticized by competitors) as soft bargaining. It focuses largely on the quest for relatedness in ways that are jointly affirming.[6] Lewiki, Raiffa, and others call this integrative bargaining and its themes are mutuality, reciprocity, communication, and the free exchange of information. Where distrust is the assumed condition of competitive bargaining, the creation and maintenance of trust is the bedrock of cooperative negotiation. "Negotiators create a communication

---

[3] Alinsky, S. 1971. *Rules for Radicals*, Random House, New York. For other iconic popular examples, see Trump, D. 1987. *The Art of the Deal*, Random House, New York. Ringer, R. 1973. *Winning Through Intimidation*, Fawcett Crest, Los Angle and Koren, L. and Goodman, P. 1991. *The Haggler's Handbook*, W.W. Norton, New York, and Schatzki, M. 1981. *Negotiation: The Art of Getting What You Want*, Signet, New York.

[4] Trump, D. 1987. *The Art of the Deal*, Random House, New York.

[5] See Lewiki, R. et. al. 1994. *Negotiation*, Second Edition, Irwin, Illinois and Raiffa, H. 1982. *The Art and Science of Negotiation*, Belknap Press, Cambridge.

[6] Bush, R.A.B and Folger, J. 1994. *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*, Jossey-Bass, San Francisco.

system," says Bernard Mayer. "It may be carried over from previous exchanges, or it may be freshly created, and its nature strongly affects how the negotiation proceeds."[7] Cooperative negotiation is predicated on the search for common ground. It seeks reciprocity, mutuality, and the avoidance of breakdowns because of relationship problems.

Closely allied to cooperation is a third negotiating philosophy that begins with a moral or ethical proposition and builds to what one set of writers has called the creation of "higher ground."[8] To accomplish this, moral suasion in negotiation takes a fact pattern, invokes a set of principles, builds logic around them, applies them to the facts, and works to bring others to the same conclusions. Many negotiations over larger or smaller matters, especially those that are aimed at disentangling a grievance, begin with one side or the other saying "it's the principle of it." Third-parties who work from this same premise often prefer the term "peacemaking" to "mediation" because it implies something greater than making a deal or restoring a relationship. "The moral imagination," as John Paul Lederach calls it, "has a quality of transcendence. It breaks out of what appear to be narrow, shortsighted, or structurally determined dead-ends."[9]

Finally, and in counterpoint to the moral impulse in negotiation, is a philosophy of pragmatism and rational problem-solving. Much of the literature on interest-based negotiation might be thought of in this vein. It assumes that people know and understand their needs, that interests can rationally and dispassionately be analyzed, and that elegant if not super-optimum solutions can be found. Fisher and Ury's famous dictums of separating the people from the problem, focusing on interests, generating possibilities, and insisting on objective criteria are an attempt to create a rational, if not quasi-scientific, critical inquiry process that leads to a more easily negotiated result.[10]

Even more expressive of this conception of negotiation is the work of Brams and Taylor who have developed clever protocols that overcome the problem of envy and successfully divide everything from goods and services, to marriages and

---

[7] Mayer, B. 2000, p. 152. *The Dynamics of Conflict Resolution*. Jossey-Bass, San Francisco.

[8] Dukes, F., et. al. 2000. *Reaching for Higher Ground in Conflict Resolution*, Jossey-Bass, San Francisco.

[9] Lederach, J.P. 2005. *The Moral Imagination: The Art and Soul of Building Peace*, Oxford University Press, Oxford, p. 27.

[10] Fisher R. and Ury, W. 1981. *Getting To Yes: Negotiating Agreement Without Giving In*, Houghton Mifflin, Boston.

whole businesses, to the borders and territories of feuding countries "The problem of fair division," they write, "is old as the hills, but our approach to this problem is new. It involves setting forth explicit criteria, or properties, that characterize different notions of fairness; providing step-by-step procedures, or algorithms, for obtaining a fair division of goods, or alternatively, preferred positions on a set of issues in negotiations; and illustrating these algorithms with applications to real life situations."[1]

By themselves, each of these negotiating imperatives – pursuing a fair share, uniting with others to make common purpose, insisting on doing what is right, and using logic and reasoning to solve problems – has a particular clarity and utility in the moment of certain facts and circumstances. Yet, taken to excess or transformed into orthodoxy, each runs a progressively greater risk of instability and destructiveness the more we attach ourselves to it. Saul Alinsky and Donald Trump are tough, competitive, goal-oriented poker players accustomed to pushing, pulling, probing, bluffing, and feinting. So was Slobodan Milosevic who evolved into the ultimate political warrior and war criminal in an intergenerational blood feud bent on achieving what he perceived to be securing his fair share? At the farthest boundary of competitive bargaining lies the seduction of ruthlessness, retaliation, and predation.

Cooperative approaches are also vulnerable. If everyone is trusting, it is easy to be cheated by competitors disguised as cooperators, duped by "free riders," or to become a sucker. Neville Chamberlain fell into this trap in his negotiations with Adolph Hitler before Germany invaded Poland. A sole and persistent focus on moral suasion is no more immune than the other strategies. Unbridled moral preoccupation can turn to smugness, sanctimony, and fanaticism. There is a line, not always distinguishable at first, between the purity of a moral high ground and the fervor of an Osama Bin Laden who would like to eliminate all non-believers. In turn, unchecked rationality and hyper pragmatism eventually overwhelms the collective humanity that links all of us through our hopes, fears, hurts, joys and curiosities. A sole focus on rationality makes us cold. In the extreme, when science goes completely mad, it takes us to the banality of an Adolph Eichman who sought to make death organized, efficient, and systematic.

When individuals and groups bargain with each other, the four imperatives play out in complex and nuanced ways and with unpredictable emotional intensities. As

---

[1] Brams, S. and Taylor, A. 1996. *Fair Division: From Cake-Cutting to Dispute Resolution*, Cambridge University Press, Cambridge.

the impulses come to control our behavior and as the behaviors amplify, they become more risky, exposed, and dangerous. Fortunately, most of us do not operate from a single value premise. Values compete within us, seeking attention. Though we may all yearn for the clarity that would come from a single gospel of negotiation, the popular and scholarly literatures don't really tell us how to reconcile them. So most of us, most of the time, do what we always do. We muddle along until we succeed or fail never quite knowing why either of those happened.

4. Polarity and Paradox

It doesn't matter if you are a tenant talking to your landlord, an ambassador pressing for security measures on the India and Pakistan border, or Consolidated and Pulsar testing the waters for a joint venture in Brazil: competition and cooperation form a paradox. So too do the pressures of acting ethically or pragmatically. Not every negotiation embodies each tension, nor are these four the only predicaments that come up when people struggle to reconcile different ideas. Nonetheless, inconsistency and contradiction create paradox and paradox fosters what Todd Bryan calls a "strange loop that cannot be resolved to our satisfaction".[12]

Confronted by the ambiguity and inconsistency of countervailing imperatives, the human mind seeks the purity of "one" or the "other." We veer away from the discomfort of being or doing "both," split the differing injunctions apart, and resolve the contradictions by insisting that life is one or the other. We are competitive or cooperative, moral or pragmatic, emotional or rational, expressive or bureaucratic, open or closed, aggressive or passive. Yet conflict inevitably brings these paradoxes back to the fore. It forces us to confront what is incongruous and requires us to take some kind of action.

This is not a new problem. Between 480 and 221 B.C., for example, during what is now called the Warring States Period of the Chou Dynasty, a general who would later be given the honorific name of Sun Tzu, wrote a short treatise on how to triumph in warfare. Sun Tzu's advice was simple and tough. He believed in estimating costs, making plans, positioning oneself for success, maneuvering for

[12] Bryan, T. 2004, p. 886. "Tragedy Averted: The Promise of Collaboration," Society and Natural Resources, 17:881-896.

advantage, gathering intelligence, staying calm under fire, and wherever possible avoiding unnecessary confrontation. Those sound like the traits of a good negotiator, no less than a good general. And if Leonard Lira is correct, the two are intimately connected.[13]

At core, said Sun Tzu, conflict is not just in the nature of things, it is the nature of things. Conflict is as sure a thing as sickness and health, day and night, joy and sadness, risk and opportunity. The paradoxical nature of conflict is thus something to be mastered and used. He said: "To act on an entire organization is ideal; to break an organization is inferior. To act on an entire corps is ideal; to break a corps is inferior." In sum, he opined, "Those who win one-hundred triumphs in one hundred conflicts do not have supreme skill. Those who have supreme skill use strategy to bend others without coming to conflict." [14] All of this may sound like New Age hocus-pocus but it is also the common sense of someone confronting the dilemma of achieving victory at the lowest possible cost.

Negotiation is filled with detailed strategic and tactical paradoxes of just this type. All of them require attention and action. If I am Pulsar, do I disclose information to CBS or withhold it? If I am the ambassador, do I make a first move or wait for theirs? If I am the tenant, do I come on tough or open friendly to the landlord? And more generically, should I meet in their office or insist that they come to me? Do I try to do a fast deal or wait for a better one? Do I come right to the point and start with an offer or demand or establish atmospherics and context first? All of these decisions represent choices in time and each choice potentially has cascading effects, not all of which can be predicted, all of which must be made with imperfect knowledge, and any or all of which could reverberate back negatively as revenge effects.[15]

Ultimately, managing paradox requires us to embrace both ends of the dilemma (because both ends have validity), to then find a comfortable place with the uncertainty that sits between them, and to apply that uncertainty to the negotiation at hand. In negotiations, there are specific things to be done. We can make the

---

[13] Leonard Lira, "Transforming Conflict in Post Combat Operations: The Military profession's Use of Negotiation Skills in Constrained Environments,"….(cite)

[14] R.L. Wing, 1988. Chapter 3, *The Art of Strategy: A New Translation of Sun Tzu's Classic*. New York: Doubleday & Company.

[15] See Tenner, E. 1997. *Why Things Bite Back: Technology and the Revenge of Unintended Consequences*, Vintage, New York.

dilemmas that usually stay unspoken explicit by giving voice to them. We can seek to define and clarify them to make sure everyone understands them. We can map them by describing the polarities, examining their attributes carefully, and review the strengths, weaknesses, threats, and opportunities that attend each.[16] Finally, we can use both ends of a paradox to help reframe the opposites into questions that can be answered through negotiation.

The affinity, ability, and tolerance for doing these things are the essence of "Protean" negotiation.

5. The Illusive God of Negotiation

Amidst the incessant feuding and dysfunctional lives of the Greek gods, Proteus is an enigma. A minor actor at best, he was one of Poseidon's miscellaneous children, and certainly not the most important. In fact, he ended up residing by himself on an island called Pharos off the coast of the Nile delta, his day job being the tending his father's seal herds. As such, he was more of a servant than a political player. Yet, Proteus had unique qualities. He was a shapeshifter and a much sought after mystic who could peer into the future and answer the most difficult questions posed to him with great clairvoyance and prescience. Others gods would try to capture him and force answers from him. Proteus would wiggle away from their grasp by changing shapes. It was his way of avoiding the uncomfortable task of telling others what they ought to do.

In the late 1960s, psychiatrist and historian Robert Jay Lifton picked up on this notion of psychological shapeshifting in a series of talks he gave for the Canadian Broadcasting System. In his radio essays, Lifton ruminated on some of the cases he had been dealing with, among them, survivors of Hiroshima, victims of brainwashing in China, and young radicals in both Asia and America who found their worlds collapsing about them. In the context of great institutional upheavals and rapid social changes, Lifton found some common threads among his disparate patients: a deep loneliness; restlessness and constant flux; a persistent feeling of isolation and disconnection; and a constant and sometimes all-consuming search for authenticity. Paradoxically, he also found great strengths: an intellectual, emotional, and spiritual rejection of orthodoxy; a resilient and often fluid ability to

[16] Johnson, B. 1992. *Polarity Management: Identifying and Managing Unsolvable Problems*. HRD Press, Amherst.

reinvent oneself; and a sense of inner "many-sidedness" that created a certain gift of empathy and tolerance.

A deeply reflective man and a skillful writer, Lifton synthesized his observations and tried to placed them in a larger context. He saw a connection between the dislocations of his patients and the historical dislocations of the times. In so doing, he talked about a new and distinctly "Protean Style" of identity that he was finding in different cultures and countries. Lifton speculated that it might be part of a more universal response to what we now call globalization, the unprecedented flooding of images and ideas across borders, the meltdown of the traditional anchors of family and place, and a reaction to our permanently altered notions of nature[17] and culture.

"The Protean style of self-process," he said, "is characterized by an interminable series of experiments and explorations, some shallow, some profound, each of which can readily be abandoned in favor of still new psychological quests." [18] Like that ancient son of Poseidon sitting alone with his seals and visions, modern humans are, for the first time in history and on a scale unimagined, becoming shapeshifters, able to adjust and adapt, able to manage contrary imperatives, able to succeed in the midst of complexity and chaos. Foreshadowing some of the ideas of Thomas Friedman three decades later, Lifton contrasted this new Protean style of identity with an older more fundamentalist self conception who he found to be rigid, unyielding, fearful of breakdown, obsessed with chaos, wary of loss of control, and absolutely self-certain.[19]

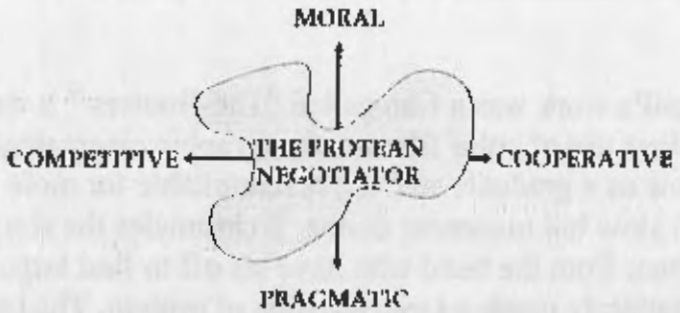
"An effective negotiator," says Robert Benjamin "requires a thinking frame that is adaptive, dynamic, fluid, and shifting and a model of negotiation that can house a variety of negotiation rituals." [20] As the following schematic suggests, the Protean negotiator is a dancer.

---

[18] Lifton, R.J. 1967, p.4. *Boundaries. Psychological Man in Revolution.* Vintage: New York.

[19] Friedman, T. 2000. *The Lexus and the Olive Tree: Understanding Globalization.* (First Anchor, New York.

[20] Benjamin, R. 2004. "The Protean Sensibility: Reconsidering Approaches to Leadership and Negotiation." Unpublished Paper.



He or she can dance the competitor's jitterbug, the cooperative's tango, the moralist's waltz, and the pragmatist's boogey. One dance may be more comfortable than the others but they are all in the repertoire. The Protean negotiator adapts.

And like Proteus, the skilled negotiator reconciles the tensions of ancient and sometimes contradictory impulses by understanding and accepting polarity and dilemma. Paradox is neither distasteful nor uncomfortable. In fact, dilemmas become the spawning ground of solutions. Negotiation is an all-too human business, a strange and challenging alchemy of difficult choices. It reflects, says Susan Podziba, Aa chaotic mix of passions, values, interests, emotions, self interest, and altruism.@[21] It is the job of the Protean negotiator to manage all of these with highest degree of elegance and intelligence possible. It is the job of the Protean mediator to help negotiators turbo-charge those efforts and make them as humane and productive as possible.

6. Ancient Imperatives - Revisited

In 1950 John Marshall, an anthropologist and film maker, received funding from the Smithsonian Institution and Harvard University to study one of the last migratory bands of the! Kung people, also known as the San People or Bushmen.

---

[21] AThe Human Side of Complex Public Policy Mediation,@ Susan Podziba, in Negotiation Journal, October 2003, p. 285-290.

Living in small groups in Namibia on the edge of the Kalahari Desert, these people were, and remain, one of the last true remnant hunting and gathering peoples on the planet. Though few in numbers, they are, even today, what we all were 2,000 generations back.

The result of Marshall's work was a film called "The Hunters." It was, among other triumphs, the first use of color film in ethnographic cinematography. The film, which I first saw as a graduate student, is remarkable for more substantive reasons as well. In a slow but mounting drama, it chronicles the story of a hunting expedition by four men from the band who have set off to find large game at a time when the group desperately needs a large infusion of protein. The band is small, four or five extended families, with a total population of about 30. Without fresh meat, elders and babies start to die. Without fresh meat, women cannot gather tubers and men cannot hunt. So the men depart.

Over the next several days, in fits and starts, they spot and track various animals without much luck. They sneak up on a kudu, try to get close, and spook the animal away. They find some porcupines and eat their meager flesh themselves. They spot other animals but are unsuccessful in bringing them down. Finally, they encounter a small herd of giraffes and succeed, after much complication, in shooting an arrow tipped with poison into one of them. For the next few days the viewer follows them as they track the creature over hard terrain, nearly losing it in the surrounding hills and scrub. Finally, they find the animal in a stand of trees, weakened and abandoned by the rest of the herd. With arrows and spears they battle the still dangerous giraffe and bring it down, butcher and dry it, and begin the journey home.

Seeing this film again after many years, I looked at it through the layers of a professional career focused on the constructive management of conflict. I hazily recalled the four hunters as short, tough, skilled men working in tandem to accomplish their objectives. I remembered the dry and torturous terrain and the sense of urgency I felt for them to find food. But this time, I saw something else: their individuality and uniqueness. I saw four men, each different; four functions in the group, each different; four skills and preoccupations, each different.

Although all of them hunt, one man among them is more skilled than the others. He is strong and competitive, able to pick up scents and follow trails when the others seem baffled. In these moments, the others rely on his knowledge and prowess. The second is a craftsman. He is the practical technicians, the one who fashions the small, intricate, and high lethal arrows they use, the one who tips them

with poison, the one who repairs spears and belts and bows. The third is the shaman, the man who performs small ceremonies along the way and who reminds the others of the rituals that must be done if harmony in the world is to be maintained. And the last is the headman, the man who insists on cooperation when the others are quarreling, the one who wears the weight of their many failures on his shudder, the one who urges them to work together until their goal is accomplished.

Four men, four ancient imperatives. In an essay celebrating Marshall's documentary, William Irwin Thompson writes: "The model of four seems to be a persistent one; it recalls the rule of four in the Indian caste system, Plato, Vico, Blake, Marx, Jung, and McLuhan." Perhaps that same rule is at play now in Pulsar's negotiations in Brazil, in the tenant's urgings to his landlord, in the secret ambassadorial talks that are inevitably going on along some border. Says Thompson: we may never know whether this structure of four exists in reality or is simply a convenient artifice to try to explain our crude fumblings when we attack difficult problems. Either way, Marshall's film hints at something older and more mysterious that permeates the efforts we are engaged in.

Why Mediation Works When Negotiation Fails

By Stephen A. Hochman, Esq.

1. Mediation permits each party (and his or her attorney) to communicate directly to the other party (rather than communicating only through their respective attorneys).

2. A mediator can let the parties vent their feelings, put emotions behind them, focus on their *real* needs and interests and then make a rational cost/benefit and risk/reward analysis of the differences between litigating and settling.

3. A mediator can be an “agent of reality” to help the parties and their advocates overcome “advocacy bias” and other cognitive barriers to objective risk analysis.

    a. Advocates have a tendency to fall in love with their arguments, and parties have a tendency to believe what they want to believe.

    b. A mediator has more credibility than the opposing party in pointing out the weaknesses in each party's case so as to assist each party in making an *objective* risk/reward and cost/benefit analysis of its litigation alternative.

    c. A mediator can help the parties focus on their tolerance for or aversion to risk (e.g., a defendant might prefer paying $250,000 to avoid a 20% risk of losing $1,000,000, whereas a plaintiff might prefer a 20% chance of winning $1,000,000 rather than a certainty of receiving $250.000).

4. A mediator has a different agenda than the parties.

    a. A party's agenda may be (i) to get (or keep) as much as possible in a zero sum negotiation or (ii) to "win," "get even," be vindicated or satisfy a similar non-economic need.

    b. The mediator's sole agenda is to assist each party in finding a way to settle on terms that (i) meet its real needs and interests and (ii) are preferable to its litigation alternative.

5 A mediator can help the parties create added value.

    a. A mediator can suggest ways to enlarge the pie (*e.g.*, non-monetary benefits that cost one party less than the value of that benefit to the other, the difference being the "added value").

    b. When the mediator suggests a method for adding value to each party in separate confidential caucuses, that may enhance its perceived value to each party, whereas if one party (*e.g.*, a seller) suggests a method of creating added value directly to the other (*e.g.*, a buyer) by offering to give the buyer a discount on

future orders, the buyer may feel entitled to keep all of the added value because the fact that the seller (as opposed to the mediator) suggested the discount may be perceived by the buyer as a benefit primarily to the seller who suggested it,thus causing the buyer to expect more than a fair share of the added value.

6 Communicating directly to the other party or party representative that has the major stake in the outcome can minimize the risk of a conflict of interest between that party and its negotiating representative.

a. Litigators may have financial or ego needs that may, consciously or subconsciously, cause them to overvalue the strengths of their case and thus prefer to focus on the advantage of winning in litigation over a settlement that would avoid the risk of losing.

b. A party's negotiating agent may have a different need from its principal or employer (e.g., a credit manager may wish to avoid taking responsibility for a write-off).

7. A proposal suggested by a mediator may avoid a knee-jerk negative reaction, which might have been the reaction if the other party made the same proposal.

a. When made by the mediator rather than one's adversary, the proposal is more likely to be considered and evaluated rather than suspected or attacked.

b. If one party makes a final "take-it or leave-it" proposal to the other, the other may not be willing to accept an ultimatum from its adversary, whereas if a respected mediator makes a proposal that he or she believes is better for both parties than their litigation alternative, it is more likely to be accepted by both parties.

8. By making a mediator's proposal as a last resort to avoid impasse, the mediator can overcome the posturing that negotiators often use in an attempt to settle on terms that are better than their worst-case alternative to litigation.

a. Because each party knows that, if it accepts (albeit reluctantly) the mediator's proposal, the mediator will not reveal its acceptance to the other party unless the other party also accepts the proposal, there is no downside in accepting the proposal as long as it is at least somewhat better than its worst-case alternative to litigation.

b. One definition of a good settlement is when both parties are equally unhappy because they agreed to a less than ideal settlement that nevertheless was determined by each party to be better than its uncertain or "role-the-dice" litigation or arbitration alternative.

HOW TO BE AN EFFECTIVE ADVOCATE IN MEDIATION

By Stephen A. Hochman, Esq.[1]

I. The Pre-Mediation Stage

A. Subjects to Discuss at a Pre-Mediation Conference with the Mediator (Either in a Joint Conference or Privately)

1. Scheduling the mediation so as to allow sufficient time for the process to work

2. Asking the mediator to get your adversary's ultimate decision maker to participate in the mediation (including their insurance carrier, if applicable)

   a. If the ultimate decision maker is unavailable, suggest that he or she participate by phone, and get cell phone number

   b. If ultimate decision maker cannot participate by phone, suggest that the mediator get a guarantee from your adversary that he or she will meet with the mediator in a private caucus at a future date if needed to break impasse

3. The desirability of having the parties exchange relevant documents or information prior to the mediation

4. Other information you should tell, or questions you should ask, the mediator (*e.g.*, ask about experience, success rate, style)

B. Contents of the Pre-Mediation Submission

1. What should it include and should you share it with your adversary?

2. What confidential information should you share (or not share) with the mediator?

C. Who Should You Bring to the Mediation?

1. The representatives of your client who were involved at the deal level

2. The higher level decision makers

3. Key witnesses

4. Experts

5. Your client’s insurance carrier, if applicable

D. How Should You Prepare Your Client for the Mediation?

1. Explain the process, the extent of confidentiality, the role of the mediator and the fact that the opposing party as well as the mediator is the audience.

2. Find out your client's needs and interests and the desirability of giving or getting non-monetary benefits.

3. Discuss of the strengths and weaknesses of your client's case.

4. Adjust your client's expectations as to its BATNA and WATNA as well as its MYLATA in the context of its business alternatives as well as its litigation alternatives.

5. Discuss settlement options (*e.g.*, monetary and non-monetary consideration, future business, confidentiality, non-disparagement agreements, etc.).

6. Plan the negotiation strategy.

   a. Explain the need for the negotiation dance.

   b. Explain the need for patience.

7. Explain the role of your client (i) in the joint session and (ii) in the caucuses:

   a. In the joint session, consider having your client explain his or her suffering and feelings (but avoiding accusatory statements or hot buttons), and acknowledge adversary’s sufferings or feelings.

   b. In the caucuses, consider good cop, bad cop strategy and what not to tell the mediator.

   c. Advise your client as to when to speak, and when not to speak, and ways you and your client can privately signal each other.

d. Advise your client as to how to respond to the adversary's accusations or provocations.

8. Prepare your client for likely questions the mediator may ask.

E. Consider Requesting Pre-Mediation Meetings, Such As:

1. a four-way meeting (with clients) or a two-way meeting (lawyers only), without the mediator:

a. to explore settlement and avoid the cost of mediation;

b. to decide on the ground rules for the mediation.

2. a four-way (with clients) or two-way (lawyers only) meeting with the mediator

a. to agree on the mediation process;

b. to define and narrow the issues;

c. to discuss sensitive party relationship issues.

3. a pre-mediation caucus with the mediator, either with or without your clients.

F. Consider Bringing a Draft Settlement Agreement to the Mediation.

II. The Joint Session (Should It Ever Be Avoided?)

A. Your Opening Statement

1. Should you use the positional bargaining approach - *e.g.*, "We believe we will win in litigation because...."?

2. Should you use the fair settlement approach - *e.g.*, "We are here because we want to settle on terms that are fair to (or better than the alternative for) both parties"?

3. Should you use the problem solving approach?

a. Explain your desire to accommodate your adversary's needs.

b. Explain the impediments to accommodate those needs, for example:

(x) the strength of your case and your duty not to settle if your litigation alternative is better;

(y) practical constraints (*e.g.*, financial inability).

c. Invite your adversary to provide information or ways to overcome the impediment (*e.g.*, what are the weaknesses in my case that I may have missed, or how can we give you benefits other than money).

4. Should you propose focusing on business deal alternatives in the joint session?

5. To what extent should you avoid telling the other side its weaknesses and use the mediator to tell them their bad news?

6. Avoid hyperbole, overstatement, strident tone and accusatory or insulting statements (*e.g.*, "It's a lie", "Your position is absurd", "Your case stinks and is worth only nuisance value").

7. Show empathy to the other side if appropriate.

8. Don't discuss money or other types of consideration yet.

B. <u>How Should You Evaluate and Respond to Your Adversary's Opening Statement?</u>

1. Listen for clues as to their needs and interests.

2. Be prepared to respond if your adversary communicates threats, insults or a positional bargaining approach.

C. <u>Consider Communications After the Opening Statements</u>

1. to get clarification or information from your adversary (as opposed to arguing);

2. to explore possible business deal alternatives to litigation.

III. The Initial Caucus

A. Consider Asking the Mediator For His or Her Views as to the Litigation Alternative.

B. Should You Negotiate with the Mediator?

C. To What Extent Should You Disclose the Weaknesses in Your Case to the Mediator?

D. Consider the Extent to Which You Should Hold Back Some Strengths or Arguments For Later.

E. Give the Mediator Ammunition to Show the Other Side Its Weaknesses.

F. Coach the Mediator Not to Permit the Other Side to Discuss Money Before the Mediator Does Risk Analysis with Them

G. Don't Make or Respond to "Out-Of-The-Ballpark" Offers or Demands.

H. Coach the Mediator to Discourage the Other Side to Avoid Making "Out-Of-The-Ballpark" Offers or Demands.

I. Consider Using the Mediator:

1. to convey difficult messages to your adversary;

2. to get information from your adversary;

3. to test the viability of settlement alternatives;

4. to orchestrate the negotiation;

5. to help get your client to be realistic about his or her litigation alternative.

J. Coach the Mediator to Let the Other Side Vent and Have Its Feelings Validated so It can Focus on Tomorrow Rather Than Yesterday.

IV. Subsequent Caucuses

A. Consider When and How It's Better to Let the Mediator be the Author of Your Proposals to Avoid Reactive Devaluation.

B. Make a Reasonable Opening Offer or Response Through the Mediator:

1. Leave room for movement;

2. Consider offering a range rather than an absolute number.

C. Look for Clues in what the Mediator Tells You About the Other Side.

D. Consider Holding Back Some Strengths and Some Proposals Until the Final Caucus.

E. Don't Accept the Other Side's Proposals Too Quickly.

F. Support Your Proposals with Reasons.

G. Coach the Mediator on How to Let (A) the Plaintiff Feel It is Getting the Last Available Dollar From the Defendant or (B) the Defendant Feel It is Not Overpaying (As The Case May Be)

H. Should You Tell the Mediator Your Real "Bottom Line" (or "Last Dollar")?

I. Should You Say to the Mediator "This is the Most We Will Pay Unless You Can Show Me I'm Missing Something?"

J. Explain to the Mediator the Basis of Your Rational Costs/Benefit Analysis.

V. **Breaking Impasse and Closing the Deal:**

A. Consider Offering any Available Non-Monetary Concessions at This Time (*e.g.*, Apology, Letter of Recommendation or Amended U-5).

B. Consider Suggesting that the Mediator Propose Conditional Offers.

C. Consider Orchestrating a Mediator's Proposal.

D. Don't Accept the Mediator's Proposal Too Quickly.

E. Consider Baseball or High/Low Arbitration to Close the Gap.

F. Consider Finalizing a Potentially Controversial Settlement Agreement Even Though the Dollar Amount is Still Open:

1. It commits both sides to the process;

2. It creates momentum -- how can we let it fail now?

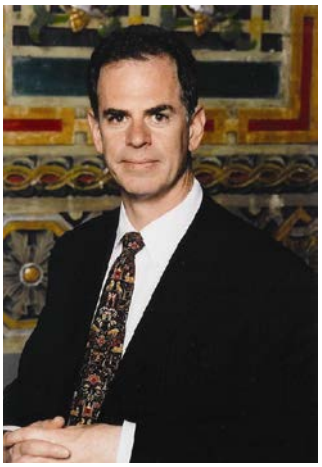
G. Consider Whether the Process Should Keep Going or Take a Breather.

H. Consider Whether the Lawyers or the Parties Should Confer Separately with Each Other or with the Mediator.

I. Consider the Desirability of Imposing a Deadline (Even if Flexible).

VI. **<u>Conclusion</u>**- Mediation is an adversarial as well as a collaborative process.

NEGOTIATION SKILLS:
Tips on How to Negotiate and Acquire Negotiation Skills



By: Simeon H. Baum**

When asked to address the modest subject of "How to Negotiate and Acquire Negotiation Skills", I am reminded of the narrator's comment in *Moby Dick*:

> "One often hears of writers that rise and swell with their subject, though it may seem just an ordinary one. How, then, with me, writing of this Leviathan? Unconsciously my chirography expands into placard capitals. Give me a condor's quill! Give me Vesuvius' crater for an inkstand. Friends, hold my arms! For in the mere act of penning my thoughts of this Leviathan, they weary me, and make me faint with their outstretching comprehensiveness of sweep, as if to include the whole circle of the sciences, and all the generations of whales, and men, and mastodons, past, present, and to come, with all the revolving panoramas of empire on earth, and throughout the whole universe, not excluding its suburbs. Such, and so magnifying, is the virtue of a large and liberal theme! We expand to its bulk. To produce a mighty book, you must choose a mighty theme. No great and enduring volume can ever be written on the flea, though many there be who have tried it."[1]

Hundreds of books have been written on this theme.[2] Moreover, all of us go through life negotiating in myriad circumstances. Thus all of us are experts in this area. What can one add that is meaningful for a 50 minute program?

[1] Melville, *Moby Dick*, Ch. 104.

[2] Some recommended reading includes: Fisher & Ury, Getting to Yes; Ury, Getting Past No; Mnookin, Beyond Winning; Shell, Bargaining for Advantage; ABA Section on Dispute Resolution, The Negotiator's Handbook.

What follows is an effort to capture key ideas and approaches that appear to have nearly universal applicability and to put them into a helpful, simplified framework. For starters, the simplest format follows and expands upon the advice of the Ancient Greeks: know yourself, know others, know the world. It then turns Taoist and adds a fourth component, recognizing that Negotiation is very much a process: the Way.

***Nosce te ipsum* (Know yourself).**

This phrase, inscribed above the entrance to the ancient temple of Apollo at Delphi, captures a core injunction for negotiators.

Know Your Interests.

In their well known negotiation model, Fisher and Ury – and the vast majority of proponents of joint, mutual gains, cooperative bargaining models – suggest that ideal negotiation involves the identification of the interests of each party, a search for options that will best satisfy those interests, and consideration of alternatives to any proposed deal in light of those interests. At the outset, in order to be effective, a good negotiator must be familiar with the interests that he represents – of himself, his group or his principals. Before starting any negotiation, it is useful to be clear on what one needs, and to give thought to how best one might satisfy those needs. "What do we need? What are we trying to accomplish?" should be expressly asked in advance. Are we trying to maintain a client base? Trying to avoid damage to good will or a reputation? In a labor context, are we trying to stay within budget in light of other material costs; increase productivity; cut down on health costs; improve our risk picture for experience rating by insurers; improve morale? Knowing the needs can direct the strategy and also can keep one alert to opportunities that might arise in the course of negotiations.

Keep a Tab on Your Emotions & Inner Life.

Beyond this, it is vital to be in touch with ones actual feelings, thoughts, and impulses at any point in time. In "Getting Past No," Ury advises negotiators not to react to provocative actions or comments by one's negotiation counterparty. Reactions can lead to escalation. They can also cloud chances to learn about the other. They can kill chances to demonstrate recognition of the needs and feelings of the other, which could have enhanced the quality of communication and relationship, smoothing the bargaining, building trust, and capturing opportunities for mutual gain. The prerequisite for preventing undue reactions is sufficient self awareness to identify ones emotions and inner responses, including value judgments and the like, before they are given expression.

Cultivate a Disciplined Self Consciousness.[3]

[3] The phrase "disciplined self consciousness," coined by John Ross Carter, Professor of Philosophy and Religion; Robert Hung-Ngai Ho Professor of Asian Studies, Colgate University, for use in connection with the comparative study of religion, has wide applicability in the context of negotiation as well.

For all of this, a disciplined self-consciousness is a negotiation treasure. Part of the discipline, in not reacting, is to know that there is a difference between having a feeling, thought, or even conviction, and acting on it. Knowing oneself is a first step in keeping the ego under control.

SKILL ACQUISITION:

Try Mindfulness Meditation.

How do we develop and increase this type of self knowledge? There are a range of activities and even exercises that enhance cultivation of self awareness and promote self knowledge. For nearly a decade, Professor Len Riskin[4] has been promoting mindfulness meditation as a way not only of reducing stress but also of increasing awareness of one's inner processes on the theory that this improves capacity as a negotiator or mediator. Sitting quietly, following the breath, being aware of bodily sensations, letting go particular emotions or thoughts – again, sensing the freedom of awareness without compulsive action – and, with bare attention, gaining a greater sense of presence and the richness of just being are all part of this type of exercise.

Catalogue Interests.

In addition, as mentioned above, reflective cataloguing of ones needs and interests in advance of a negotiation, and reconsidering needs and interests throughout the course of the negotiation, puts in the forefront of one's consciousness matters that should be addressed or that might enable one to seize opportunities for gain in the bargaining process.

[4] *See, e.g.*, Leonard Riskin (C.A. Leedy Professor of Law and Director of the Center for the Study of Dispute Resolution and the Initiative on Mindfulness in Law and Dispute Resolution at the University of Missouri-Columbia School of Law) "The Contemplative Lawyer: On the Potential Relevance of Mindfulness Meditation to Law Students, Lawyers, and their Clients," Harvard Negotiation Law Review (May 2002). This was the centerpiece of a symposium entitled Mindfulness in Law and Dispute Resolution. Professor Riskin has provided training in mindfulness in law and dispute resolution at a wide range of venues including the Harvard Negotiation Insight Initiative, Harvard Law School, Straus Institute for Dispute Resolution, Pepperdine University School of Law, and Benjamin N. Cardozo School of Law.

Observe the Mirror of Others.

Beyond awareness of one's impulses, feelings, thoughts, judgments and interests, there is another type of self-understanding, all too often elusive, as expressed by the poet Robert Burns:

> "O would some power the giftie gie us to see ourselves as others see us."[5]

Particularly where one is engaged in negotiation, it is important to observe not only one's inner workings, sense of self, and recognition of one's own interests, but also the impact one is making on the other. How do they see us?

Catch Cultural Differences.

This becomes even more critical in negotiations between members of different cultures. Lecturers like our own Professor Hal Abramson, on cross cultural understanding in the mediation context, frequently identify such differences as expectations for eye contact. In certain South American cultures, *e.g.*, eye contact is seen as rude; yet for us, failure to make eye contact might be read as dishonesty, disrespect or a lack of self-confidence.

Be Alert to Conflict Handling Styles.

Even without major cross cultural differences, there can be a substantial discrepancy between the way one believes one is behaving and the way others perceive it. Classic examples are disconnects between people with different styles of handling conflict. These often are classified in five groups: competitors, compromisers, collaborators, accommodators, and avoiders. First, knowing one's own preferred mode of handling conflict can alert one to natural ways of reacting and can liberate one to try out different approaches. Understanding these modes leads to a better understanding of the negotiating counterparty, and also to an appreciation of how they might be perceiving us.

SKILL ACQUISITION:

Test Drive the Thomas-Kilmann Conflict Mode Instrument.

While we will not have time to administer this test during this 50 minute period, it can be instructive to test oneself using the Thomas-Kilmann Conflict Mode Instrument.[6]

[5] (O would some power the gift to give us to see ourselves as others see us.) Robert Burns, Poem "To a Louse," verse 8. In this poem, Burns, who was the Scottish national poet (1759 - 1796), paints a scene of a haughty beauty at Church, unaware of the louse on her bonnet and of others' awareness of same.

[6] Thomas-Kilmann Conflict Mode Instrument -- also known as the TKI (Mountain View, CA: CPP, Inc., 1974–2009), by Kenneth W. Thomas and Ralph H. Kilmann; *see*, http://kilmann.com/conflict.html.

This series of questions takes an inventory of one's preferred style of handling conflict. The basic premise is that people vary in the degree to which they seek to assert their own interests even at the expense of others (compete), or to cooperate and promote the interests of others (accommodate). Some prefer just to avoid conflict altogether, neither asserting their own interest in the particular dispute, nor satisfying the other's interest. Others seek a moderated satisfaction of their own interests and those of the other, through the shared sacrifice of compromise. Yet others maximize the promotion of both their own interests and those of the other – through collaboration. Despite the apparent preference of negotiation theorists for collaboration – as the way to reach the pareto optimum – the TKCMI advises that each of these modes of handling conflict has its own utility and drawbacks. It is a fascinating study, worth investigating.

For our purposes, in addition the knowledge of self and other gained through familiarity with the TKCMI and its principles, there is an added insight into the way people of different mode preferences interact and understand each other. A classic example is the competitor matched with an avoider. Competitors like to seal deals. Avoiders prefer to take time. The result can often be an odd mix where competitors offer up a series of increasing offers, just to be frustrated by further delays by hesitant avoiders. Judgments can be added to the mix, with competitors thinking avoiders are not trying or not appreciating their efforts and avoiders thinking competitors are pushy and self-interested.

Try Being Proactive – Understand One's Impact

Awareness of differences in styles and preferences can help with self understanding, as well. Beyond this, there are a host of behaviors and expressions that can have an impact on others and lead them to perceive us in manner different from the way we perceive ourselves. To the extent we are seeking to accomplish the goal of building an agreement that maximizes everyone's interests, we need to encourage the other to feel safe making disclosures about their interests, and to feel it is in their own interest to maximize ours.

Nosce Alius **(Know the Other)**

The dance of negotiation by its nature involves partners. The advice given for self-knowledge above, applies across the board to ones counterparties as well. Both to prepare for negotiation and throughout the course of negotiations, it is helpful to be alert to what is going on for the party across the table. What are their interests? How are they feeling? What is important to them? What are their cultural assumptions? What is their conflict style? What is their context? What is their sense of self, their hopes, dreams, and aspirations?

Only by understanding the interests of the counterparty can a negotiator work to develop options that are going to meet everyone's needs. One can learn these interests indirectly, through the application of logic, and through direct communication. The best

way to learn of the other's interests is from what they say. The degree of disclosure by the other party will be influenced by the tone at the bargaining table.

SKILLS ACQUISITION:

Set a Tone Conducive to Candid Disclosure; Be Effective as an Active Listener.

Active listening is a buzz word in ADR circles, but for good reason. Targeted questioning calls for answers to questions we already have, to promote our pre-existing goals. Active listening, by contrast, is more open-ended. The other party can drive that conversation.

With active listening, we use open ended questions, show recognition of the other party's feelings, values and perspectives, and acknowledge their worth. A classic formulation is VECS: validate, empathize, clarify and summarize.

By this approach, the other party feels less alone and more willing to open up. This is the royal way to learning their interests. With that information, one can look for ways to create value in a deal – ways to satisfy the other party's interests and achieve satisfaction of ones own.

Communication is Key.

Even First Amendment case law recognizes that communication occurs not only with words and speech but also in nonverbal ways. The effective negotiator is alert to, and uses, all forms of communication to advantage. Body language – the handshake, eye contact, posture, tone of voice – all communicate messages or attitudes. It is fundamental to communicate in a manner that builds trust and rapport.

Build Relationship & Trust.

Understanding that it takes two to tango in deal making and that we must learn what will satisfy the other in order for the other to meet our own needs, nothing goes so far as a relationship of trust to foster disclosure. To enhance relationship, people from various cultures give gifts or serve food prior to commencing talks, to signal good will and create a common bond. Shell, in Bargaining for Advantage, tells of an executive who gave his counterparty a gold watch prior to initiating merger talks.[7] This signaled a valuing of the other and, to paraphrase Claude Rains at the end of *Casablanca*, "the beginning of a beautiful relationship."

Watch for Dynamics of Escalation and De-escalation.

We have all seen it happen. An even toned conversation all of a sudden goes out of control. Tempers flare, people leave the room. Often these scenarios can be altered if the participants are aware of the factors escalating tensions as they arise. Points are made,

[7] G. Richard Shell, *Bargaining for Advantage – Negotiation Strategies for Reasonable People*.

counterpoints asserted, one-upmanship takes place, voice tone changes, expressions change, the pace of speech accelerates. If one sees this happening, there is no loss in taking a break, changing tone, slowing things down. Much can be said for the pause that refreshes. Silence is a gift.

Control the Spigot of Disclosure.

At the heart of communications in negotiation is the flow of information. This can range from communicating ones own interests, eliciting and confirming the interest of the other, learning about context, developing principles for fair resolutions, exchanging offers, discussing alternatives, assessing and evaluating legal options and even possible litigation outcomes.

There is a balance in disclosure. Social scientists have observed that disclosure by one party encourages disclosure by the other; and the opposite is true as well. It pays to be clear in advance of what are one's confidential facts, interests, concerns and analyses, and also of what one would like to learn from the other. These views should be revisited throughout the negotiation.

Disclosure Choices are Informed by Competitive or Cooperative Strategy and Behavior.

In short, be artful in striking the delicate balance in disclosure. Share where possible, both to encourage sharing and also to enable one's counterparty to help think of options that might meet one's own needs. But be judicious as well, on disclosure of one's own weak points, points that give the other party leverage, feelings that might provoke, and arguments that might lead to escalation or corrective action shoring up the other party's position.

The fundamental difficulty entangled in the preceding consideration is the question of whether to engage in strategic behavior that is competitive or cooperative. Current negotiation theory has shown the greater advantages that can be gained by cooperative behavior. Only cooperation can enable both parties to learn and work together to meet the interests of all, and to maximize gain. A legitimate cause for hesitation in proceeding down the cooperative path is the view that one's counterparty is motivated by a purely competitive strategy or driven by ill will. The bind implicit in this assessment is that ill will or competitive approaches might change if one takes a risk and extends the olive branch. It takes courage and the ability to take a short term loss to make this long term advance.

There is no ultimate solution to this problem. In each instance one uses one's best judgment. But it pays to be aware of this set of choices and of the way the exercise by one party of choices to follow a competitive or cooperative strategy can itself be transformative for all parties.

Maintain Credibility.

Nothing can destroy trust and good will like the discovery that one has been lying or that one is operating with less than candor. Counterparties will clam up and be more inclined to resort to competitive approaches in self-defense if they perceive a negotiator to be dishonest or insincere. Crafty conduct can not only hurt one in the instant negotiation but also can wreak havoc on one's reputation in the long run.

Assess Commitment Levels & Risk Tolerance.

A classic image is the game of chicken. Imagine teenagers racing at each other in hot rods in some LA viaduct. Who will swerve out of the way? If I were driving, I know the answer. I tend to be highly risk averse. It is fascinating to watch commitment levels at play in negotiations. There is great strength in posing a credible threat. To the extent one is able to gage the counterparty's commitment to a certain course of action or deal element, one will understand whether a concession need be made. The capacity to understand the nature of one's own and the other's level of commitment, and also tendency to avoid risk in general and on the particular point at issue comes not only from understanding the person, but also from understanding their context. What happens to them if they give on a particular point? What interest is affected? What in the larger picture do they win or lose? This analysis should be applied for understanding of both self and others.

***Nosce Mundus* (Know the World)**

None of us lives in isolation. As indicated above, to understand ourselves, we must understand our context. This is true for understanding the other as well. An effective negotiator is sensitive to the context in which every party is suspended, recognizing the impact of context and using it as a strength.

Behold the Business Context.

Litigators in particular can be reminded to think beyond the case. Why did this case originate? What is driving the parties?

If one is negotiating a real estate deal, it certainly pays to understand the current real estate market, and even the broader economic climate as that affects property and resale values, demand for space, capacity to build, the ability to obtain loans, interest rates, and related issues.

More specifically, knowing a market enables the negotiator to arrive at more compelling standards for use when setting values. The uses of mutually acceptable standards is routinely recommended by proponents of principled negotiation. Once recognized, they give direction to a negotiation and support fair and doable deals.

Heed the Hierarchy.

Wayne Outten, when thinking about strategies for negotiating on behalf of employees, considers where those employees stand within the framework of their employer. Do they have political allies, "Rabbis," people willing to go to bat for them? Do they have "political capital," credibility with certain supervisors or others in management? Have they earned loyalty; would harm to the employee engender a sense of guilt?

Conversely, knowing where the opposing negotiator fits can be helpful. Is he or she trying to cover for their own mistake? Is he responsible for the P&L that is affected by this deal or litigation? Who in the chain of authority must be brought in to achieve closure? Is the negotiator at a level where he or she is trying to impress a superior, or trying to prove a point to a subordinate?

Assess Alternatives.

Any post-modern piece sketching the contours of the Leviathan of Negotiation would have a gaping hole larger than that great beast's blowhole if it omitted mention of the BATNA coined and popularized by Fisher and Ury. BATNA – the best alternative to a negotiated agreement – as well as its variants, all other alternatives, good, bad and ugly, can be used by negotiators to test whether a deal on the table is worth taking. If the likely, tangible alternative to that deal is superior, the rational negotiator keeps bargaining for something better or walks away.

The simplest example is of a currently employed party testing a proposal from a prospective new employer. If the job offer is for lower pay, at a shakier institution, doing less exciting work, with worse prospects for advancement, in a less convenient location, with nastier colleagues, and a less impressive title than one's current employer, no rational worker will take that bait. When these and other similar factors begin to equal and exceed the appeal of those at the current job, then the new offer begins to seem worth taking. Of course, returning to self-knowledge, one still needs to be aware of one's risk tolerance. Even if the offer is better than one's BATNA, is one willing to move from the known to the unknown?

Analyze Risk.

Beyond the subjective condition of risk tolerance, in the context of pending or potential litigation, understanding alternatives to a deal requires an understanding of the probable consequence of litigation. This includes not only the like outcome after trial and appeal, but also the direct and indirect costs incurred along the way. These are often described as risk analysis and transaction cost analysis.[8] Careful counsel spend hours

[8] For helpful articles on decision trees and risk analysis, *see*, Douglas C. Allen, *Analytical Tools and Techniques: Decision Analysis Using Decision Tree Modeling;* Marjorie Corman Aaron, *The Value of Decision Analysis in Mediation Practice*, 11 Neg. J. 123 (1995); Marc B. Victor, *The Proper Use of Decision Analysis to Assist Litigation Strategy*, 40 Bus. Law 617 (1984-1985); Jeffrey M. Senger, *Decision*

assessing the strengths and weaknesses of their case to guide clients in assessing the amount of payment that makes sense to put that matter to bed.

SKILL ACQUISITION.

Man Learns from Machine – Try the TreeAge Decision Tree Program.

As a general tool in decision making, it is helpful to identify areas of uncertainty and choice points that affect outcomes along the path of a predictable process. For example, in a case, there might be uncertainty on whether discovery will develop favorable or unfavorable information on a set of points; on whether the law characterizes a particular action or arrangement as legal or illegal; on whether one will win or lose on motions to dismiss and for summary judgment; on the range of damages that might be awarded under different standards at trial; and on likelihood of victory on appeal. Added to this mix, can be the litigation transaction costs – fees for attorneys and experts, transcripts, photocopying, preparation of exhibits and the like. These costs can be factored in along the way.

We all can rough out these factors and do our own math. If there is a 50/50 chance that we will win $1,000,000 after trial, we can loosely give that case a $500,000 value. Understanding it will cost the client $250,000 in fees to get there, we might reduce that value to $250,000 if that sum of cash were sitting on the barrelhead for the taking to end the suit.

When the factors get complex, we might explore a program that does the math on the factors of uncertainty and choices taken along the way – TreeAge. This software, available online at treeage.com, helps develop and test outcome through complex decision tree analysis.

Gather Information.

Across the board, information is the medium of negotiation. Information helps us identify our own and the other's interests. It is the basis of our understanding of the business, legal, or other risk context for assessing a deal. It is the *prima materia* with which we make any assessment of risk or value. Only with information can we discover and assess our leverage.

Assess Leverage; Engage in Logrolling.

Much has been written on leverage. When one controls the counterparty's access to a means of satisfying that counterparty's need, or if one can impede the satisfaction of that need, one has bargaining power. It is important to be clear on what those levers are on both sides of the table. It is further helpful to see if there are alternative means of

Analysis in Negotiation, 87 Marquette Law Rev. 723 (2004); David B. Hoffer, *Decision Analysis as a Mediator's Tool,* 1 Harv. Neg. Law Rev. 113 (1996).

satisfying, or jeopardizing, the need or interest in question; this liberates one from being hung up on a particular risk or issue.

There are a good number of times when it can cost one party little to satisfy a significant need of the other party. If each party can offer something of low value to the offeror and high value to the other party, this presents a wonderful opportunity for trading that will generate higher overall value in the deal. This type of trading, known as logrolling, can be a source of great satisfaction.

Crunch Numbers.

The risk analysis discussion above should already suggest that a good negotiator should not shy away from numbers. In deals there are often many moving parts, each with its potential economic value. It pays to try to price values, to calculate risks, to test principles and assumptions by working out their math.

Develop Principles and Standards.

At the heart of the Fisher-Ury model of negotiation – in addition to putting the parties into a cooperative frame of mind, focusing on the problem, identifying the issues, discovering underlying interests, and developing options to meet those interests, producing a deal that is superior to the BATNA – is the recognition that developing workable options and deals often depends upon arriving at principles which all parties can adopt. This fits into our "mundus" section, because they are an effort at transforming the subjective into the realm of objectivity. Whether it is fair, doable, wise, legal, efficient, considerate, reciprocal, due – whatever the standard, it pays consciously to work to develop standards that can be discussed with and adopted by one's counterparty in order to address distributive issues or generally to work out a deal.

This can include finding an objective basis for assessments by turning to authorities in recognized texts – like the Kelley Blue Book for used car values – to experts, like appraisers or accountants, or to broader custom and usage in a particular industry or trade. The net result is bringing the discussion into an objective realm susceptible to shared, open analysis, and away from the subjective realm governed by the assertion of wills.

Opening to the Great Way

Having embraced the chiliocosm, framing out content and approaches through the vast domains of self, other, and the world, a comprehensive presentation on Negotiation Skills must finally recognize that we are dealing with what is fundamentally a process.

We recognize that there is a wide range of styles and approaches in negotiation that can differ and yet be both effective and legitimate. Having said that, I still might make a few recommendations. Since we engage in negotiation in all areas of life, there is something to be said for being bigger than the topic. Sometimes living with dignity and

genuineness trumps a minor strategic gain. Moreover, with principled, joint mutual gains approaches, it is possible to hold one's own, and indeed improve the deal outcome, while still acting with decency and in a manner consistent with ones own values.

As we engage in this process, we can negotiate the process itself. If we find ourselves in a mode of interacting that seems inappropriate or unproductive, we can discuss our approaches with the counterparty. We are all too familiar with the frustration of negotiating the size and location of the table. Yet, while we do not wish to be hung up and frozen in our interactions, it can also be liberating – and good strategy – to be alert to process choices that might enhance relationships, information gathering, or the deal.

Negotiators should cultivate creativity, openness, and flexibility. We are participating in something greater than ourselves. Richer possibilities may emerge from a deal than we could have at first realistically have imagined. This attitude of openness makes us not only more humane and appreciative of others, it also opens us to reality and enables us to see and seize upon opportunities.

Along these lines, let a lively silence be your baseline. This helps in decision making on disclosure flow, preserves candor through eliminating impulsive misrepresentations, controls the expression of unhelpful emotional reactions, prevents reactive behavior overall, and encourages listening to others. It gives one a chance to consider before committing. Yet, this approach should not be at the expense of wholesome spontaneity and warm sharing.

Finally, negotiation, at its core, recognizes of the freedom and dignity of all participants. We all can take it or leave it, talk or walk. For this reason, it is a beautiful way indeed.

***Simeon H. Baum, President of Resolve Mediation Services, Inc. (www.mediators.com), was the first Chair of NYSBA's Dispute Resolution Section. Mr. Baum has mediated over 800 disputes, including the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site and Trump's $ 1 billion suit over the West Side Hudson River development. He was selected for New York Magazine's 2005 - 2010 "Best Lawyers" and "New York Super Lawyers" listings for ADR. He teaches Negotiation Theory & Skills at Benjamin N. Cardozo School of Law and is a frequent speaker and trainer on ADR.*

Top 10s

Ten Mistakes Even Good Mediators May Make

1. **Failing to get the right persons at the table.**

2. **Failing to explain the mediator's role as "agent of reality."**

3. **Permitting settlement negotiations to begin prematurely - i.e.,**
   a. **prior to permitting the parties to vent;**
   b. **prior to risk analysis and reality testing.**

4. **Failing to orchestrate the negotiations:**
   a. **by discouraging "out of the ballpark" offers or demands;**
   b. **by discouraging moves that send the wrong signal.**

5. **Failing to recognize that unrealistic expectations must be lowered gradually.**

6. **Being evaluative (a) too early or (b) in a joint session.**

7. **Failing to suggest ways to avoid reactive devaluation of sensible settlement proposals from the adversary.**

8. **Believing "bottom line" offers or demands.**

9. **Failing to "test the waters" before making a mediator's proposal.**

10. **Being impatient or failing to be persistent or giving up prematurely.**

ALTERNATIVE

Top 10 Things

ART BY JAMES ENDICOTT

Avoid aborting the process and its possibilities.

BY SIMEON H. BAUM

MEDIATION is widely used these days. Federal court mediation programs have been in place since the 1990s; the Supreme Court's Commercial Division has a thriving Alternative Dispute Resolution (ADR) program; there are court-annexed mediation programs for specific areas — matrimonial, family, criminal court community disputes, landlord/tenant, and small claims court, to name a few. Agencies like the Equal Employment Opportunity Commission and quasi-governmental entities like the United States Postal Service have longstanding mediation programs, as do self-regulating organizations like the National Association of Securities Dealers and the New York Stock Exchange.

Beyond those programs, there is a growing use of private professional mediation. Corporations with pre-dispute ADR clauses, insurers with inter-company agreements, and attorneys with cases on an ad hoc basis are regularly turning to mediators to help them resolve their disputes and save their clients the cost, disruption and aggravation of protracted litigation.

Given this burgeoning use of mediation, it is likely that most litigators, and many legal dealmakers, will find themselves representing clients in this process. It is thus imperative to understand the mediation process, its goals and possibilities, and to be effective in that process, understanding what works and what can abort the process and its positive possibilities.

It is just as important to understand what not to do in the mediation process. Here is a non-comprehensive list of 10 choices counsel or parties might make that reduce the likelihood of arriving at a mutually acceptable resolution through mediation.

1. Insult the Other Party

An agreement, which by its nature must be mutually acceptable, is the product of consent, not force. It is thus important to keep the other side willing and active participants in the dance of negotiation.

Offensive comments — such as calling the other party a liar, an incompetent, or a fool — are discouraging. They communicate a low likelihood of understanding the other. In the face of such comments, parties may conclude that there is no point in continuing because an offer based on so negative a point of view will be inadequate to the true value of what is at issue.

Offensive comments might gratify the speaker, but they anger the recipient. This

Simeon H. Baum, *president of Resolve Mediation Services, Inc. and an experienced mediator, was recently involved in the Studio Daniel Libeskind–Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site.*

DISPUTE RESOLUTION

Not to Do in Mediation

can trigger primal responses — revenge (fight), defense, suppression, avoidance (flight), adding needless complexity to the other's communication.

At the core, the mediation process depends on communication. The mediator works to facilitate and enhance the quality of the parties' communication like a radio tuner. It is counterproductive to create static.

2. Give Up

Settlement opportunities are missed by quitting too soon. Often, the mediator, who has the chance to speak privately with each party, sees that a resolution is possible when the parties, having not been privy to all conversations, do not. Causes of premature departure include emotional reactions, frustrations with case assessment, and misreading of bargaining moves.

The converse of unwisely provoking a reaction through offensive remarks is succumbing to reactions to comments deemed offensive, and walking out. A good negotiator learns to sift negative remarks for the elements that might lead a party in good faith to make such remarks, and then addresses that content rather than reacting to the form.

Misunderstanding case assessment issues by either side may also prompt premature departure. One might be missing weaknesses that should be processed. If the other side does not appear to be getting it, the mediator should be given the time to work with that party in caucus to engage in reality testing. Time and gentle persistence can be the mediator's best tool; do not take it away. Confidentiality of caucuses prevents the mediator from reporting progress in the other party's case evaluation. Counsel should not conclude from silence that progress is not being made.

3. Focus Only on Dollars

Focusing only on dollars can mean missing integrative possibilities.

Mediation offers more than a settlement payment, and the mediation process is more than finding an acceptable number in a range formed by the extremes of low offer and high demand. While many settlements involve solely economic terms, there are times that openness to integrative possibilities, or a search for satisfaction of non-economic party interests, is key to reaching a resolution.

Mediators report business deals and new ventures emerging from the mediation of business cases. Employment dispute settlements can involve return to the workplace, reference letters, retirement or benefits packages, sensitivity training, and apologies. Even economic terms can be reworked to meet interests or party limitations through payment plans and contingent packages.

The ability to keep eyes open to non-economic interests produces surprising results. In one case involving the reduction in force of a large number of workers emerging from a plant closing, the attorneys had arrived at a possible resolution, which several of the plaintiffs, including a couple of management "tag-alongs," were not ready to accept. Mediation permitted the strongest objector, one of the management plaintiffs, to hear for the first time an explanation of the company's actions.

That plaintiff particularly objected that certain plaintiffs, in particular a widow with children, should be receiving more. This opened the door for the mediator to explore whether the management plaintiff would prefer to have the funds earmarked for him to go to the widow. As a testament to the importance of not overlooking altruism as a component of human interests, the management plaintiff agreed, and the case

Continued on page S10

ALTERNATIVE

What Not to Do in Mediation

Continued from page S5

settled. Plainly, a non-economic interest, and, indeed, a sense of identity, broke that impasse.

4. Gag the Client

Prohibiting your client from speaking during a mediation session misses various opportunities unique to this process.

Having your client speak during the opening in joint session can showcase a strong witness, giving the other parties and their counsel a sense of what things might look like if the matter goes forward. More importantly, however, the client's speaking in a non-trial mode lets the genuine story emerge naturally and efficiently, and can show the other party the real human impact of the issues in this mediation. It enables your client to go beyond marshalling the facts to present his or her core concerns and interests and make a genuine connection with the other party. This paves the way for real dialogue, which is impossible in a trial context.

Both in joint session and caucus, active participation increases client "buy-in" for the eventual settlement. This can be more efficient than a double negotiation of attorneys, as agents for their clients, with each other and then the negotiation of attorney with client, in effect of agent and principal.

In addition, both in caucus and in joint session, the party's direct participation enhances brainstorming, i.e., the generation of ideas as possible options for settlement proposals. Brainstorming works best if the participants agree to refrain from critical judgment as ideas emerge, so that parties' creative efforts are not inhibited. A party is in a better position than his or her counsel to make suggestions that reflect business needs or might satisfy the party's interests.

Permitting the client to engage with the neutral in analyses of the risks and transaction costs of proceeding with litigation enhances the value that the neutral brings. While some clients might criticize their attorneys as being less than zealous for raising possible weaknesses, risks or costs, the client is not likely to fault the mediator for raising these issues and concerns.

Direct engagement of your client with the mediator increases the chance that "reality testing" by the mediator might have an impact on the client. This is helpful in facilitating change. Conversely, counsel can always correct any misimpressions formed by this discussion, either in or outside of the mediator's presence. On "BATNA" [1] analyses, it is the client's values and interests that govern an analysis of the "best alternative to a negotiated agreement;" and thus, it makes sense for the client to discuss this directly.

5. Balk at Emotion

The informal and confidential nature of mediation communications creates an opportunity for parties to express emotion and share their perspectives in a way that would be irrelevant or possibly damaging in court. This results in greater satisfaction for the party and offers the chance of greater understanding between the parties. Advising your client not to speak may prevent critical comments, but the gain from a wholesale bar on emotional expression may be outweighed by the loss of client satisfaction and constructive impact of genuine emotion.

In one mediation, a broker, who had sat silently for an hour and a half, let loose his feelings of betrayal and frustration, communicating to a former customer that he had nothing to do with the losses in question and that this claim had a very negative impact on his reputation and career. The customer heard the message loud and clear, and a half hour later all claims against that broker were withdrawn.

Emotional expression by the other party can also be useful. "Venting" emotion, particularly if validated, frees parties to move on to constructive problem solving. It also offers a window into the concerns of that party, which counsel and your client can then seek to satisfy in their advance towards a deal.

6. Misread Late Demand or Offer

Mediation takes time, and each mediation proceeds at its own pace. Counsel should not expect mediation to occur at the pace of an in-court settlement conference, with numbers emerging within minutes from the meeting's inception.

There are times when development of facts, reality testing, and interest exploration may take hours. Sometimes the mediator may choose to work on adjusting expectations rather than communicate to the parties the extreme — and discouraging — number suggested in a caucus. And, there are times that a party's negotiation style compels that party to begin with an extreme offer and demand, regardless of whether it is already mid-afternoon.

On these occasions, patience is advised. If much work was done prior to the first and late offer or demand, then once the ball starts rolling, movement can be generated and resolutions can occur, despite the negative message that the extreme position seems to communicate. Trust the mediator, if he or she encourages counsel and parties to keep going.

7. Lack a Person With Authority

The mediation process works best when all parties are at the table and can be directly affected by the discussion; when their own participation generates the "buy-in" mentioned above; when their needs and interests can be fully and immediately expressed and explored; and, when decisions can be made on the spot.

Sometimes keeping the decision-maker apart from the negotiation creates the opportunity to renegotiate, to play "good cop, bad cop." This separation, however, can lead to bad feelings in the party that is present with full authority, or to a strategic withholding of fulsome proposals by the other party in anticipation of renegotiation, thus stalling meaningful negotiations.

Beyond this aspect, mediation involves transformation. Information learned during the process leads to adjustment and

accommodation, to compromise as well as collaboration. If the decision maker is absent, he or she will not be affected by the process. Missing the mediation gestalt, the absent decision maker might not fully appreciate the explanations of counsel or the on-site representative. Political factors might inhibit the on-site representative from giving a full blast of reasons to adjust the party's position. Presence of the decision maker eliminates these problems.

8. Overlook Information Need

Do not overlook the other party's need for information.

Mediating early in the life of a case, before discovery, increases the settlement pot and enhances cost savings. Yet, it is often predictable that certain parties will not settle without certain information.

Personal injury matters typically require development of medical information. Coverage claims require development of policy-related information, or possibly information relating to the application for coverage. Property damage claims require development of proof of loss. Customer-broker securities claims require development of the profits and losses on an account, and might also require information about prior trading experience, e.g., in a suitability claim. Employment discrimination claims require, inter alia, development of mitigation efforts, current employment status and past compensation. Breach of contract claims require development of the contract terms, information relating to the breach and damages assessment.

Settlements occur based on certain assumptions. The mediation of most matters in which counsel participate will likely require development of information in order to satisfy the need of the other party before those assumptions are accepted. Conversely, your own willingness to resolve a matter under a certain set of terms and conditions is also based upon assumptions. To the extent information can be developed prior to the mediation to address these assumptions, one enhances the speed and likelihood of a resolution.

9. Give an Ultimatum

Prior to arriving at the first mediation session, prepared counsel and parties might have discussed their communication strategy, developed their case analysis, analyzed their BATNA, set their aspiration (best deal within the realm of realistic possibility) and assessed their "walk away." It is always advisable to keep these goals flexible and provisional, with the understanding that new information or insights gained from mediation might affect your analysis.

With all this preparation, it is still advisable to avoid making a "take it or leave it" demand. Negative consequences of the ultimatum include: (a) it can produce a reflexive reaction, needlessly ending discussions; (b) it hardens your own thinking, when additional information might fairly lead to an adjustment; and (c) it puts the party making the demand in a bind. Having made an ultimatum, one fights a credibility loss if it is not taken and one wishes to continue in the negotiation. But, walking out to preserve credibility may literally be cutting off your nose to "save face."

10. Misunderstand Mediator's Role

The mediator is a tremendous resource — a neutral third party, with effective facilitation skills, usually[2] motivated to help parties reach a resolution. It is advisable to take advantage of what the mediator has to offer, and not to misunderstand what that is. Following are several roles not played by the mediator.

Judge. To arrive at a deal, you must convince the other parties, not the mediator. Some attorneys work hard to "spin" the mediator. While there is utility in helping the mediator recognize valid issues in a case, to aid in reality testing, this has limited value. Sometimes directing remarks to the mediator in joint session can deflect tension. Often, though, it makes sense to address comments generally to all present, or to direct them to the other parties. At a minimum, one must recognize that they are the real audience.

Policeman. The mediator can help set ground rules for the discussion, e.g., no interruption. But the mediator is a facilitator, and party self-determination is at the heart of the process. The best assumption is that the participants are autonomous adults, and that the mediator is not busy keeping everyone in line.

Director. Along these lines, while the mediator may suggest that parties break for caucus, address or defer certain issues, or undergo certain processes, because this is a party-driven process, counsel and their clients are free to make suggestions on the process or to express a preference not to undertake action suggested by the mediator.

Dealmaker. While the mediator might "coach" parties in caucus on the timing of offers and other negotiation strategy to keep the negotiation moving constructively, ultimately, the offers are from parties. Do not blame unacceptable proposals on the mediator.

Adverse party. Parties and counsel may confide in the mediator and take advantage of his or her unique position of having access to information from all parties and having a modicum of trust from all parties. Holding information back from the mediator can be counterproductive. Providing information enables the mediator to find solutions that defensive parties, not privy to information from the other party, might miss.

Don't Forget

Attorneys have the power to enhance the effectiveness of mediations. Awareness of what not to do may lead counsel to take approaches designed to elicit constructive responses leading to a resolution of the dispute.

1. Fisher and Ury popularized this concept in Getting to Yes and other writings. Understanding one's BATNA or "best alternative to a negotiated agreement" enables a party to have a basis for judging whether a proposal is worth taking, or whether the party would do better without this agreement.

2. In the transformative mediation model, the mediator's purpose is not settlement or problem solving, but fostering empowerment and recognition in the parties. See, Bush & Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (Jossey Bass, Inc. 1994).

Emotion and Psychological Factors In Mediation

Creativity in Mediation:

Why, How and When?

UIA Conference, Lausanne 31.1.09

Birgit SAMBETH GLASNER

Partner & Attorney-at-Law, Etude ALTENBURGER
Commercial Mediator (SCCM, CEDR, CMAP & SBA)
Committee Member: IBA, SBA, & SCCM (VP for Geneva)
Former Deputy Conciliation Judge, Geneva Civil Court

Zürich
Seestrasse 39
CH - 8700 Küsnacht
Tel. +41 44 914 88 88
mail@altenburger.ch

Jeremy LACK

Partner & Attorney-at-Law, ALTENBURGER
Commercial Mediator (SCCM, WIPO, CEDR, CMAP, IPOS, & INTA)
Advisor to CCIG, IMI, CPR & CIArb.; ODAGE SAE Council Member
Door Tenant, QUADRANT CHAMBERS (UK) & Counsel PCZLAW (US)

Genève
Rue Rodolphe-Toepffer 11bis
CH - 1206 Genève
Tel. +41 22 789 50 20
mail@altenburger.ch

WHY?

a) What are we shooting for?
b) Escaping the narrative trap
c) Genetic/neurophsyiological hardwiring
d) The cross cultural need

"Win-Win" Mediation: A Survey in the UK ...

THE CHARTERED INSTITUTE OF ARBITRATORS

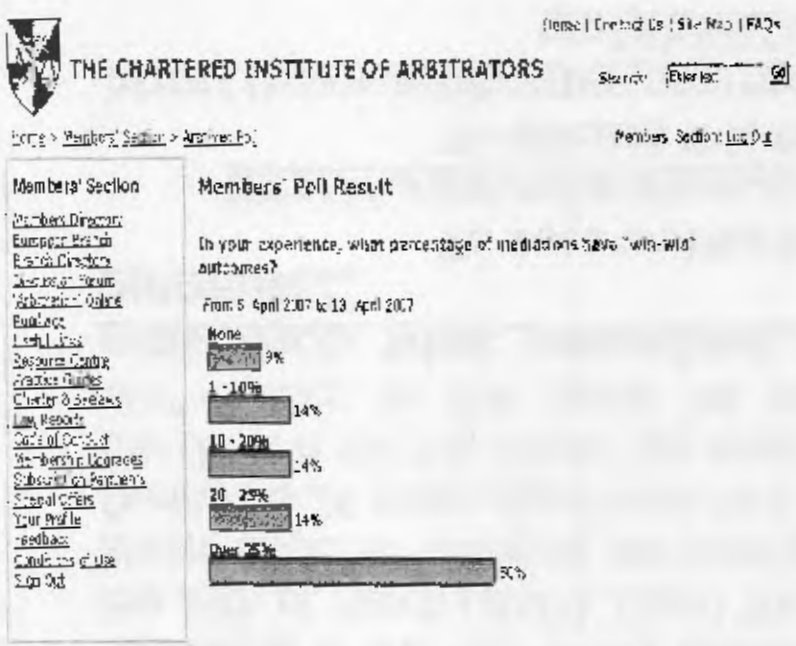
QUESTIONNAIRE: Mem. no: 22513

"Speaking at the first of our quarterly Mediation Lectures this year, on the 29th of March [2007], David Shapiro recounted beautifully that story about disputed oranges, an example of a classic "win-win" solution. During his 25 years experience as a mediator and mediation advocate in the UK and the US, David has witnessed an average of 20 - 25% "win-win" results in the cases he has been involved in. **In your experience, what percentage of mediations have "win-win" outcomes?"**

To vote on this topic please visit:
http://www.arbitrators.org/member/m1/index.asp
To discuss this topic please visit:
http://www.arbitrators.org/member/m1/disc/forums.asp?ForumId=8&TopicId=219"

Results = 58 votes, 9 replies posted (see next slide)

Should Mediators be satisfied with < 25% Win-Wins?



THE CHARTERED INSTITUTE OF ARBITRATORS

Members' Section

Members' Poll Result

In your experience, what percentage of mediations have "win-win" outcomes?

From 5 April 2007 to 13 April 2007

None 9%

1 - 10% 14%

10 - 20% 14%

20 - 25% 14%

Over 25% 50%

"In the last edition we asked what percentage of mediations have "win-win" outcomes in your experience. 50% of those of you who voted said that [more than] 25% of mediations have win-win outcomes. 14% said that 20-25% of them do, 14% said that 10-20% do, 14% said 1-10% and 9% said none of the mediations have win-win outcomes."

"A dispute normally germinates, when a difference of opinion or a disagreement on commercial outcomes couldn't be resolved amicably and through all possible means within the available options to the parties. To resolve such issues, mediation is construed as the first logical step to avoid unnecessary litigation expense and or disrupt commercial relationship between parties. It is not a matter of making a deal to achieve "win-win" situation for if a "win-win" situation could be found, parties will not have to resort to "mediation" by an expert mediator. I would consider mediation as a prelude to resolving contentious issues and save time and cost for the parties, based on economics of ADR or litigation process and strategic objectives of the parties." - Anon, MCIArb

Why such a poor result?

What are we aiming for?

1. A ***conciliative*** style aimed chiefly at reducing the fighting that primarily uses physical calming and spatial tools such as separation, reassurance, sympathetic tone of voice and caucusing;
2. An ***evaluative*** or directive style aimed mainly at settlement that primarily uses intellectual and logical tools such as analysis, distinction, debate, instruction, compromise and reductionism;
3. A ***facilitative*** style aimed primarily at resolution that primarily uses emotional calming and affective tools such as listening, empathy, acknowledgement, summarization, reframing and dialogue;
4. A ***transformative*** style aimed principally at personal transformation that primarily uses emotional/relational calming and meaning-altering tools such as recognition and empowerment, along with participation, responsibility and relationship building;
5. A *spiritual, heart-based,* or ***transcendent*** style aimed at personal learning, letting go, forgiveness and reconciliation that primarily uses spiritual/heart calming tools such as centering, mindfulness, direct heart-to-heart communication, compassionate inquiry, wisdom and insight;
6. A ***systems design*** style aimed at preventing systemic dysfunctions that primarily uses environmental/systems thinking and design principles to change the context, culture and environment in which conflicts occur.

Source: Ken Cloke, **Let a Thousand Flowers Bloom: A Holistic, Pluralistic and Eclectic Approach to Mediation (2007)**

The world is changing

Source: http://www.amazon.com/World-Flat-Updated-Expanded-Twenty-first/dp/0374292795/sr=8-1/qid=1170718271/ref=pd_bbs_sr_1/103-1446205-6484642?ie=UTF8&s=books

The World Is Flat [Updated and Expanded]: A Brief History of the Twenty-first Century by Thomas L. Friedman

(Hardcover - April 18, 2006)

Hardcover: 608 pages

Publisher: Farrar, Straus and Giroux; Expanded and Updated edition (April 18, 2006)

Language: English

ISBN-10: 0374292795

ISBN-13: 978-0374292799

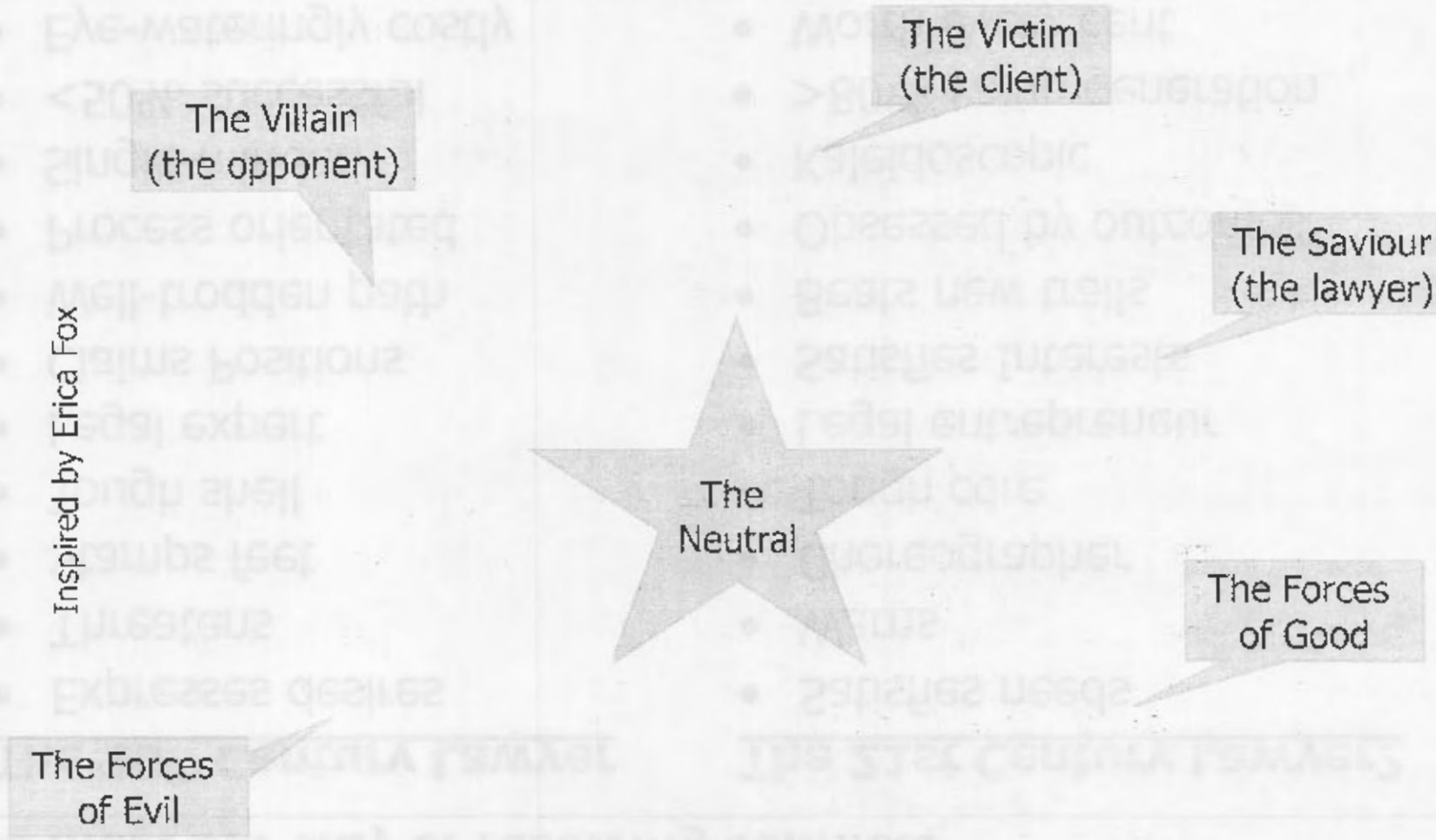
Consumerism -- Globalization -- Technology

So must our way of resolving conflicts

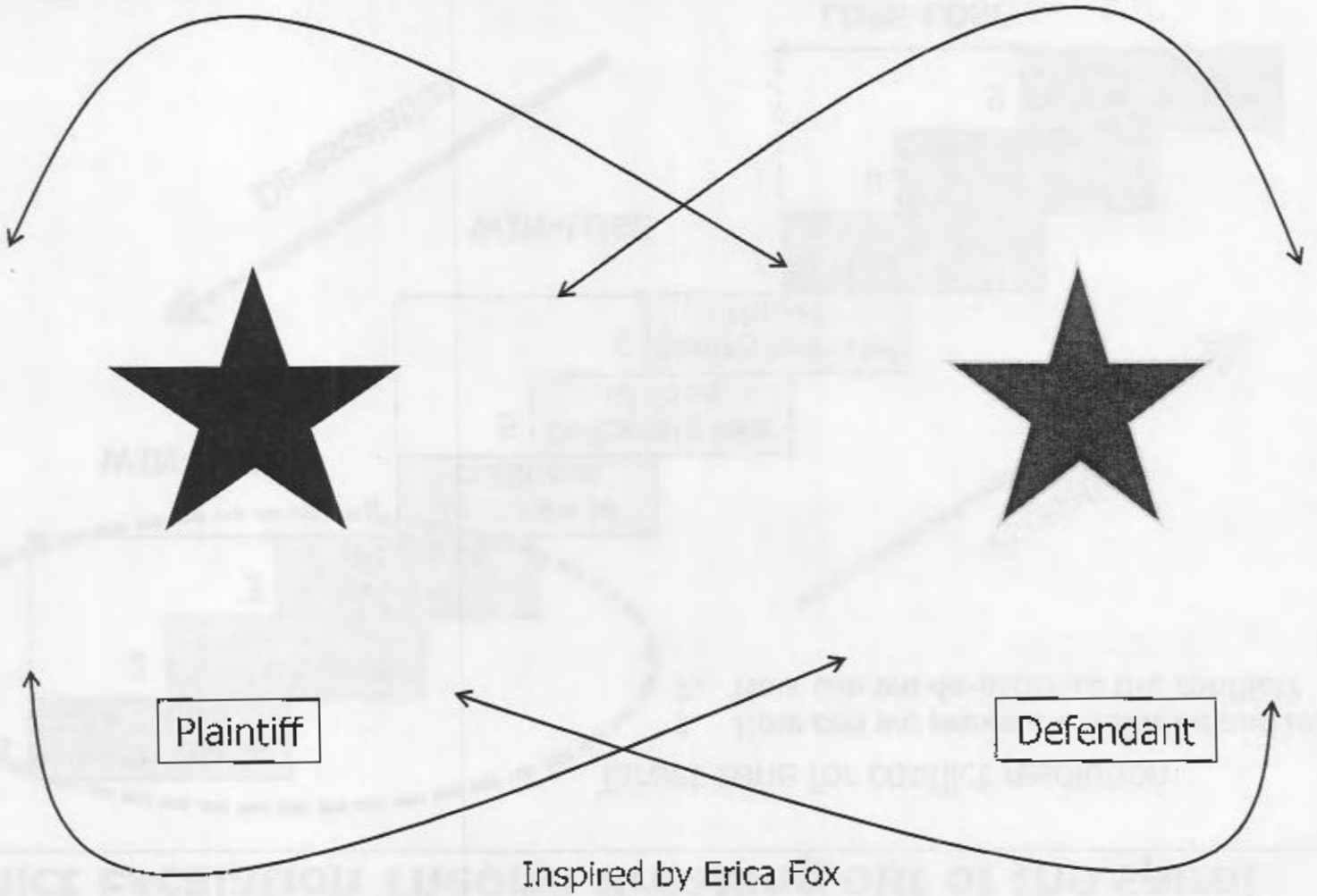
The 20th Century Lawyer	The 21st Century Lawyer?
• Expresses desires	• Satisfies needs
• Threatens	• Warns
• Stamps feet	• Choreographer
• Tough shell	• Tough core
• Legal expert	• Legal entrepreneur
• Claims Positions	• Satisfies Interests
• Well-trodden path	• Beats new trails
• Process orientated	• Obsessed by outcomes
• Single-minded	• Kaleidoscopic
• <50% successful	• >80% value generation
• Eye-wateringly costly	• Worth every cent

Source: Michael Leathes, based on Richard Susskind's "*The End of Lawyers?*" (2008)

Escaping Narrative Theory



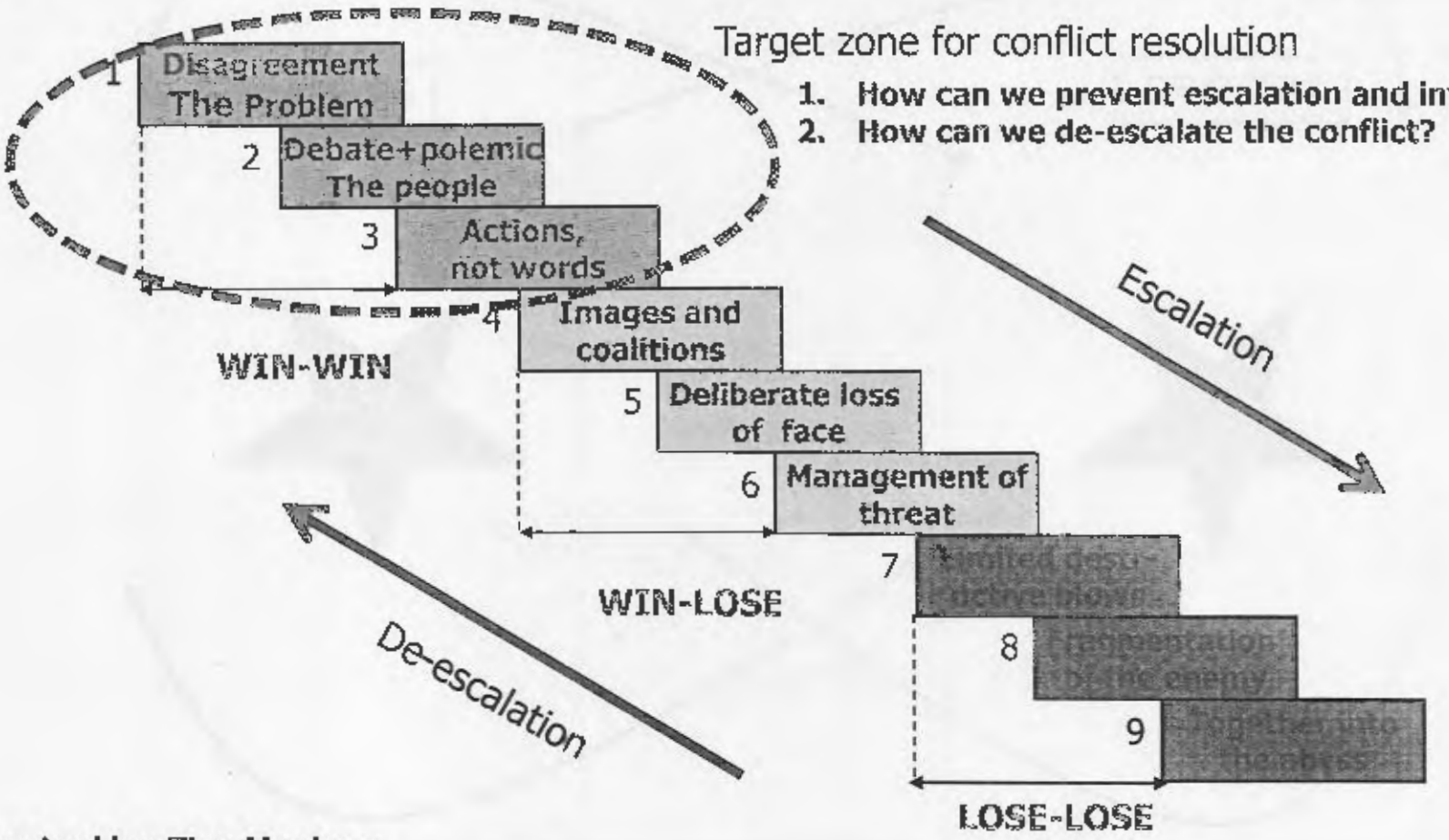
The Role Reversal Trap



Inspired by Erica Fox

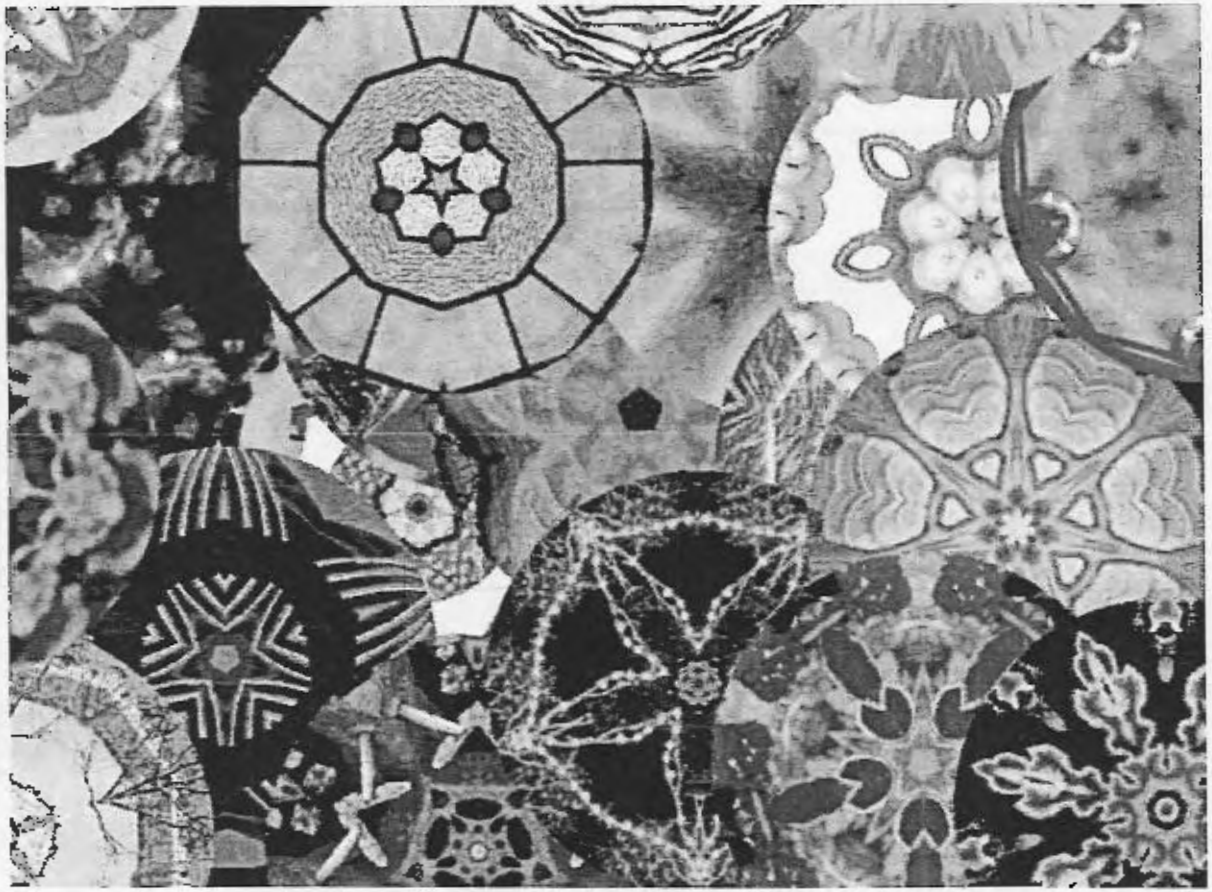
ALTENBURGER

Conflict Escalation Theory: Breaking out of the spiral



Inspired by: Tina Monberg
Source: F. Glasl's "Confronting Conflict"

Mediators need to work with kaleidoscopic vision



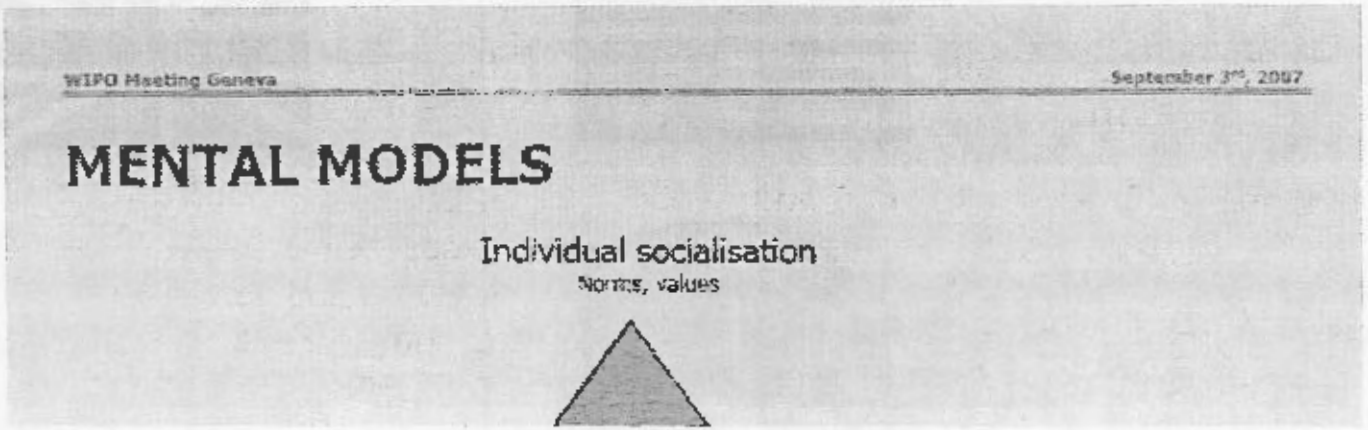
Source: http://bindweed.com/magicmirror/kaleidoscope-collage.gif

The source of disputes ... an individual phenomenon?

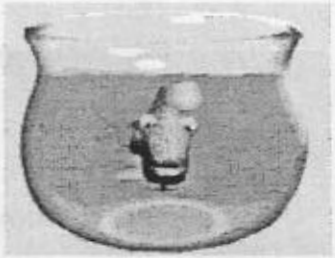
InCoMprehEnsion ?

What is our tolerance for ambiguity?

Environmental Factors at the Individual Level



The Result = Fish in fishbowls



Creativity is about creating new perspectives

Research Article

Why It Pays to Get Inside the Head of Your Opponent

The Differential Effects of Perspective Taking and Empathy in Negotiations

Adam D. Galinsky,[1] William W. Maddux,[2] Debra Gilin,[3] and Judith B. White[4]

[1]Northwestern University, [2]INSEAD, [3]Saint Mary's University, Halifax, Canada, and [4]Dartmouth College

ABSTRACT—The current research explored whether two related yet distinct social competencies—perspective taking (the cognitive capacity to consider the world from another individual's viewpoint) and empathy (the ability to connect emotionally with another individual)—have differential effects in negotiations. Across **three studies**, using both individual difference measures and experimental manipulations, we found that **perspective taking increased individuals' ability to discover hidden agreements and to both create and claim resources at the bargaining table**. However, **empathy did not prove nearly as advantageous and at times was detrimental to discovering a possible deal and achieving individual profit**. These results held regardless of whether the interaction was a negotiation in which a prima facie solution was not possible or a multiple issue negotiation that required discovering mutually beneficial trade-offs. Although empathy is an essential tool in many aspects of social life, perspective taking appears to be a particularly critical ability in negotiations.

Neurophysiological & the Need for Creativity

How are we hard-wired for conflict?

How can we think differently?

Are we preconditioned?

Can we change?

Creativity to the rescue ...

We need to take a new look at ourselves

VS.

Vitruvian Man
How we like to perceive ourselves

Sensory Homunculus Man
How our brains are actually wired

The 2 "Homunculi": Sensory and Motor

How well have we "evolved" in dealing with conflicts?

Source: http://www.didntyouhear.com/wp-content/uploads/2006/10/evolution1.jpg

ALTENBURGER

The rights-based approach to dispute resolution

The Facts
The Law(s)
The Positions

Misunderstandings
Perceptions
Emotions
Interests
Concerns
Feelings
Beliefs
Values
Needs
Fears

The legal & "objective" syllogism:

Facts (past & present)

+

Applicable law(s)

=

Outcomes

(« conclusions »)

The tip of the iceberg:
Is this the best way to resolve disputes?

Facts = Perceptions: 2 Types of Unconscious Biases

VS.

"Rational" Biases

Old v. Young Woman

http://nexusnovel.files.wordpress.com/2006/10/old-youngladv.jpg

"Irrational" Biases

Which way does she turn?

http://www.news.com.au/dailytelegraph/story/0,22049,22535838-5012895,00.html

ALTENBURGER

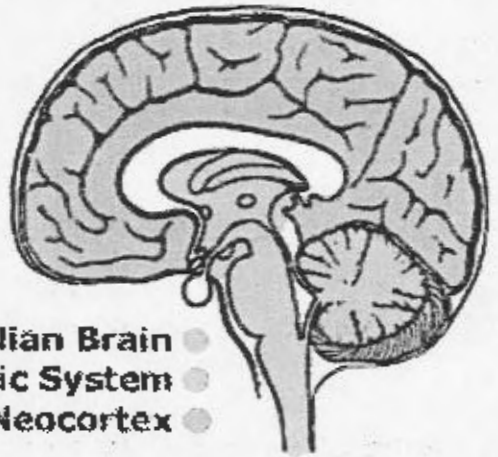
The Evolution of the Human Brain

Source: http://www.museum-marseille.org/images-marseille_fichiers/cerveau_evolution.jpg

The Triune Brain: 3 Levels of Evolution

See : Paul D. MacLean http://en.wikipedia.org/wiki/Triune_brain

The Evolution-Designed Brain



Source: http://www.cop.com/info/346edb.gif

Source: http://www.solarnavigator.net/biology/biology_images/brain_animal_comparisons.jpg

The Regions of the Human Brain

Each half of the cerebrum is divided into four parts, the *Frontal lobe, Parietal lobe, Occipital lobe* and *Temporal lobe*.

The **Frontal lobe** is the part that mushroomed most dramatically during our transition from hominid to human and it makes up about 28% of the cortical area of the human brain, a far larger proportion than any other animal

Source: http://www.brainchannels.com/evolution/physicalbrain.html

Definitions & Functions of the Outer Brain

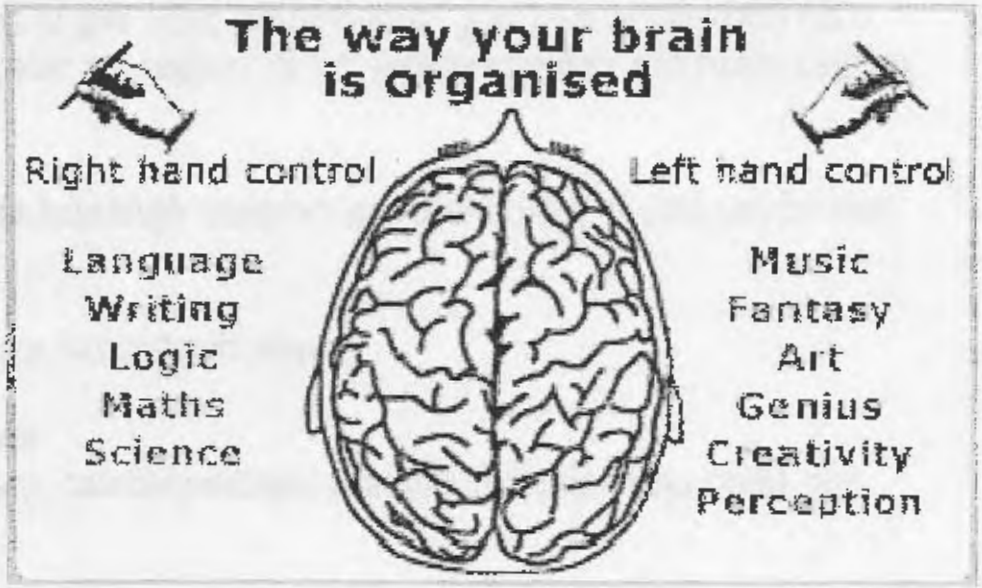
Frontal Lobe	Deals with the most Integrated brain functions: thinking, conceptualizing and planning. It also plays a major part in the conscious appreciation of emotion.
Parietal Lobe	Functions connected with movement, orientation, calculation and certain types of recognition.
Temporal Lobe	Deals with sound, speech comprehension (usually the left brain only) and some aspects of memory.
Occipital Lobe	Made up entirely of visual processing areas.
Motor Cortex	The frontal *motor cortex* primarily controls the movement of the hands and face.
Corpus Callosum	A thick band of axon fibers, 80 million or so, which connect the brain cells in left hemisphere to those in the right hemisphere. The two sides keep up a continuous intimate conversation via this neural bridge that produces a seamless perception of the world, and a single stream of consciousness. There is a difference in size between men and women, women's are relatively larger.

The impact of "brain regionalization"

"Your brain is divided into two hemispheres. The left hemisphere is sequential, textual, and analytical. The right hemisphere is simultaneous, contextual, and synthetic. Of course, we enlist both halves of our brains for even the simplest tasks. And the respective traits of the two hemispheres have often been caricatured well beyond what the science actually reveals. But the legitimate scientific differences between the two hemispheres of the brain do yield a powerful metaphor for interpreting our present and guiding our future."

From the Introduction to

A WHOLE NEW MIND, Daniel Pink.



Left Brain v. Right Brain

We need to use both sides of our brains

Concept: Michael Leathes and http://news.bbc.co.uk/cbbcnews/hi/sci_tech/newsid_2191000/2191138.stm

But this is difficult to control cognitively

Using both sides of our brains is not something we do easily or naturally. For example, look at this chart and read out loud the COLOURS and not the words that are written:

YELLOW BLUE ORANGE
BLACK RED GREEN
PURPLE YELLOW RED
ORANGE GREEN BLACK
BLUE RED PURPLE
GREEN BLUE ORANGE

Right Brain v. Left Brain:
The right side of your brain wants to say the **colour**, but the left side of your brain insists on reading the **word**.

Perception: Unconscious Biases?

Do you see the dancer turning clockwise or anti-clockwise? If clockwise, then you use more of the right side of the brain and if anti-clockwise, the left side. Most of us would see the dancer turning anti-clockwise though you can try to focus and change the direction; see if you can do it.

LEFT BRAIN FUNCTIONS
uses logic
detail oriented
facts rule
words and language
present and past
math and science
can comprehend
knowing
acknowledges
order/pattern perception
knows object name
reality based
forms strategies
practical
safe

RIGHT BRAIN FUNCTIONS
uses feeling
"big picture" oriented
imagination rules
symbols and images
present and future
philosophy & religion
can "get it" (i.e. meaning)
believes
appreciates
spatial perception
knows object function
fantasy based
presents possibilities
impetuous
risk taking

Source: The Daily Telegraph: http://www.news.com.au/dailytelegraph/story/0,22049,22535838-5012895,00.html

Perception: Can we see or change stances?

The dancer turns
CLOCKWISE
If we see her as standing
On her LEFT FOOT

The dancer turns
ANTI-CLOCKWISE
If we see her as standing
On her RIGHT FOOT

The Lymbic System

Between the Cortex and the Sub-Cortex/Reptilian brain

The modules that lie beneath the corpus callosum are known as the *limbic system.* This area is older then the cortex in evolutionary terms and is also known as the **mammalian brain** because it is thought to have first emerged in mammals. This part of the brain, and even that below it, is **unconscious**, and yet has a profound affect on our experience because it is densely connected to the conscious cortex above it and constantly feeds information upwards. **Emotions**, our most basic cerebral reactions, are generated in the Limbic system along with the many appetites and urges that help us behave in such a way to survive. For instance, the **Amygdala**, is the place where fear is registered and generated

Source: http://www.brainchannels.com/evolution/physicalbrain.html

The Amygdala and Fear

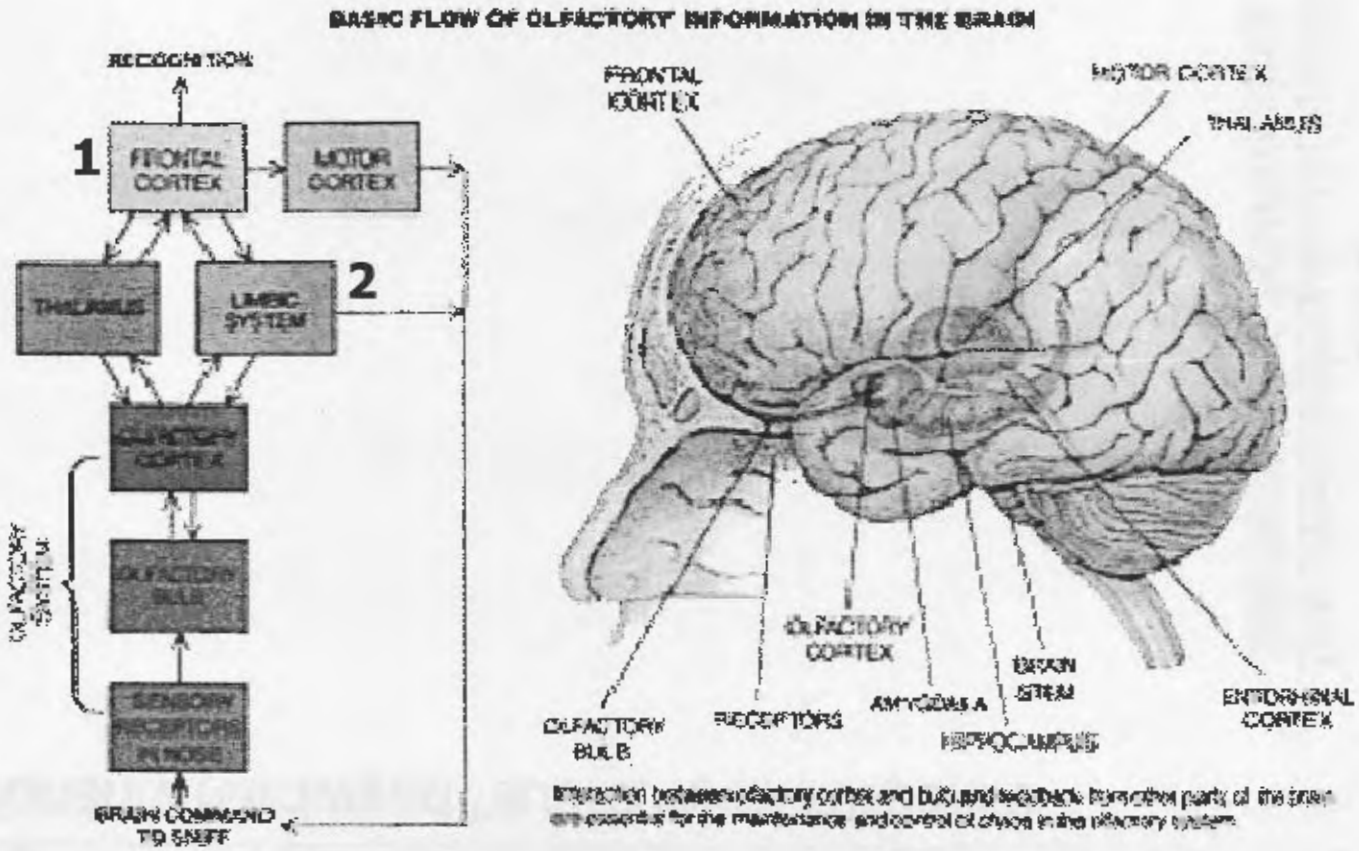
An evolutionarily hardwired "sub-cortical response"

Source
http://www.zoology.ubc.ca/~auld/bio456/lectures/stress figs/Amygdala1.jpg

ALTENBURGER

The Physiology of Perception

Walter J. Freeman, February 1991 Scientific American, Vol 264, (2) Pgs. 78-85



Focus on interaction between **1** (the Frontal Cortex) and **2** (the Lymbic System)

Emotion: The filter for perception

Perception is 100% emotional (whatever we would like to believe).
Emotions reflect our needs and interests.

The amygdala can thus be considered as a rapid relevance detector that trigger a switch between "reptilian" and "cortical" thinking.

Source: http://cbulk.virginia.edu/~psyc220/kula3/JK379_5m12.13.amygdala.curb.ipg

The Amygdala: A target for mediators

The amygdala:

- A **gateway** for emotions: they create stress/fearful stimuli before the cortex has had time to assess them.
- A storage place for **autobiographical memory** (in ICMs?)
- Can **dominate and prevent** reasoned cortical thinking once activated
- A **relevance detector & switch**: process whether stimuli should be treated as a threat and whether they should be reacted-to sub-cortically (without time for thought) or in conjunction with the cortex (especially, the orbitofrontal cortex ("OFC"))
- A **perception modulator**: they can affect how rapidly we absorb certain information (e.g., if a possible threat is perceived) and even filter and distort perceptions, based on emotions and previous memories stored in the OFC.
- Basis of the OFC-Amygdala feedback circuit: the amygdala and OFC affect one-another (directly & indirectly via the hypothalamus).
- This **combination** determines how stimuli can be received, processed and transmitted for further action by a human being.

Source:
http://www.astralvoyage.com/projection/images/amygdala2.jpg

K. Cloke: Conflict Revolution "Changing the way we change"

"On a purely chemical level, scientists are now aware of dozens of enzymes, hormones, neurotransmitters, and chemical compounds that have a critical impact on the attitudes and behaviors of people undergoing change or conflict. There is, for instance, adrenalin that triggers the "fight or flight" response; testosterone that stimulates aggression; oxytocin that instills trust, increases loyalty, and promotes the "tend and befriend" response; estrogen that triggers the release of oxytocin; endorphins that reinforce collaborative experiences with pleasure; dopamine that generates a reward response and fortifies addiction; phenylethylaline that induces excitement and anticipation; and vasopressin that encourages monogamy among males in a variety of species.

On a somewhat larger scale, there are genes and proteins that direct the manufacture of these chemicals and shape -- not only our physical appearance, personality traits, and predisposition to risk-taking -- but immune responses that can be detected by means of smell, influencing perceptions of attractiveness and repulsion.

In addition, there are a host of other chemical compounds and prescription drugs that are capable of accentuating or minimizing, instigating or discouraging collaborative and adversarial behaviors, both in change and conflict. For example, scientists have traced the development of empathy in primates, including human beings, to "mirror neurons" that fire in the brain of an observer, replicating the experience the one who is observed. Thus, when we watch someone suffer or become frightened, similar neurons fire in our brains, reproducing those experiences.

On a more macroscopic scale, the brain is divided into two hemispheres, each of which processes conflict and change experiences somewhat differently, emphasizing logical reasoning, linear thinking, pattern perception, and emotional responses. The brain is subdivided into regions that directly influence conflict behaviors. There is, for example, the ventral tegmental area that reinforces the reward circuit; the nucleus accumbens directly beneath the frontal cortex that releases oxytocin; the hypothalamus that produces testosterone; and most importantly, the amygdala, an almond shaped region near the brain stem that regulates our conflict and change responses, especially anger and fear."

Conflict Revolution: Mediating Evil, War, Injustice and Terrorism, Janis Publications **(2008) pp. 337-38**

Oxytocin & Mirror Neurons: Impact on Amygdala

The Journal of Neuroscience, December 7, 2005 • 25(49):11489–11493 • 11489

Brief Communications

Oxytocin Modulates Neural Circuitry for Social Cognition and Fear in Humans

Peter Kirsch,[1] Christine Esslinger,[1] Qiang Chen,[2,3] Daniela Mier,[1] Stefanie Lis,[1] Sarina Siddhanti,[1] Harald Gruppe,[1] Venkata S. Mattay,[2,4] Bernd Gallhofer,[1] and Andreas Meyer-Lindenberg[2,3]

[1]Cognitive Neuroscience Group, Center for Psychiatry and Psychotherapy, Justus-Liebig University, D-35385 Giessen, Germany, and [2]Neuroimaging Core Facility, [3]Unit for Systems Neuroscience in Psychiatry, and [4]Clinical Brain Disorders Branch, Genes, Cognition, and Psychosis Program, National Institute of Mental Health, National Institutes of Health, Department of Health and Human Services, Bethesda, Maryland 20892

In conclusion, our data reveal a pronounced impact of oxytocin on amygdala reactivity and brainstem interactions in humans, extending a large body of work on neuropeptide regulation of complex behavior to this species by establishing an effect of oxytocin on a key component of affective and social processing. We hope that this work will contribute to the development of therapeutic interventions with oxytocin or synthetic agonists in diseases in which amygdala dysfunction has been implicated, including anxiety disorders, depression, and autism.

Bringing Oxytocin Into the Room

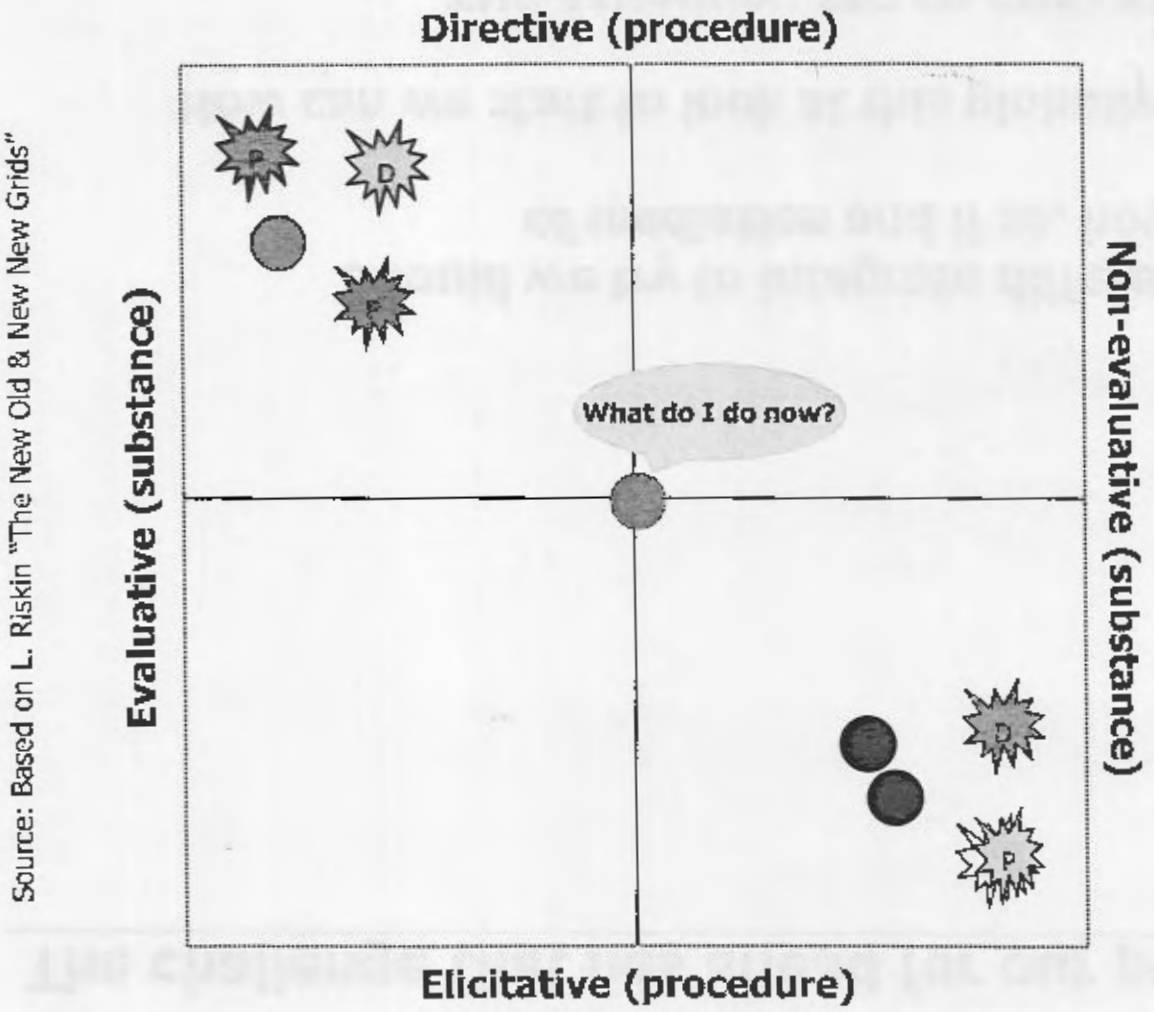
- Using Emotions in Mediation (R. Fisher & D. Shapiro *BEYOND REASON*) 2006
  - APPRECIATION
  - AFFILIATION
  - AUTONOMY
  - STATUS
  - ROLE
- Discuss basic values as to process
- Clearly identify and list on a flipchart the needs or interests of each party
- Establish a mutual recognition of the other party's needs
- Demonstrate willingness to work towards "win-win" outcomes
- Must be genuine / authentic for it to resonate positively with mirror neurons and dampen the amygdala.

The cultural need for creativity

UNIQUE	preferences adjustment self-image life-style relationships values taste finances motivation	INDIVIDUAL
DIFFERENT	We tend to start off at this level. clothes languages religions foods family patterns status symbols attitudes to money respect patterns work patterns	CULTURAL
SAME	food shelter security identity purpose in life covering belonging self respect self fulfilment (Maslow)	HUMAN

Source: J. Kalowski -- Developed by Sheila Coghill

How to manage a variety of models as mediators?



Source: Based on L. Riskin "The New Old & New New Grids"

Key

○ = Neutral

✹ = Counsel

"Directive" v. "Elicitative "
= **procedural issues**

"Evaluative" v."Non-Eval."
= **substantive issues**

- Anglo-Saxon mediation
- **Continental mediation**
- Cross-border mediation

The challenge that lies ahead for our profession

Should we try to integrate different models of mediation and if so, how?

How can we start to look at this globally and inclusively?

THE ANSWER LIES IN CREATIVITY

We should try to embrace a Chinese logic of conflict

Crisis

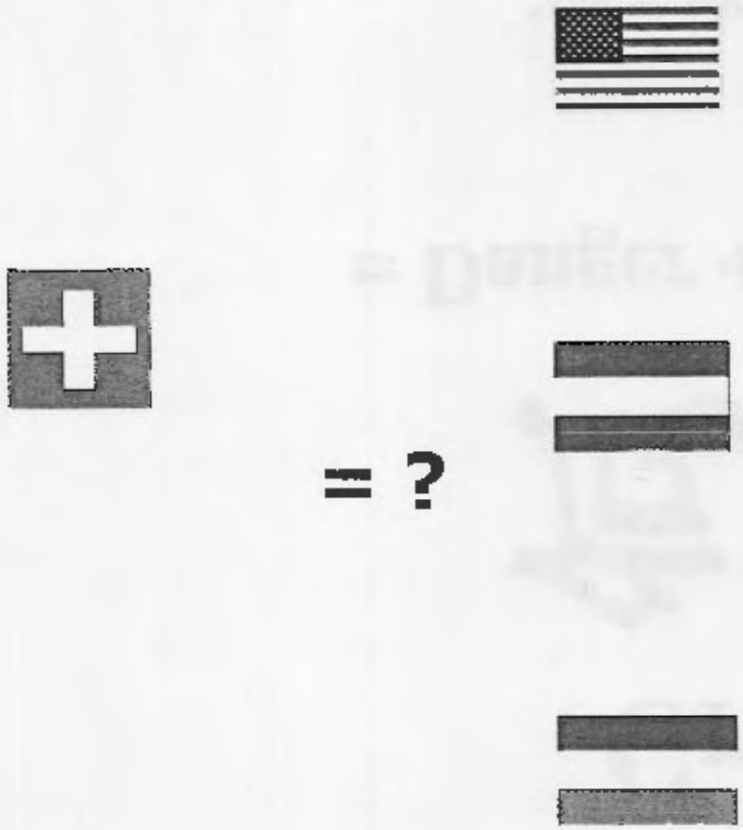
危机

= Danger + Opportunity

Source: Michael Leathes

ALTENBURGER

The need for creativity in cross-cultural contexts



UK/US = Efficiency
- Time pressure
- Emphasis on an outcome
- Much caucusing

AT (& DE) = Perfection
- Whatever time it takes
- 2 neutrals
- No caucusing
- Emphasis on process

FR = A Philosophy
- 4 steps
- Confidential
- Little other emphasis

NL = Pragmatism
- 4 half days on ave.
- Little caucusing
- Process + outcome + cheap

AU = Holistic
- Time (past & future)
- Broad and flexible

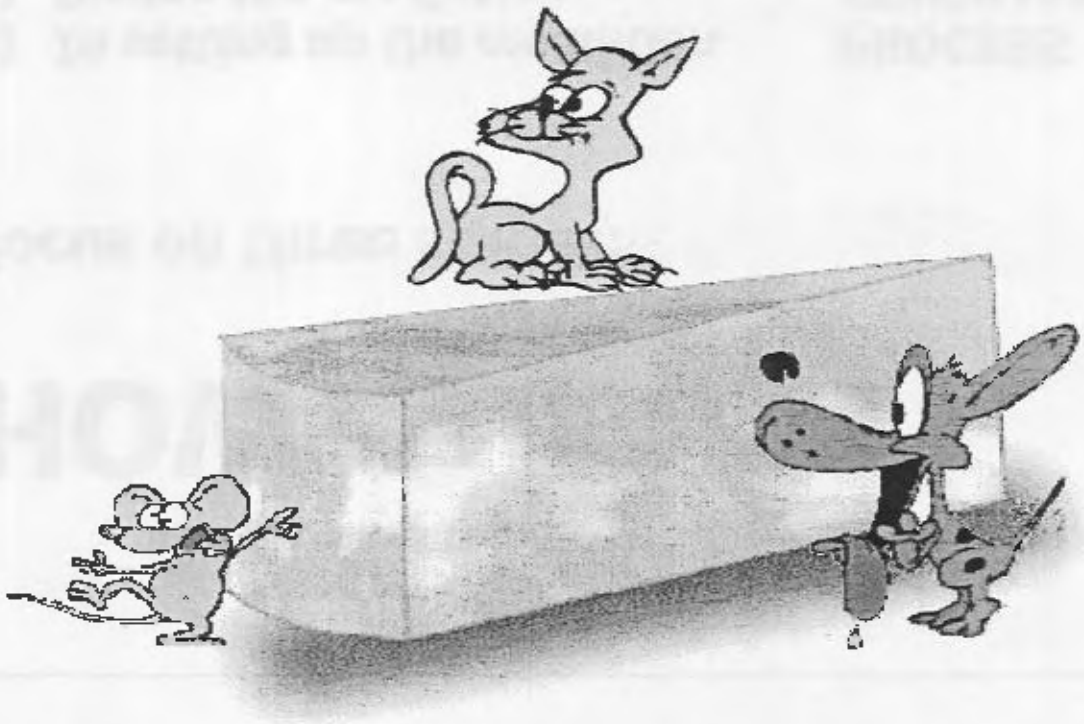
HOW?

Focus on three stages:

a) In setting up the mediation	PROCESS
b) During the mediation	GENERATING OPTIONS
c) At the end of the mediation	COMPLIANCE

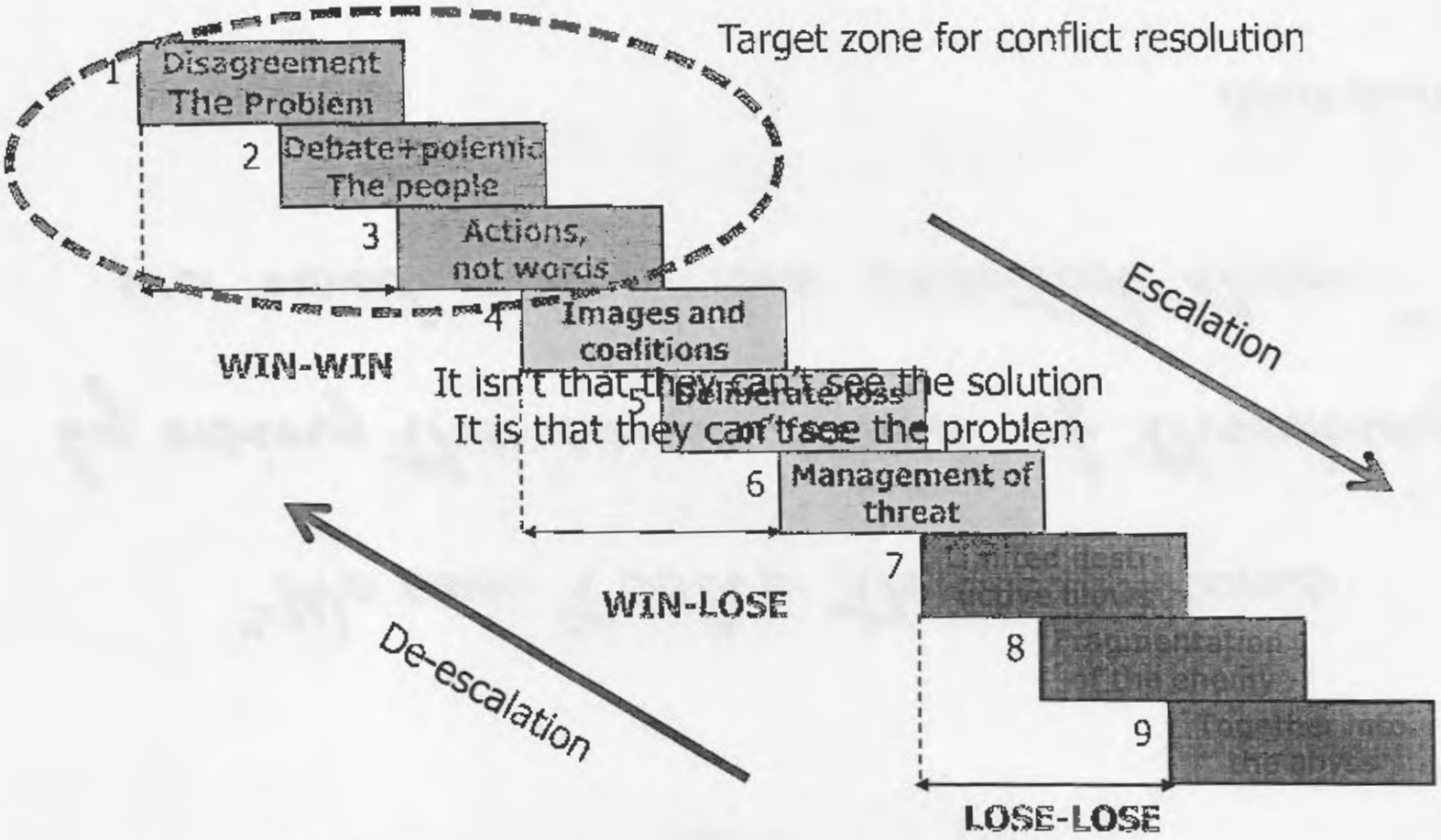
Focus on perceptions of the problem

"It isn't that they can't see the solution, it is that they can't see the problem" Gilbert Chesterton



source: Jeremy Lack

Creativity is required to de-escalate & contain the conflict



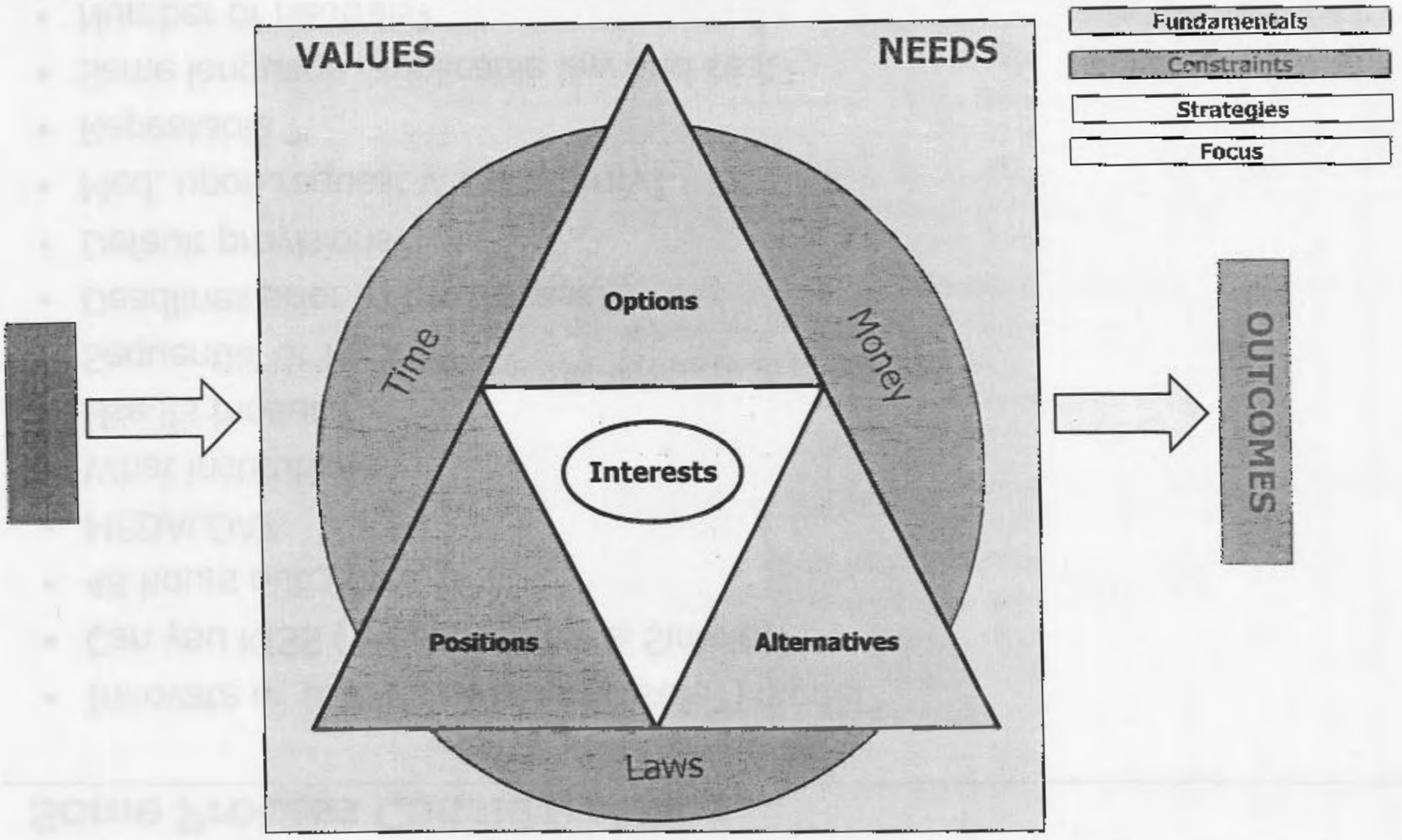
Inspired by: Tina Monberg
Source: F. Glasl's "Confronting Conflict"

"We can't solve the problems
by using the same kind of thinking
we used when we created them"

Albert Einstein

ALTENBURGER

The Holistic Approach to Process



Some Process Considerations

- Innovate or use a pre-existing (safe?) model?
- Can you KISS ("Keep it Short & Simple)?
- 48 hours outcome?
- MEDALOA?
- What institution?
- Use its models?
- Sequential or Hybrid?
- Deadlines prior to next phase?
- Default provisions?
- Med. upon request v. mandatory?
- Repeatable ?
- Same language, applicable law and seat?
- Number of neutrals?

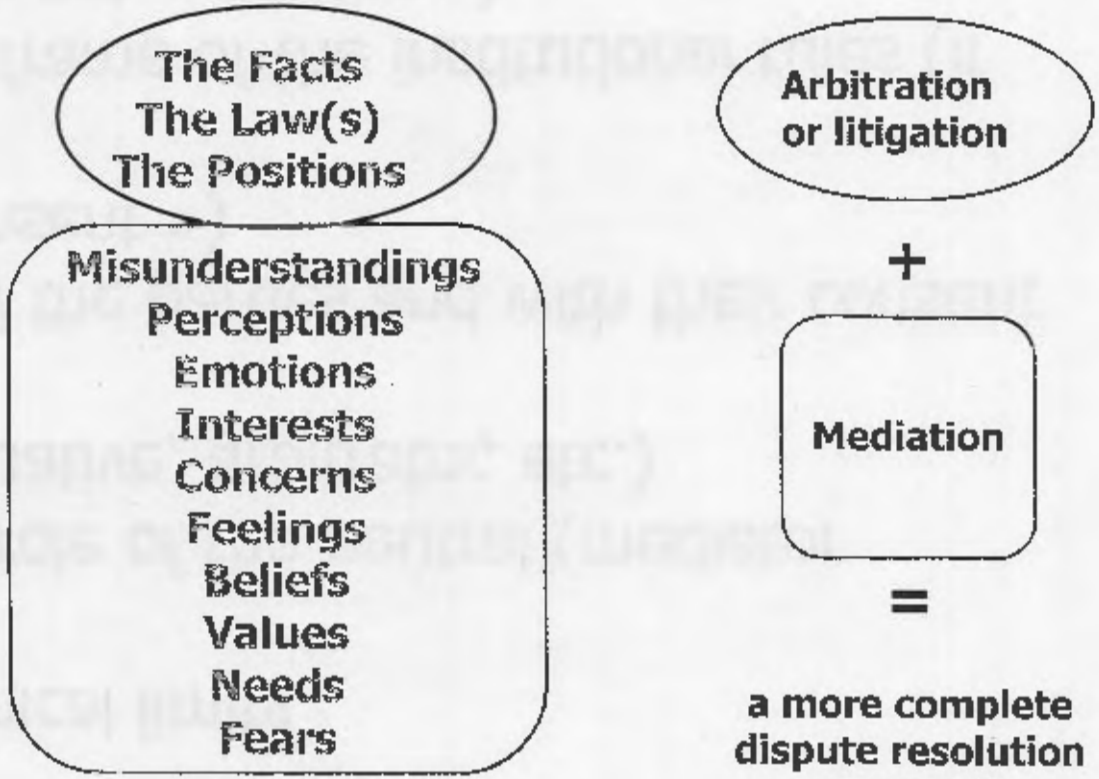
Improvisation of the Process: "Basic rules"

- Within strict ethical limits
- Sticking to the role of the neutral (mediator facilitative/evaluative, arbitrator, etc.)
- In the interst of the parties and with their consent (« informed consent »)
- Respecting the frame of the institutional rules (if the mediation is not « ad hoc »)

Combining ADR: Does a fuller picture = better outcomes?

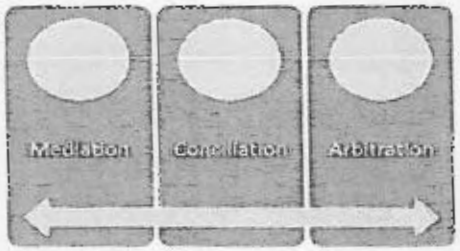
Although the "objective" aspects of the dispute may be apparent ...

... the "subjective" aspects remain to be discovered.



Process Design Considerations

Sequential
- Med-Arb
- Arb-Med

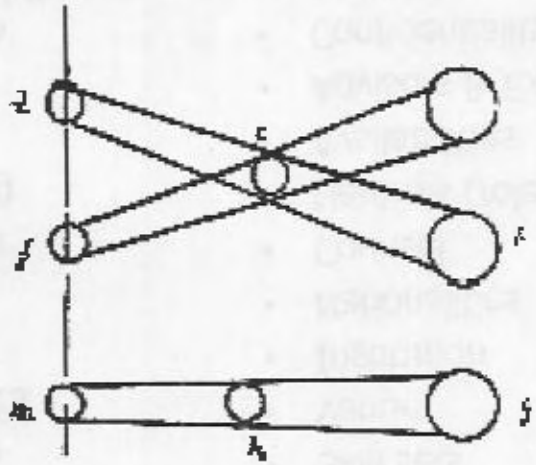


Parallel
- Med//Arb
- Carve-outs
- Windows
- Shadow mediation
- Partnering

Hybrid
- MEDALOA
- Co-medarbiters
- ??

Factors
- Parties
- Certainty of outcome
- Costs
- Time & deadlines
- Distances
- Languages
- Skill sets
- Venue
- Institution
- Nationalities
- Counsel
- Neutrals (roles & no.)
- Availabilities
- Advisors & Experts
- Confidentiality
- Discovery
- Implementation
- Enforcement

Using co-mediation to generate co-creativity



Going beyond binocular vision to generate CO-CREATION

PROCESS ISSUES – Who & How Many neutrals?

- **1 lead mediator + 1 assistant**
- **2 equal peers (anti-coalition protection)**
- **Other mediator in background**
  - Sparring partner
  - Shadow advisor / coach

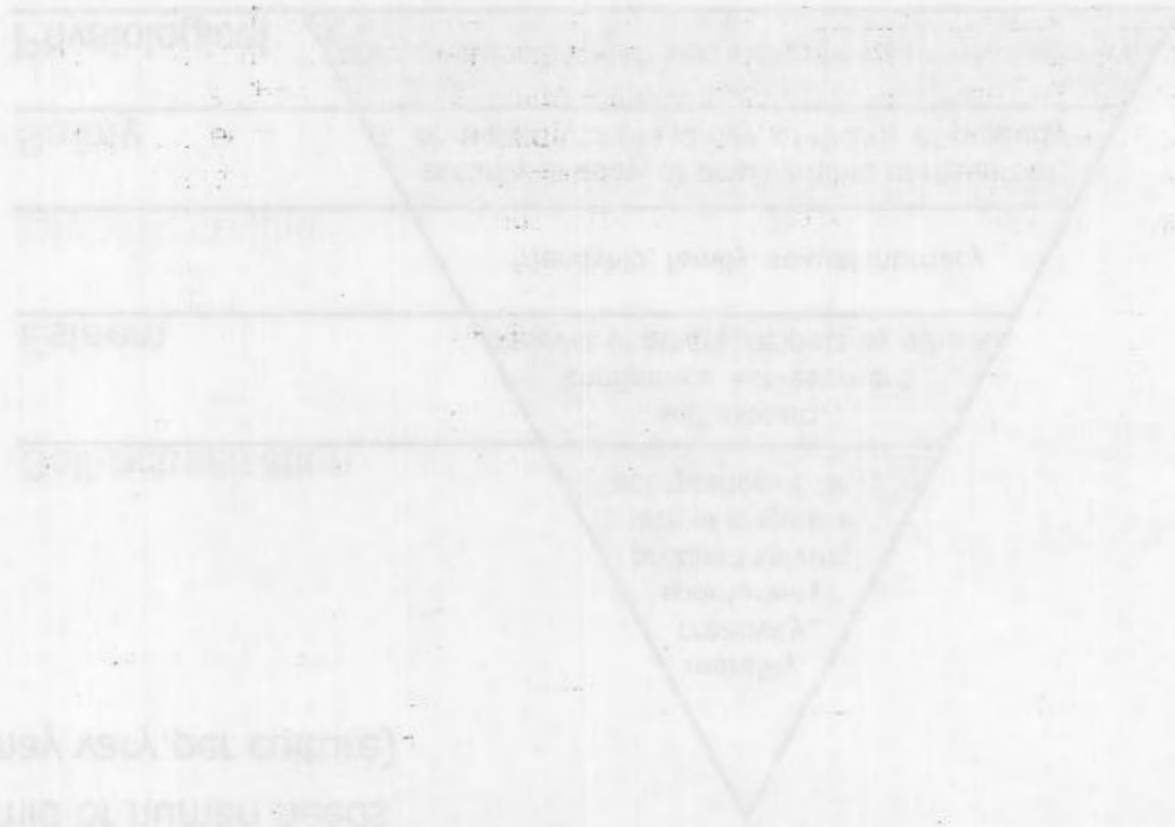
1. **Identical Mediators**
   1. Process skills
   2. Multi-tasking /splitting the team
2. **Different Mediators (competition and/or diversity)**
   1. Evaluative & Non-Evaluative
   2. « Good Cop » + « Bad Cop »
   3. « Ying » + « Yang » (Female + Male)
3. **Complementary approaches = different mental models**
   1. Random mix
   2. Cultural Mix
   3. Professional Mix

Co-mediation promotes creativity

An example using various strategies and styles:

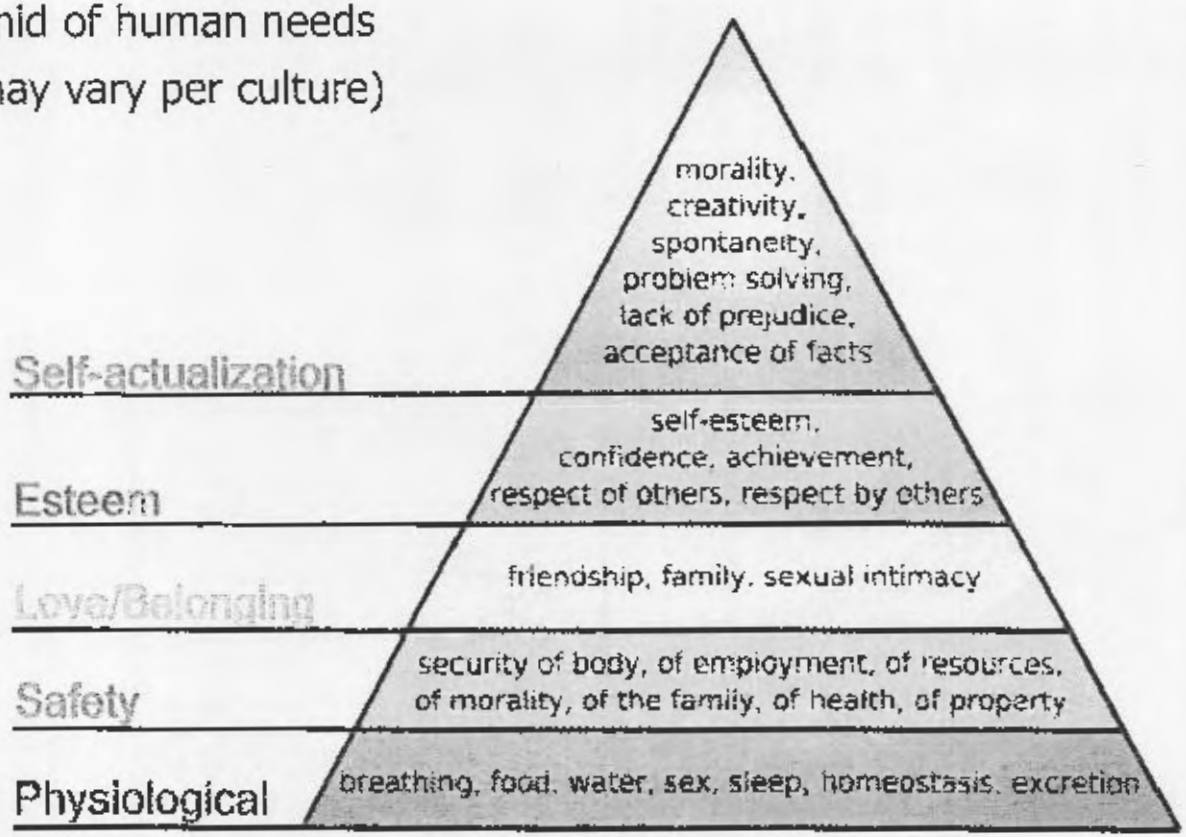
Mediator 1	Mediator 2
Increase complexity: focus on details	Decrease complexity: keep focus on big the picture
Focus on substance and facts	Focus on relationships and emotions
Focus on the problem	Focus on the solution
Focus on the individuals	Focus on the organization

Tools for generating New Options in Mediation



The constant base: NEEDS

MASLOW's pyramid of human needs
(NB hierachies may vary per culture)



Source: http://en.wikipedia.org/wiki/Maslow%27s_hierarchy_of_needs
See also M. Rosenberg: http://www.cnvc.org/needs.htm

Indispensable Tools

- Imagination
- Flexibility to change
- Try new stances (e.g. « not knowing stance »)
- Welcome emotions = entrance door to interests
- COURAGE

- Lay out of the room, seating arrangements
- Bord, flip-chart, Post-it, cards, ...
- Drawing material, artwork
- Images et metaphores

© B. Sambeth Glasner & J. Lack 2008. All rights reserved.

Use (but not abuse) of Communication

All interactions imply communication:

- body language corporel,gesture, verbal, tonal, etc… (Watzlawik)
- 2 people = 4 voices (internal / external)

- Active listening
- Open questions
- Reformulation
- Echos
- Interruptions
- SILENCE

The « Click »

- Individuals have cognitions (« knowledge, opinions or beliefs regarding their environment, themselves or their own behaviour ») that are incompatible with one-another, which puts them in a situation of unease (called "cognitive dissonances"). (Wikipedia.com)

- Experiencing cognitive dissonances enables a re-assessment of oneself, of one's opinions, beliefs, etc. and thus an opening of the mind that permits new attitudes and perspectives.

Cognitive Dissonances (Leon Festinger, 1957)

If two cognitions are relevant to one another, they are either consonant or dissonant. Two cognitions are consonant if one follows from the other, and they are dissonant if the obverse (opposite) of one cognition follows from the other. The existence of dissonance, being psychologically uncomfortable, motivates the person to reduce the dissonance and leads to avoidance of information likely to increase the dissonance. The greater the magnitude of the dissonance, the greater is the pressure to reduce dissonance.

Festinger's Smoking Example: A habitual smoker who learns that smoking is bad for health will experience dissonance, because the knowledge that smoking is bad for health is dissonant with the cognition that he continues to smoke. He can reduce the dissonance by changing his behavior, that is, he could stop smoking, which would be consonant with the cognition that smoking is bad for health. Alternatively, the smoker could reduce dissonance by changing his cognition about the effect of smoking on health and believe that smoking does not have a harmful effect on health (eliminating the dissonant cognition). He might look for positive effects of smoking and believe that smoking reduces tension and keeps him from gaining weight (adding consonant cognitions). Or he might believe that the risk to health from smoking is negligible compared with the danger of automobile accidents (reducing the importance of the dissonant cognition). In addition, he might consider the enjoyment he gets from smoking to be a very important part of his life (increasing the importance of consonant cognitions).

http://ankb.stumbleupon.com/

Source: Cognitive Dissonance: Progress on a Pivotal Theory in Social Psychology
Edited by Eddie Harmon-Jones and Judson Mills

Examples from around the world

- Trading places
  - Physical seating
  - Advocating for the other side
  - Take people out of context and allow role-plays
  - Changing the physical space of the room
- Drawing the conflict
- Miming the conflict and "acting" it back to the parties
- Characterizing the conflict in new ways: through colours, songs, shapes, smells, tastes etc.
- Systemic approaches: placing objects or people in representative constellations (e.g., on a chessboard)
- Using a "speaking stick"
- Using lego or mechano building sets
- Anything that creates cognitive dissonances ...

Skills for Lateral v. Critical Thinking

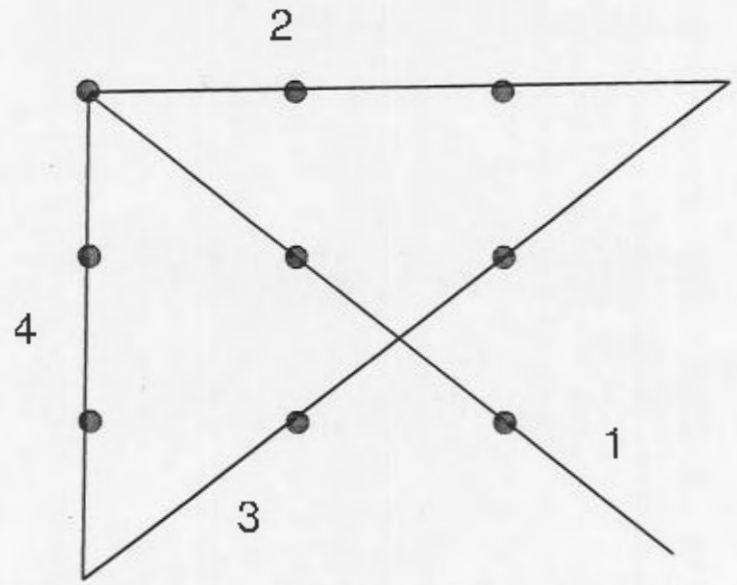
Using Mental Maps can help the parties to visualize relationships amongst topics/ideas & stimulate new thinking

Structured Creativity: e.g., De Bono's 6 Hats

Inspired by: Tina Monberg, Handbook of Human Conflict Technology

Inventing new options

Think « out of the box » ...



A Mediator is like a « Chef d'Orchestre » !

He doesn't play the instruments himself...

He gives voice to all instruments so that they can play in the most appropriate and hamonious way.

ALTENBURGER

Compliance & Creativity: The "Clause & Effect" Principle

Storebaelt, DK

Oresund, DK & SE

Source: Tina Monberg

Same Conflict Management System ("CMS") Proposed in Both Cases

PETER LUNDHUS' PROPOSAL:

Musketeer bonus + Steering group

1. Negotiation
2. Dispute Resolution Board
3. Mediation
4. Arbitration

LUNDHUS PROPOSAL DECLINED

LUNDHUS PROPOSAL ACCEPTED

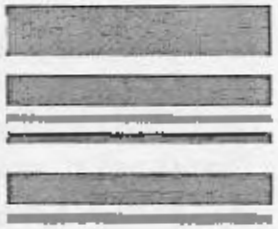
- Opened 9 months ahead of schedule
- Within budget
- No constructors lost money
- No negative press or political complaints
- Positive relations
- Less accidents and no deaths

Quantum Physics: This can work for other industries as well

Compliance & The New "Swiss ADR" Rules

Introduction: To better serve business

The Swiss Chambers of Commerce are private institutions representing a multitude of companies within industry, the service sector and commerce. With the Swiss Rules of Commercial Mediation the Chambers of Commerce of Basel, Berne, Geneva, Neuchâtel, Vaud, Ticino and Zurich offer an alternative method for settling disputes.



Mediation is an alternative method of dispute resolution whereby two or more parties ask a neutral third party, the mediator, to assist them in settling a dispute or in avoiding future conflicts. The mediator facilitates the exchange of opinions between the parties and encourages them to explore solutions that are acceptable to all the participants. Unlike an expert the mediator does not offer his or her own views nor make proposals like a conciliator, and unlike an arbitrator he or she does not render an award.

The mediation can be terminated at any time, if the parties do not reach a mutually satisfactory settlement, or if one of the parties wants to discontinue the process.

Modern, flexible, cheap, & commercially-oriented.

E.g., Using MED-ARB for Consent Awards Across Borders

Article 23.1 Swiss Mediation Rules -- Recourse to arbitration

1. In international mediations, the parties may jointly agree in writing at any time during the course of their mediation to refer their dispute or any part of their dispute to an Arbitral Tribunal under the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce for resolution by arbitration. Either party may then initiate arbitration proceedings under those Rules, including the provisions for an Expedited Procedure under article 42 of those Rules, by submitting a notice of arbitration as provided for by Article 3 of those Rules. If the parties settle the dispute during the arbitral proceedings, article 34 of those Rules shall be applicable for the rendering of an award on agreed terms.

2. In domestic mediations, the parties may jointly agree in writing at any time during the course of their mediation to refer their dispute or any part of their dispute, to the domestic arbitration Rules of one of the Chambers for resolution by arbitration. Either party may then initiate arbitration proceedings under those Rules, including an expedited or fast-track procedure as may be provided for by those Rules, by submitting a request or notice of arbitration as provided for by those domestic Rules. If the parties settle the dispute during the arbitral proceedings, the domestic Rules shall govern, where applicable, the procedure for the rendering of an award on agreed terms.

Article 34 Swiss Rules of International Arbitration -- Settlement or Other Grounds for Termination

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. ...

3. Copies of ... the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties and to the Chambers. Where an arbitral award on agreed terms is made, the provisions of Article 32, paragraphs 2 [written document] and 4 to 6 [signature, publication & original copies] shall apply.

WHEN?

Me Thierry GARBY

THANK YOU!

NEUROSCIENCE, NEGOTIATION AND PERSUASION

Rich Birke & Craig Bachman

A SHORT HISTORY OF PERSUASION

- What the Greeks gave us
- How we listen and learn
- How to persuade any audience

WHAT THE GREEKS GAVE US

- Rules of 3's
  - 3 kinds of argument
  - Triads
  - 3 part argument
- Ockam's Razor (KISS)

3 KINDS OF ARGUMENT

- Aristotle's triangle
  - Ethos -- Reputation
  - Logos -- Logic
  - Pathos -- Emotion

TRIADS

- Everything looks better, sounds better and is more persuasive if expressed in 3's
- Examples
  - I came, I saw, (I conquered)
  - Friends, Romans, countrymen
  - Blood, Sweat and Tears
  - Faith, Hope and Charity
- Why?

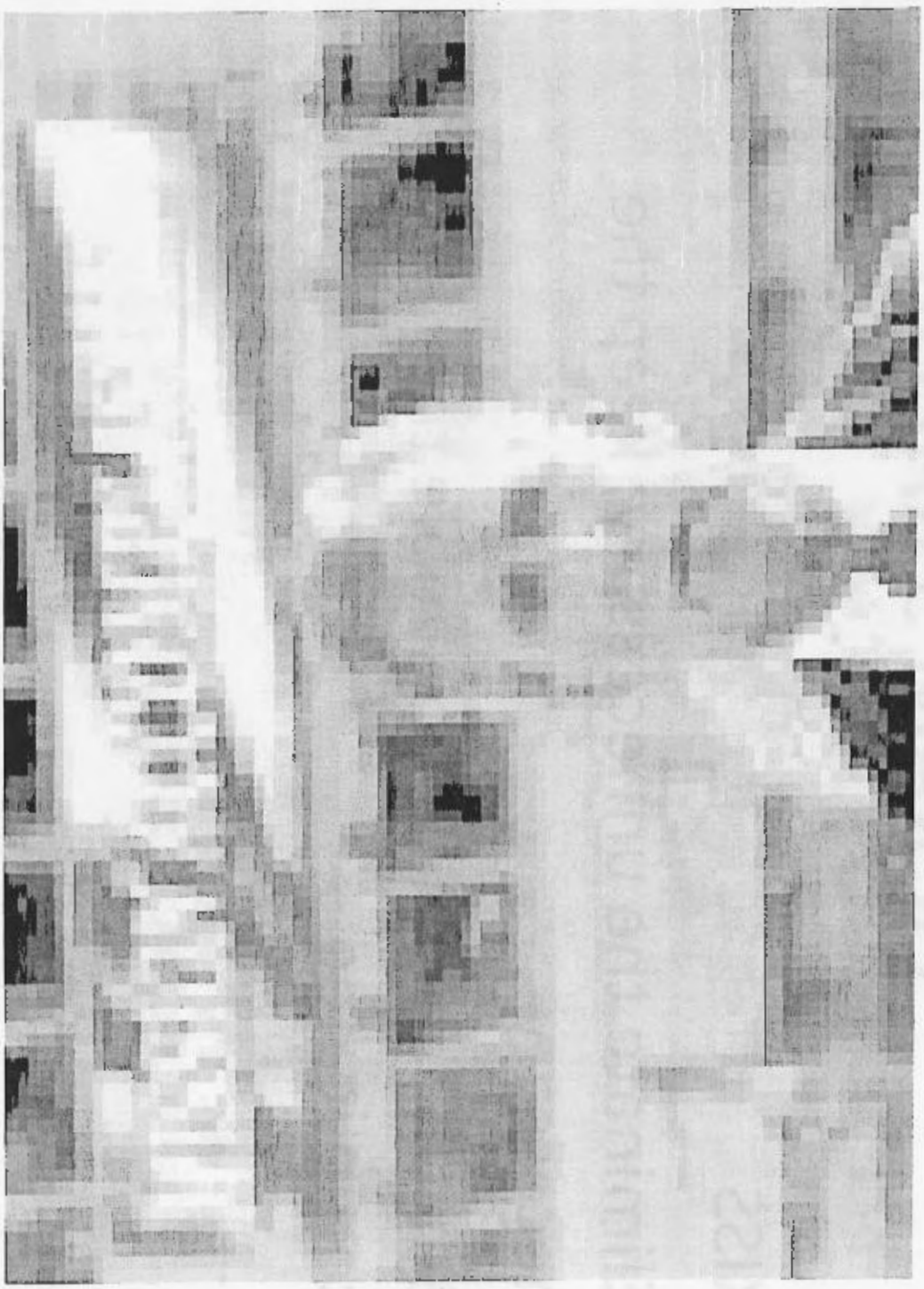
3 PART ARGUMENT

- Thesis
- Antithesis
- Synthesis

- In comedy (setup, anticipation, punchline)

OCKAM'S RAZOR

- KISS
- Eliminate the unnecessary; keep the necessary
- But things can be so simple they become complicated



HOW WE LISTEN AND LEARN

- More emotional, Less intellectual
- Left Brain, Right Brain
- Triune Brain
- Read alone, Hear together
- Hear but once
- Environment competes
- Speech has content beyond words
- Attention span

HOW TO PERSUADE ANY AUDIENCE

- Be the Iceberg
  - Put the stats in
  - Use 3 real quotes
- How to make a quotable quote
- Be Present
- Winston Churchill model
- Be comforting
- Tell a story

We already know a lot about the mind

- Cognitive and behavioral psychology have taught us a lot

There are quite a few principles to consider

- Naive Realism and Biased Assimilation: People believe that they "see the world as it is" and this causes them to overweight information that confirms pre-existing hypotheses, and underweight disconfirming information.
- Confirmation Bias: People look for information that buttresses preexisting hypotheses in places likely to produce it.
- Risk Aversion: People are risk avoiding in the face of gains.
- Loss Aversion: People are risk seeking in the face of losses.
- Framing: Many equivalent deals are accepted or rejected depending on the framing of the offer as opposed to the value of the offer.
- Concession Aversion (status quo bias): People don't value equal trades from a neutral perspective. They distort the value of the offer so as to overvalue the loss, making equal trades difficult to effectuate.

And a few more

- Reactive Devaluation: (a) Things that are offered are less valuable than things that are not offered; (b) Offers from an opponent are evaluated according to the status of the offeree relative to the offeror.
- Fundamental Attribution Error: We react to situations while others act in accordance with immutable character traits).
- Reciprocation of Concessions: People feel obliged to reciprocate for acts of goodwill, even if the act produces no value and was not requested or wanted.
- Rejection of Offers and Later Cognitive Dissonance (Committment Bias): It's harder to say "yes" if you've already said "no."
- Authority: Perceived authority causes changes in decision making.

And these

- Certainty and Possibility: Decisionmakers value the changes from impossibility to possibility or from high likelihood to certainty far more than equivalent changes in probability elsewhere on the certainty continuum.
- False Uncertainty: People hesitate to make decisions when awaiting the outcome of a preliminary event, even where that preliminary event is irrelevant to the decision.
- Scarcity or Deadlines: Fleeting offers or disappearing commodities seem more valuable than if they were plentiful or available on request.
- Fairness as a Decision-Making Criterion: People reject deals that leave them better off than no deal if they perceive that their norms of fairness are being violated in accepting the deal.
- Availability: People fail to differentiate adequately their case from notorious cases
- Anchoring: People get stuck on salient, irrelevant numbers.

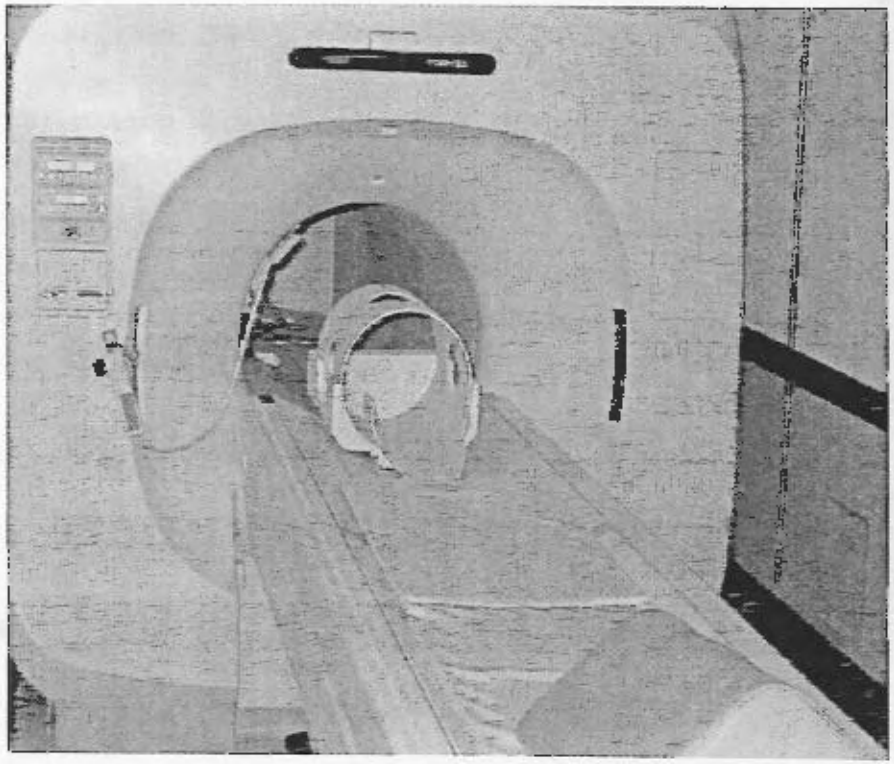
Oh yeah, and these

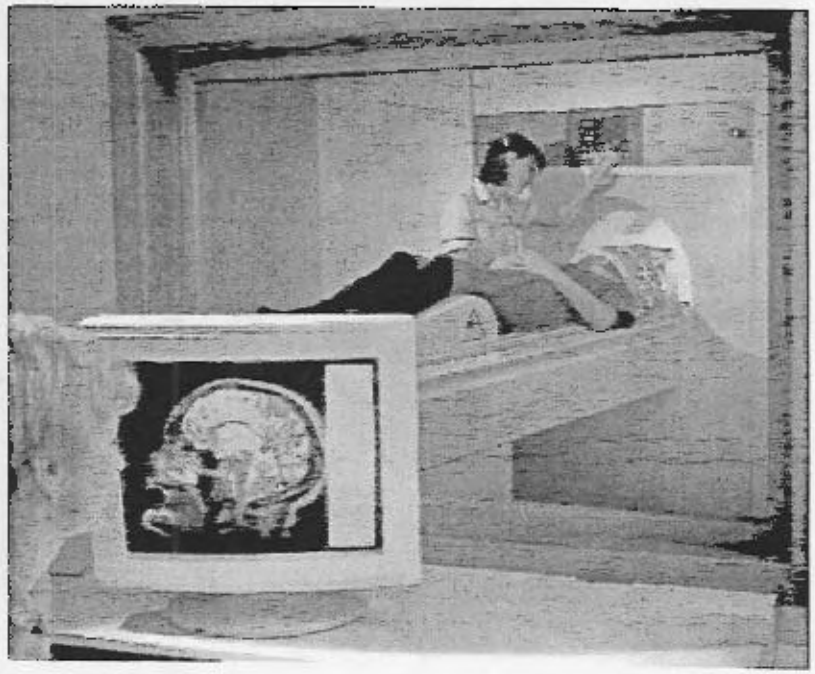
- Construal Biases: People think that others hold more extreme views than they do, and are unwilling to accept that others are moderates in a partisan situation.
- Optimistic Overconfidence: People assess uncertainty levels optimistically.
- False Consensus Bias (Projection): People believe that others think the way do or have values similar to their own.
- Base Rate Neglect: People over-rely on misleading pieces of information that happen to be particularly salient, and they undervalue objective, collected data about similar cases.
- Ellsberg's Paradox: People prefer known risks to unknown risks, even when that preference yields worse results.
- Temporal Nature of Preferences: Future forecasts of preferences are poorly aligned with present desires.

What trumps what would be hard to complete

- It's too huge
- Unless you start with a hypothesis that is meant to show that different parts of decisions, different framings, etc. trigger different evolutionary responses – with the animal brain prepared to "blink" and the frontal lobe prepared to think

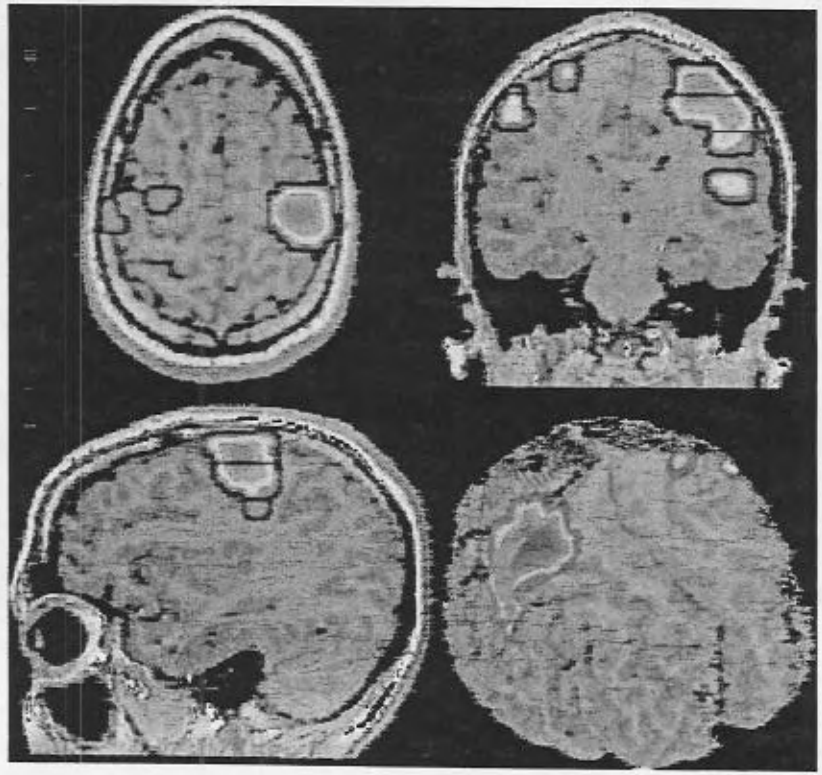
The MRI

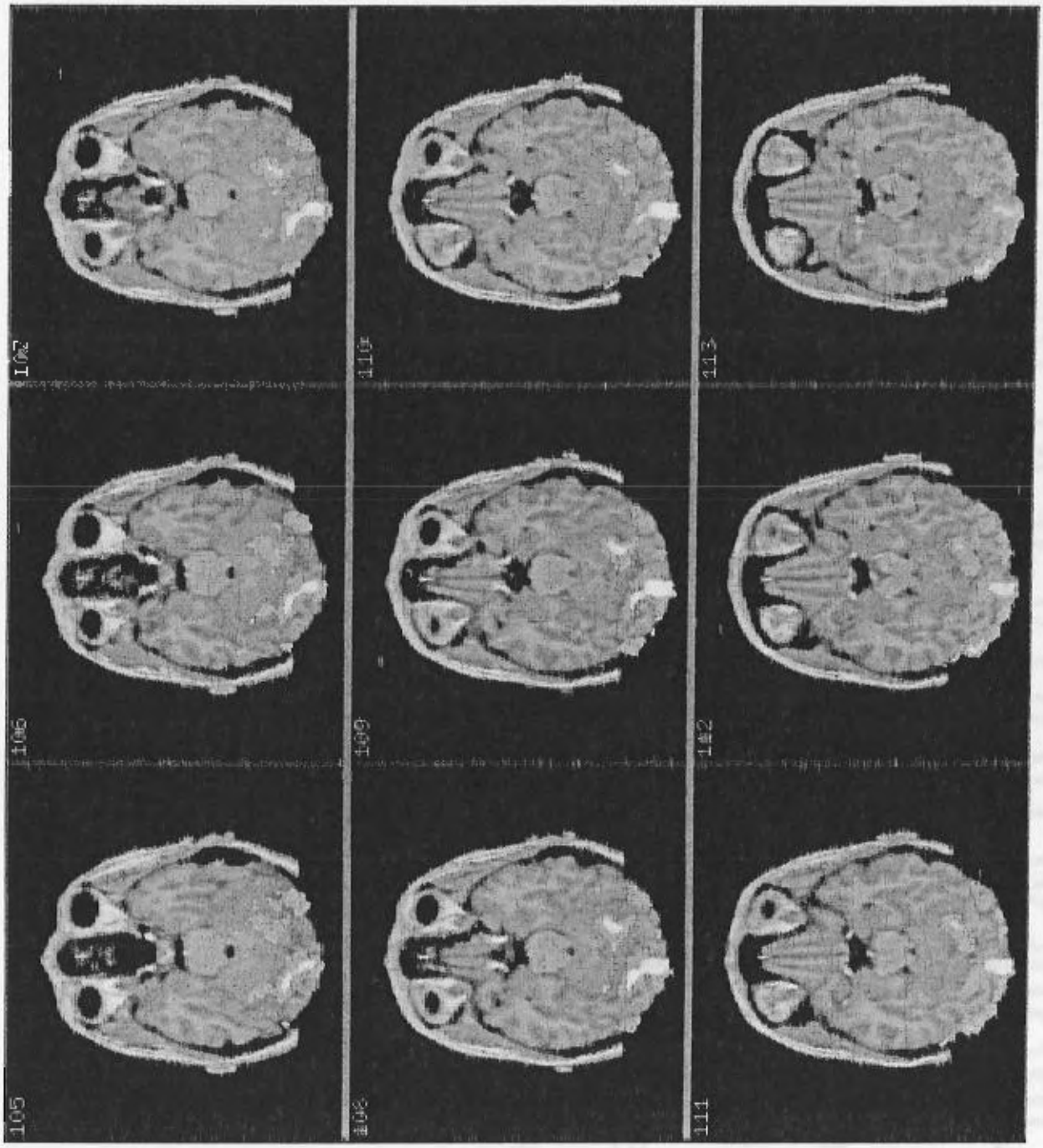




WE CAN MEASURE

- The location, intensity, duration and strength of the response to stimuli




105
106
107
108
109
110
111
112
113

NEUROPSYCHOLOGICAL PERSUASION

- Doesn't need a frame
- Not overtly logical
- Rests on logic
- Emotional core element

LEFT BRAIN RIGHT BRAIN

- Left controls Right and Right controls Left
- Confirmed the dicotomy between thinking and feeling, cognition and emotion
- Emotion is reaction
- Cognition is action
- BUT, they are mediated together

TRIUNE BRAIN

- Reptilian
- Limbic
- Cortical

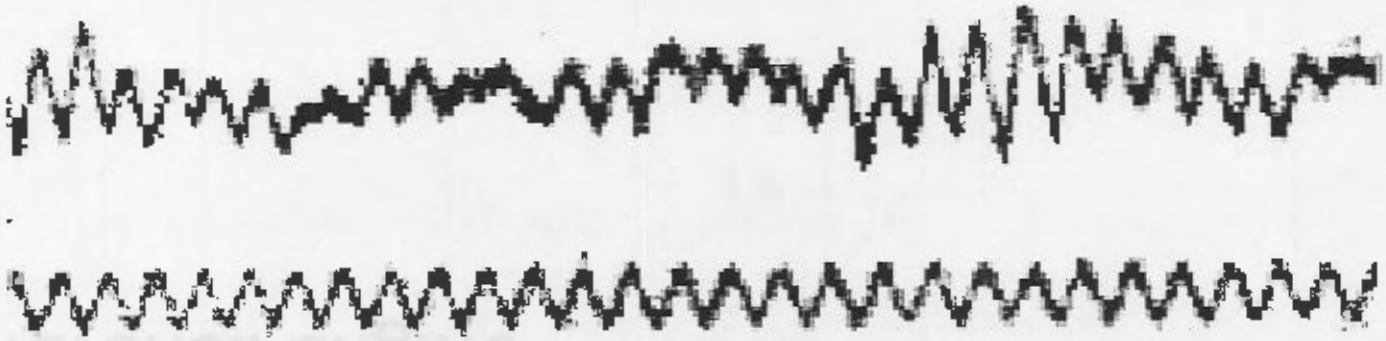
THE BRAIN WILL NOW TAKE THE WITNESS STAND

- Electroencephalography
- Magnetic resonance imaging
- Positron emission tomography

EEG

- Spontaneous Electrical Activity
- Over Time
- Multiple electrodes

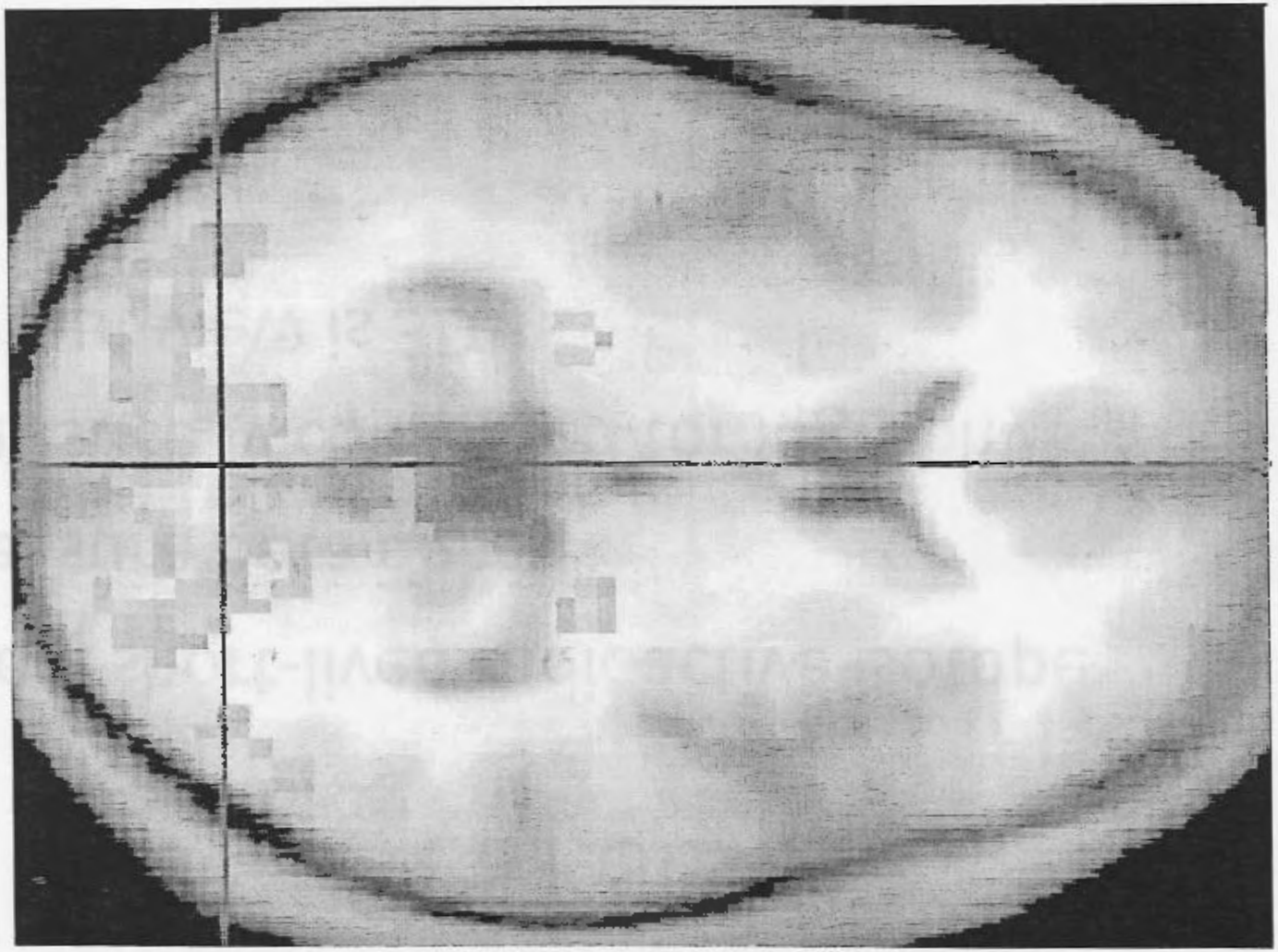
EEG SCAN



THE fMRI

- How it works
- What it measures
- Difference engine

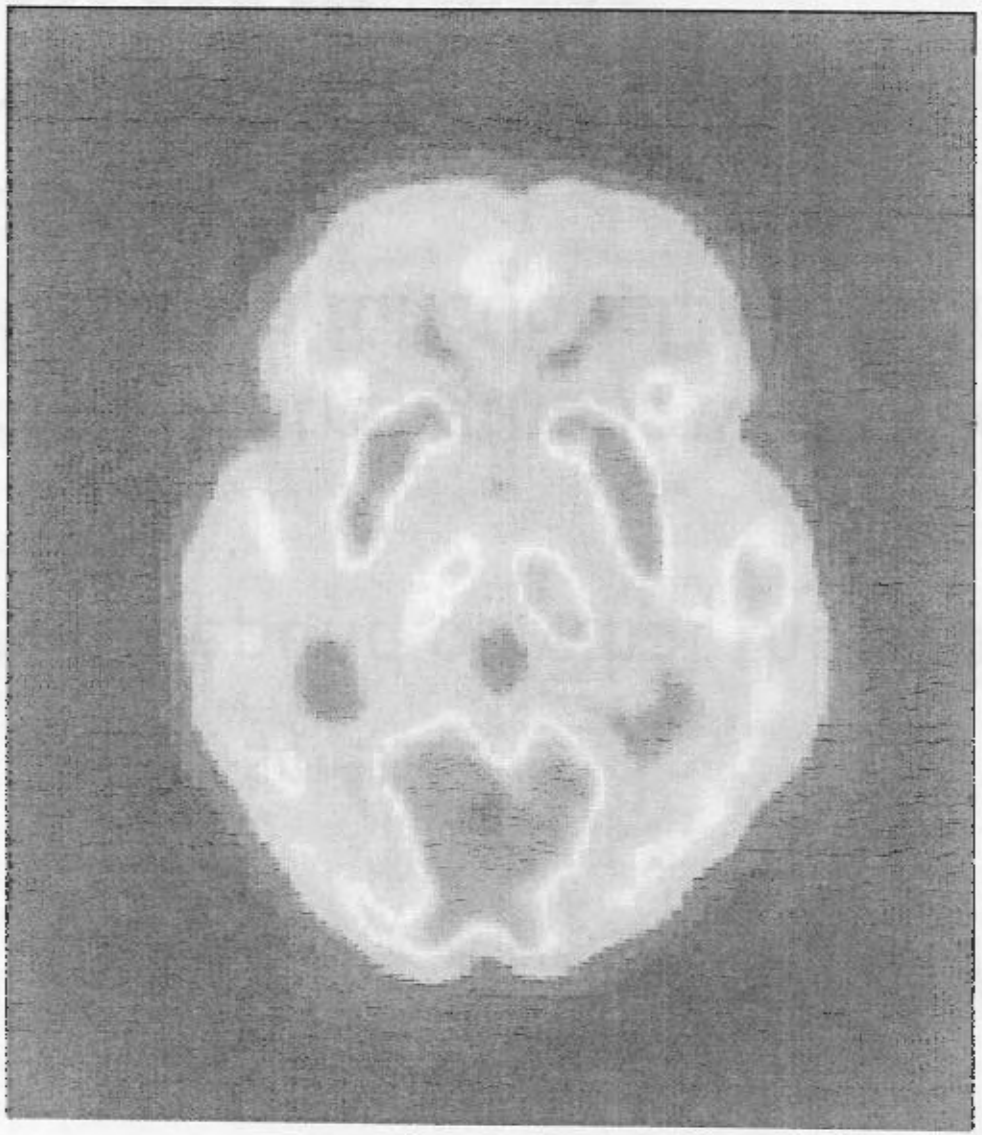
FUNCTIONAL MRI SCAN



PET SCAN

- Inject short-lived radioactive isotope
- Measure beta decay
- Statistically computed tomography
- Output view is 3D

PET SCAN



And the Science Says

- All still "baby science"
- Outcomes depend on what the experimenter does
- Confirms and Strengthens what had been developed on a functional level at the molecular level.
- Confirming the associations between responses and structures

THE CURRENT MOMENT IN LIT

- Blink
- Stumbling on Happiness
- The Accidental Mind
- The Political Brain
- Social Intelligence
- Emotion Revealed
- And many more

LET'S DISCUSS REAL SITUATIONS

- What goes on in your cases that we might be illuminated by an understanding of neuroscience?

OPENING SESSIONS

- Should there be joint openings? What is the value of an extended period of joint discussion when the parties are all very likely to have heard all about the case many times prior to mediation?
- In addition, there may be animosity between the parties or the lawyers that may be exacerbated in a joint opening.
- If the value is that the mediator is educated as to all aspects of the case, couldn't that be accomplished in advance?

Daniel Goleman

- Social Intelligence
- The mirror neuron
- The impulse and innate capacity to feel and use empathy

BESTSELLING AUTHOR OF
EMOTIONAL INTELLIGENCE

DANIEL GOLEMAN

THE REVOLUTIONARY BOOK
BY THE AUTHOR WHO REDEFINED
WHAT IT MEANS TO BE SMART

Social Intelligence

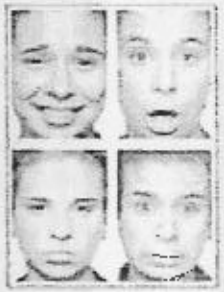
THE NEW SCIENCE OF
HUMAN RELATIONSHIPS

Paul Ekman

- Emotions Revealed
  - Universality of expression
  - Expression of motions as evolutionarily advantageous
  - Inducing fear -- the startle response to spiders and snakes

Emotions Revealed

Recognizing Faces and Feelings to Improve Communication and Emotional Life



Paul Ekman

Author of TELLING LIES

KNOWLEDGE MAY BE UNIVERSAL

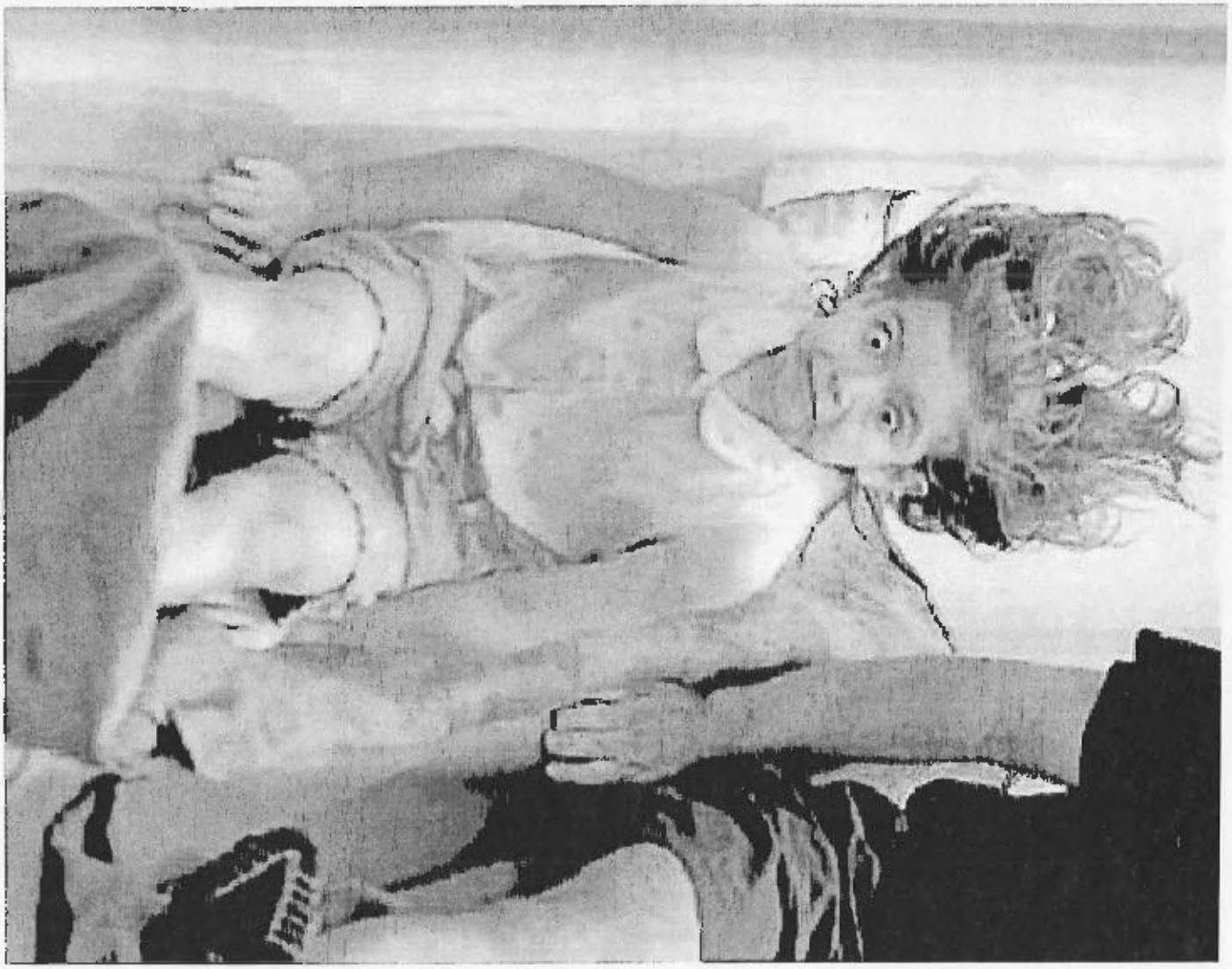
AND IT MAY BE EVOLUTIONARILY ADVANTAGEOUS

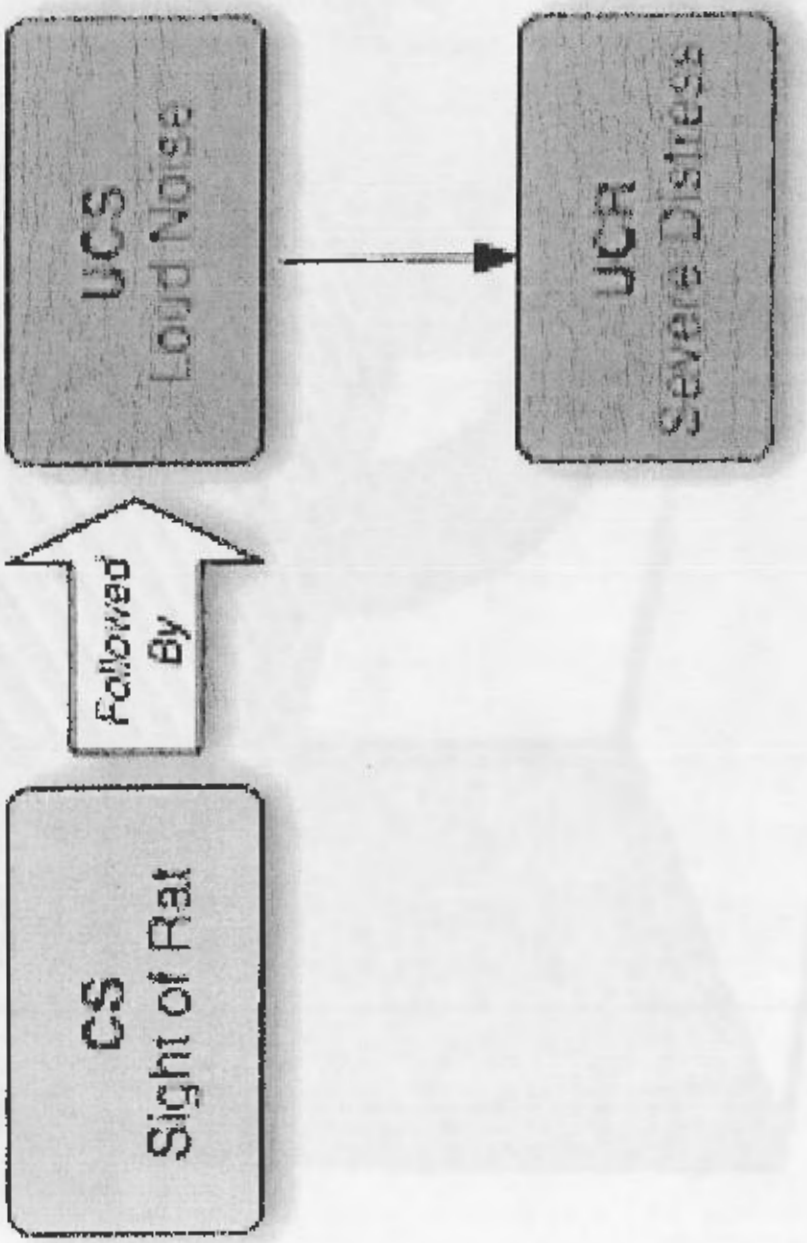
- To be able to communicate with others wordlessly so you can sort out friend from foe before it's too late
- To have the kind of storage space and connectivity associated with the neocortex
- To be scared of spiders
- To have a part of your brain that feels and senses and a part that "thinks"

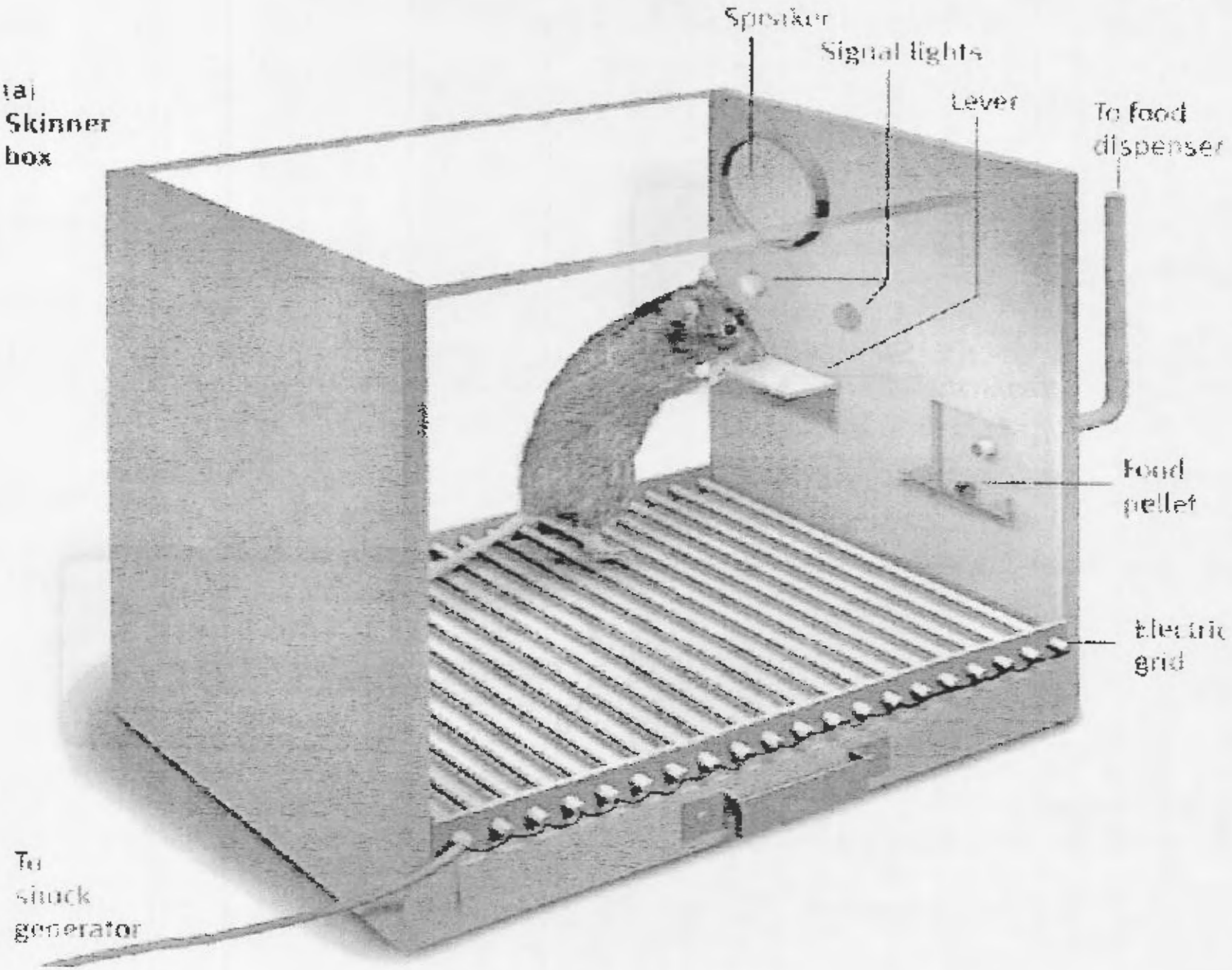
RETELLING THE TALE

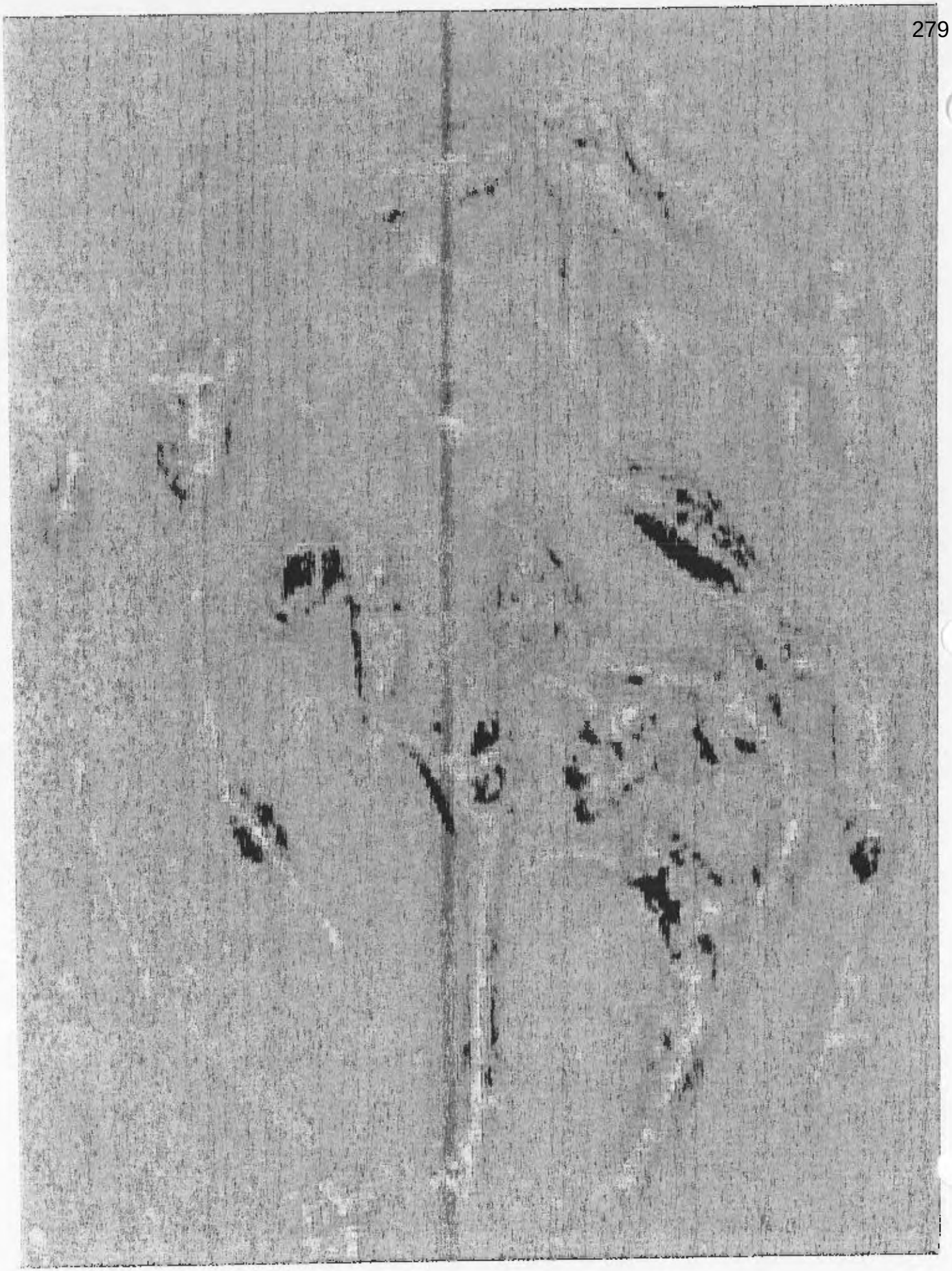
- We generally assume that it's cathartic and important for the various parties in the mediation to have a chance to speak about their version of the dispute, uninterrupted.
- Mediators use this time to help reveal interests, to discover facts, to look for places where the person might be amenable to compromise and to create a relationship of trust with the speaker.
- And then once they've had their say and the catharsis is complete, we are ready to start move bargaining. Is this good practice?

NEGOTIATING WITH FEAR

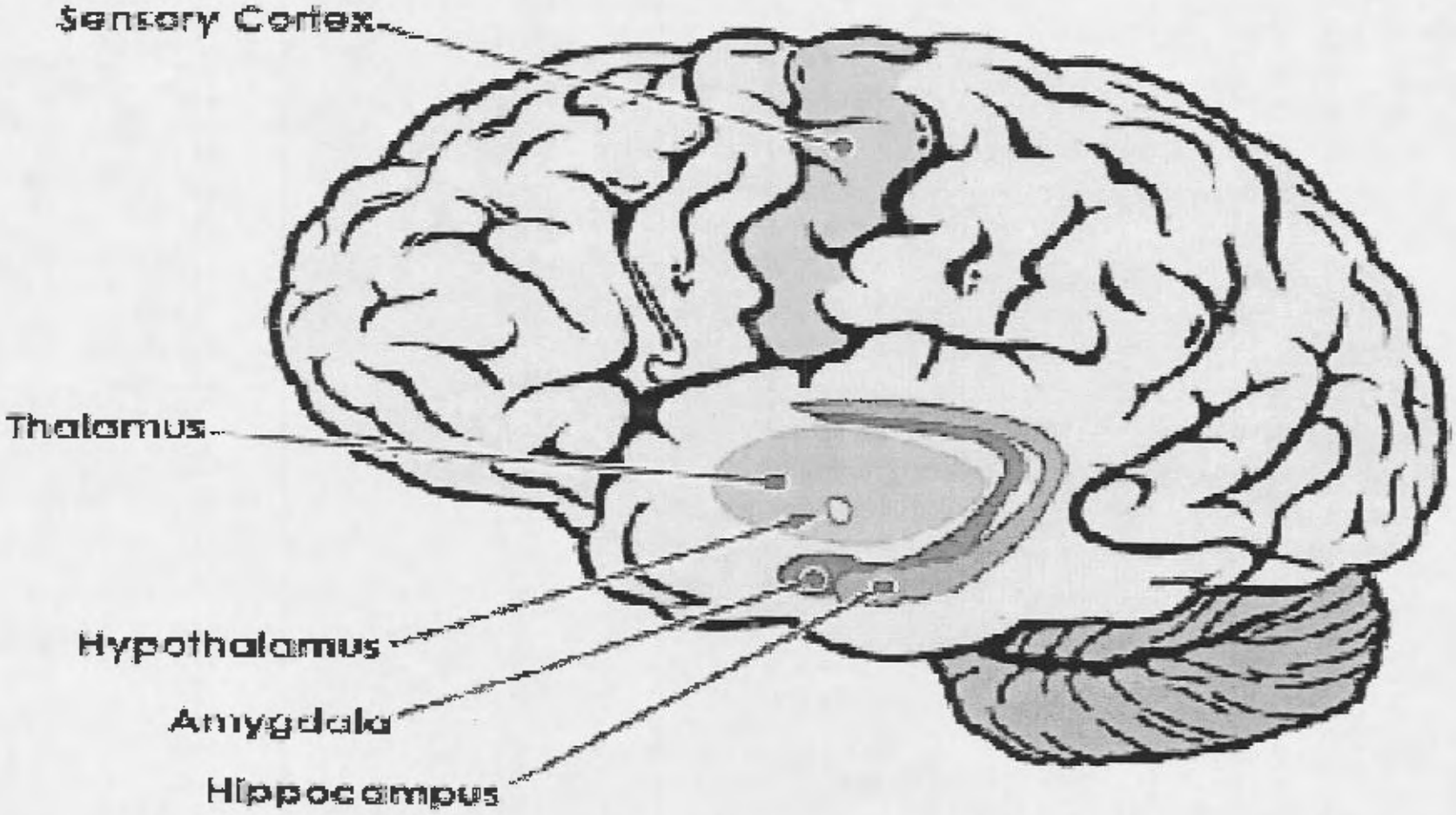



CS
Sight of Rat
Followed By
UCS
Loud Noise
UCR
Severe Distress

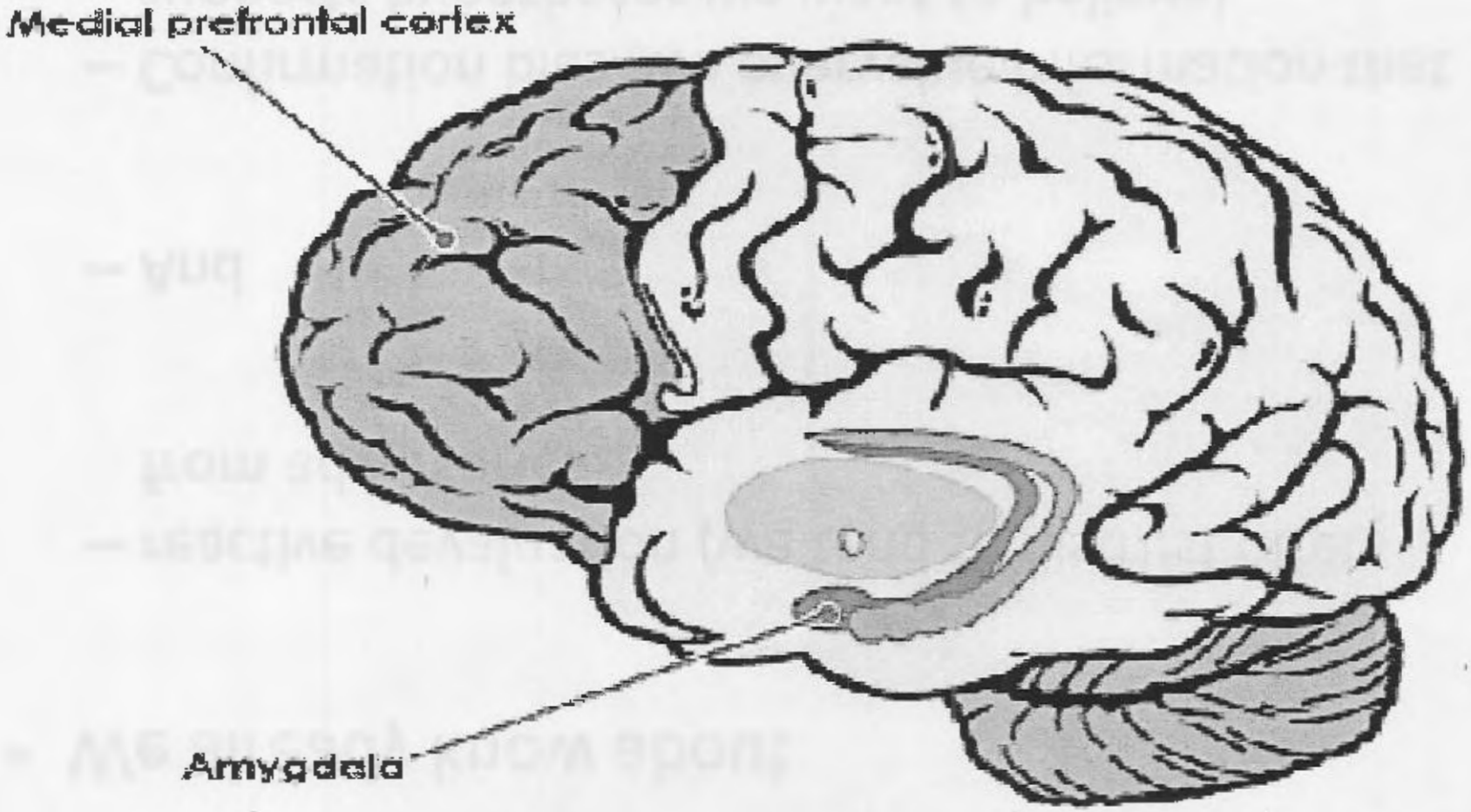

(a)
Skinner
box
Speaker
Signal lights
Lever
To food
dispenser
Food
pellet
Electric
grid
To
shock
generator



Parts of the Brain Involved in Fear Response



Fear Extinction and the Brain



PASSING INFORMATION, TRADING OFFERS

- We already know about
  - reactive devaluation (we tend to distrust offers from adversaries)
  - And
  - Confirmation bias (we overvalue information that supports hypotheses we want to believe)

Drew Westen

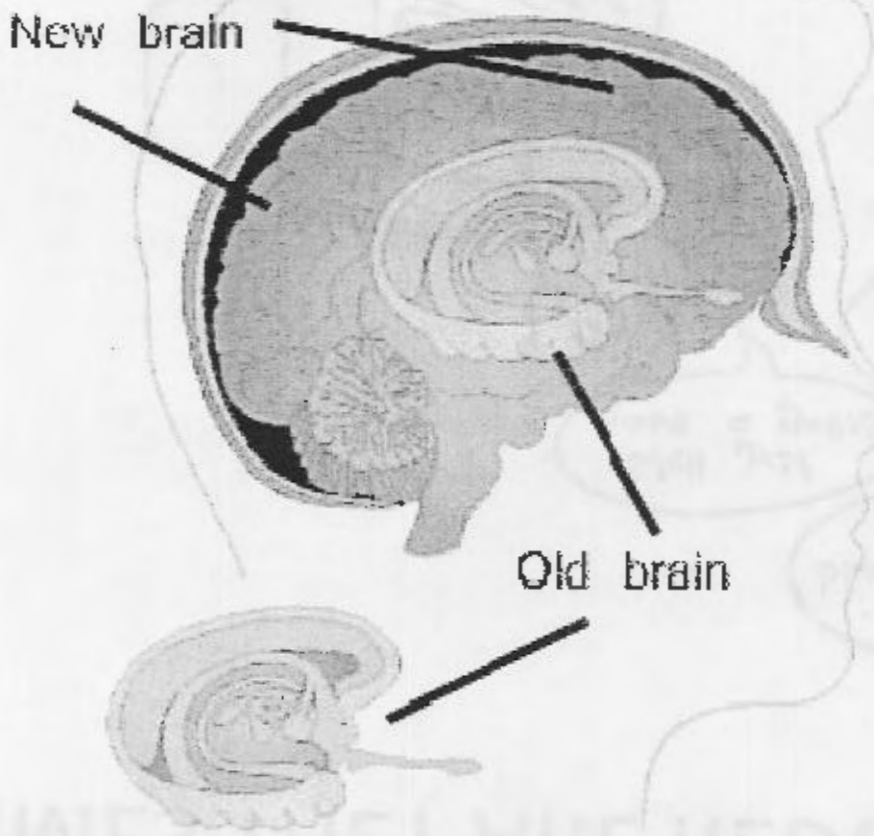
- The Political Brain
  - Emotional messages in political speeches
  - The example of race and character
  - Overt and conflicting impulses
  - Neural networks

The Political Brain

THE ROLE OF EMOTION IN DECIDING
THE FATE OF THE NATION

DREW WESTEN

THE OLDER MINDS CONVERSE WITH THE NEWER ONE

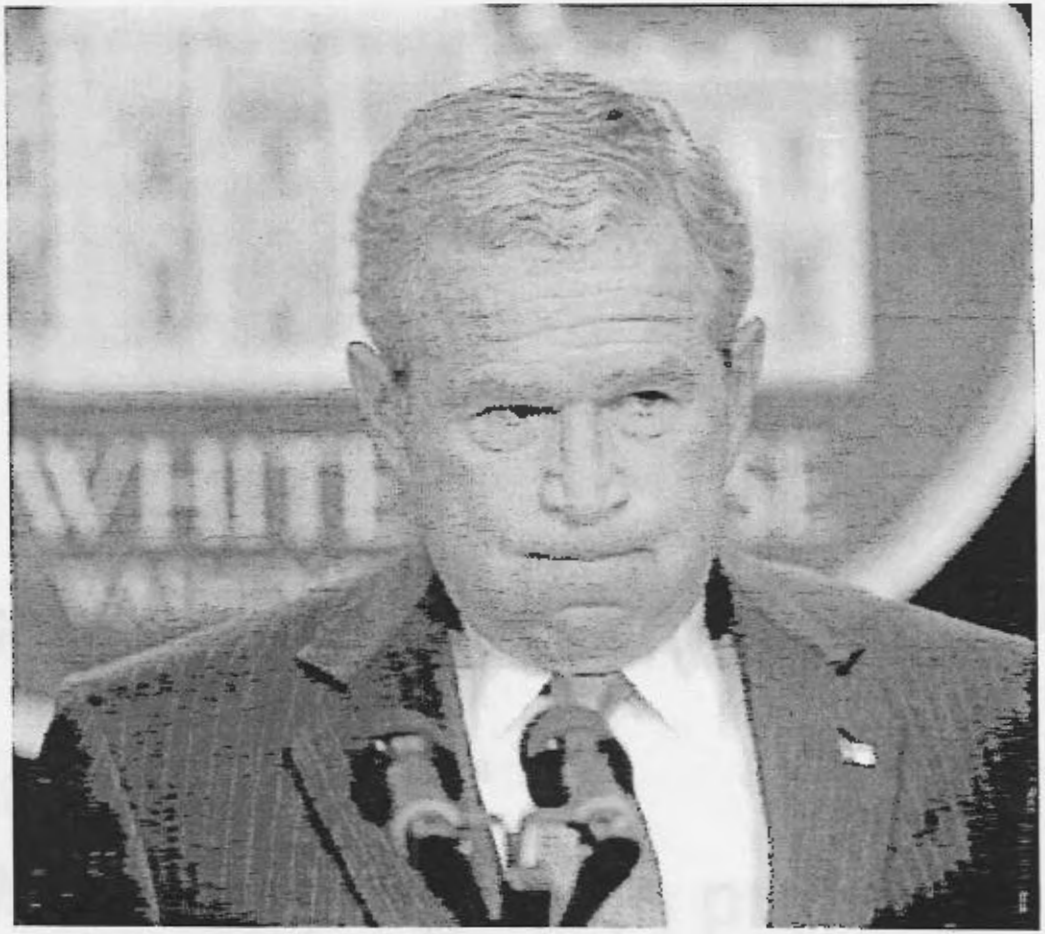


SOMETIMES THEY ARE REDUNDANT

- Sight

SOMETIMES THEY COMPETE

- Hold your breath for world peace



And when they compete, the old brain usually wins

- The emotional beats the intellectual....usually

But it doesn't always win

George Allen and "Macaca"

But Willie Horton and "Call me Harold" were below the radar


CHANGE
WE CAN BELIEVE IN
STAND FOR CHANGE
CHANGE WE CAN BELIEVE IN
VETERANS FOR Obama
STAND FOR CHANGE

THINKING ABOUT OPTIONS

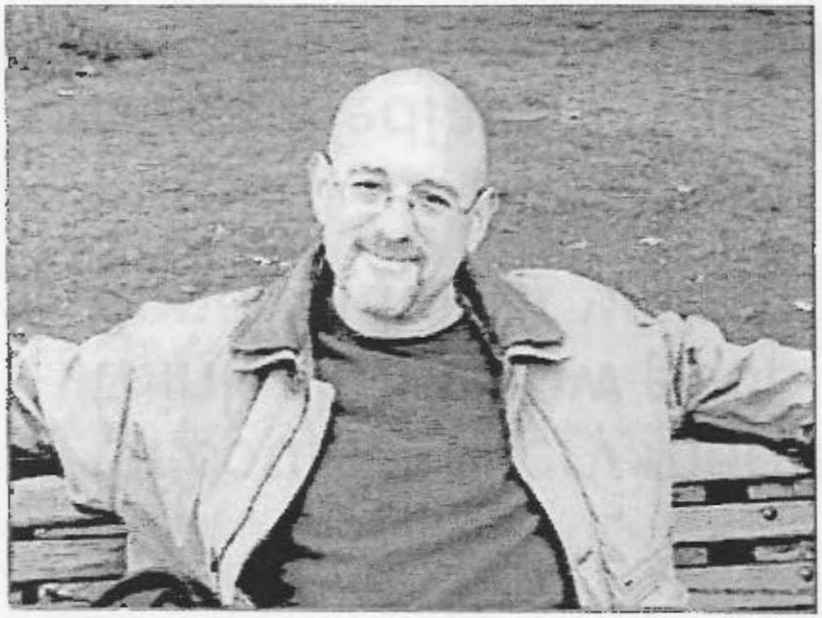
- Of course, every mediator wants the parties to think about how good it will feel to have the case done and over with.

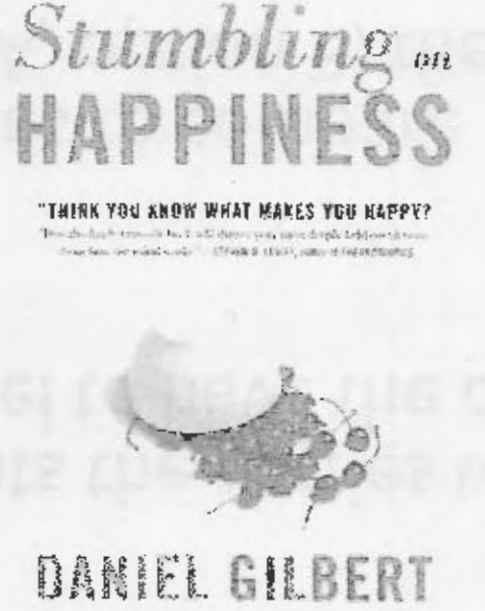
- Most mediators want the parties to compare possible futures – Deal option A, option B, the no-deal option....

- And because parties can be stuck, a good mediator can really help kickstart a creative brainstorming session.

Can we do this in good conscience?

DANIEL GILBERT **AND HIS BOOK**





FIVE SHADES OF YELLOW

The group with no note

- Approx 75%

The group with a note

- Approx 33%

FUTURE IS ALL SPACKLE

- The you who decides what to pack for lunch has no clue what the you who you will be at noon will want to eat.

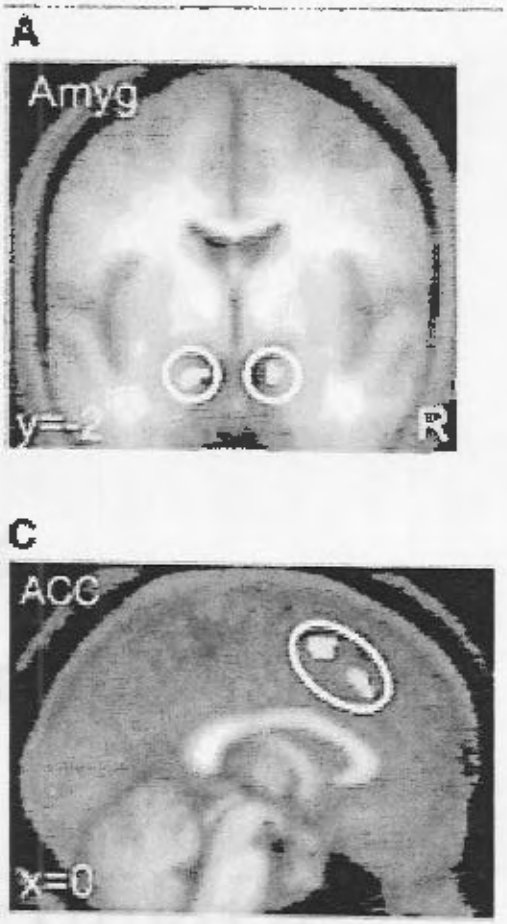
- How will you feel (emotionally) if you lost your legs? How will you feel in six months?

IT PROBABLY DEPENDS

- On whether you enjoyed your breakfast
- Whether the weather is nice
- How work is going
- Etc.

MAKING OFFERS AND CONCESSIONS

- Loss aversion and the fmri

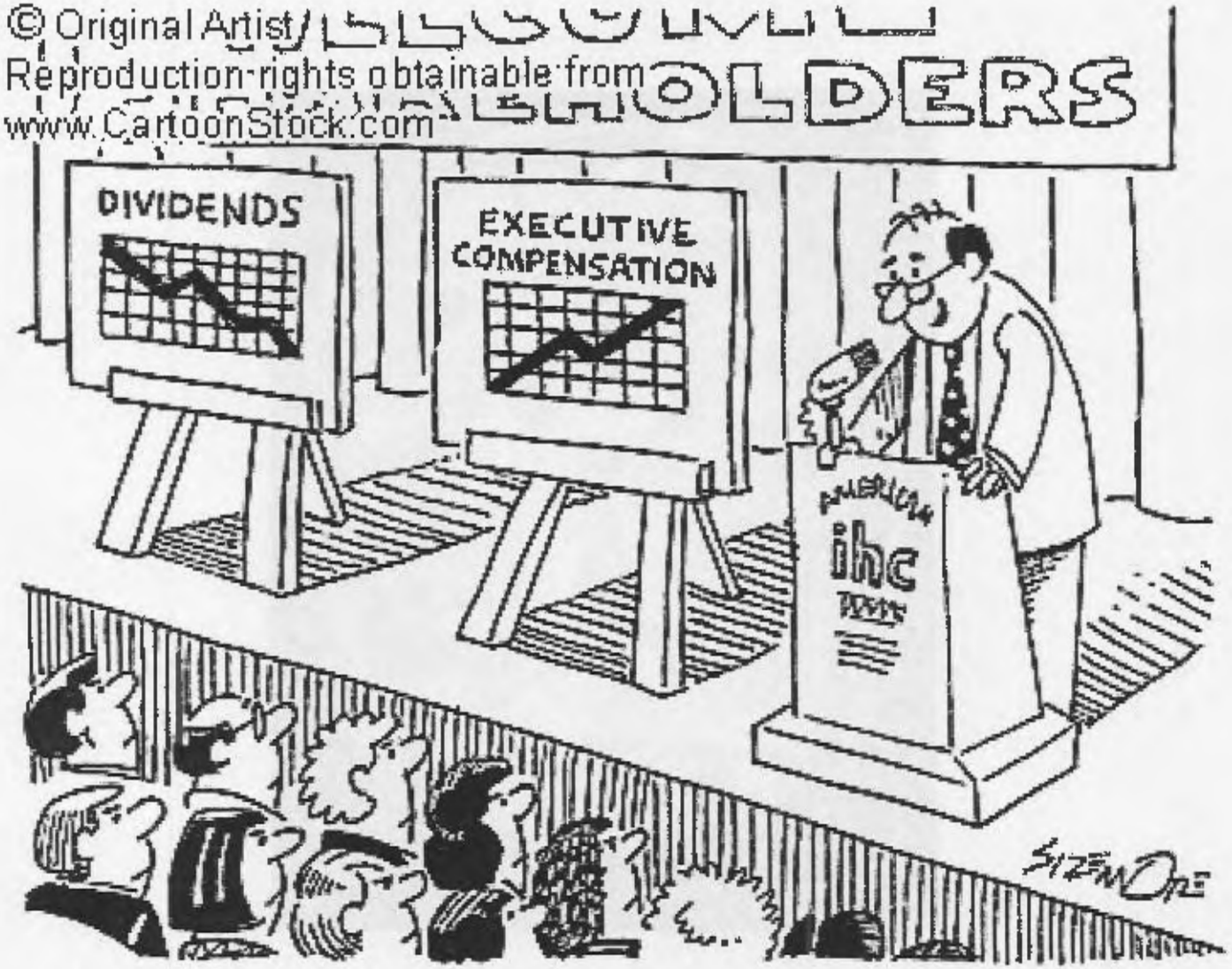


SUPPRESSION

- Not fear

CREATING POSSIBLE DEALS

- Maintaining the executive



"As you know, ladies and gentlemen, charity begins at home."

THE BRAIN'S EXECUTIVE

BREATHE DEEP TO ENABLE THE EXECUTIVE

EVALUATING OPTIONS

- Old v new brain, round 2

- Any good settlement has to feel good to the front brain and to the gut

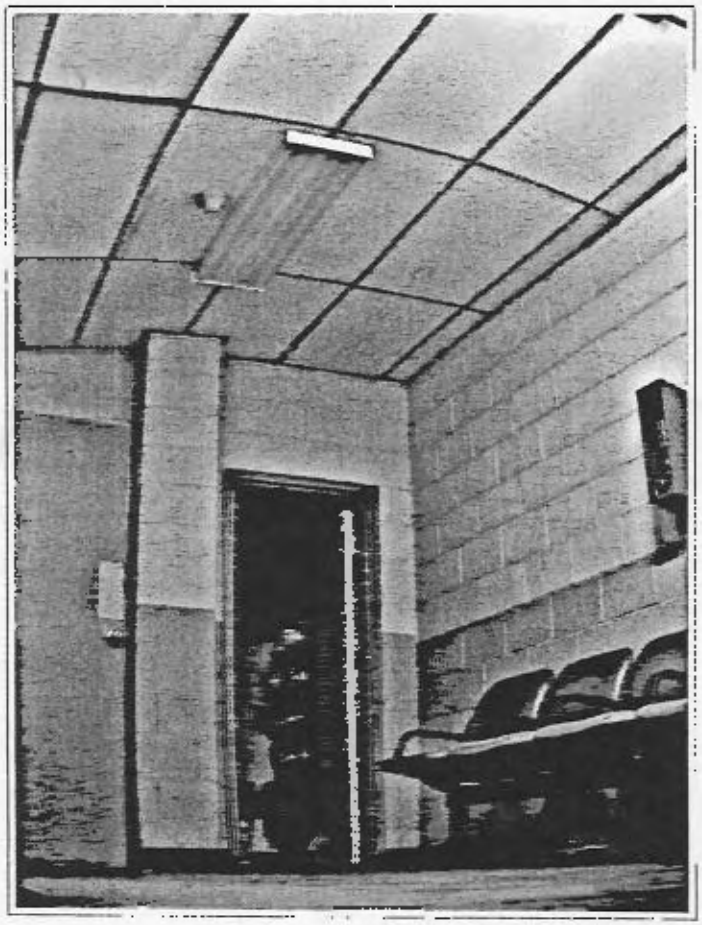
DOING WHAT'S RIGHT

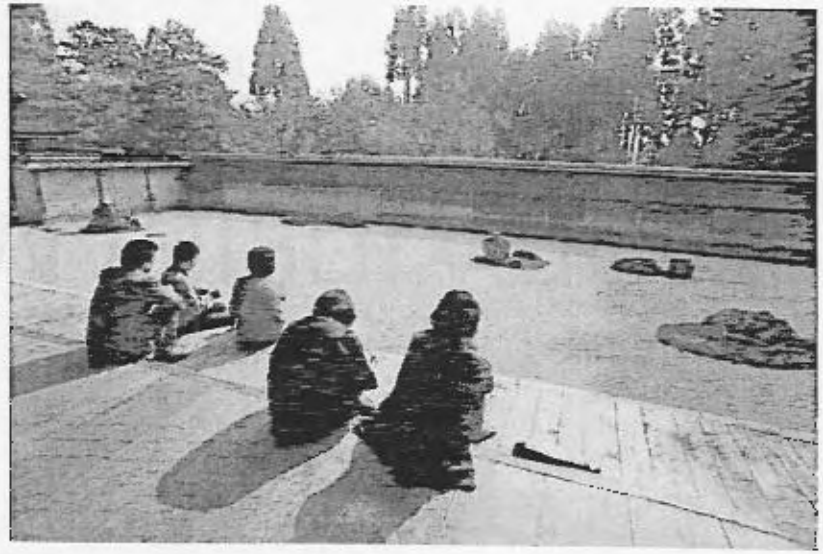
- Even when they don't see the good in it?
- Is it ethical to shove a good resolution down the throat of a reluctant party?
- Heaven forfend…?

BE HAPPY
INTERNAL REVENUE

MISCELLANEOUS MANIPULATIONS

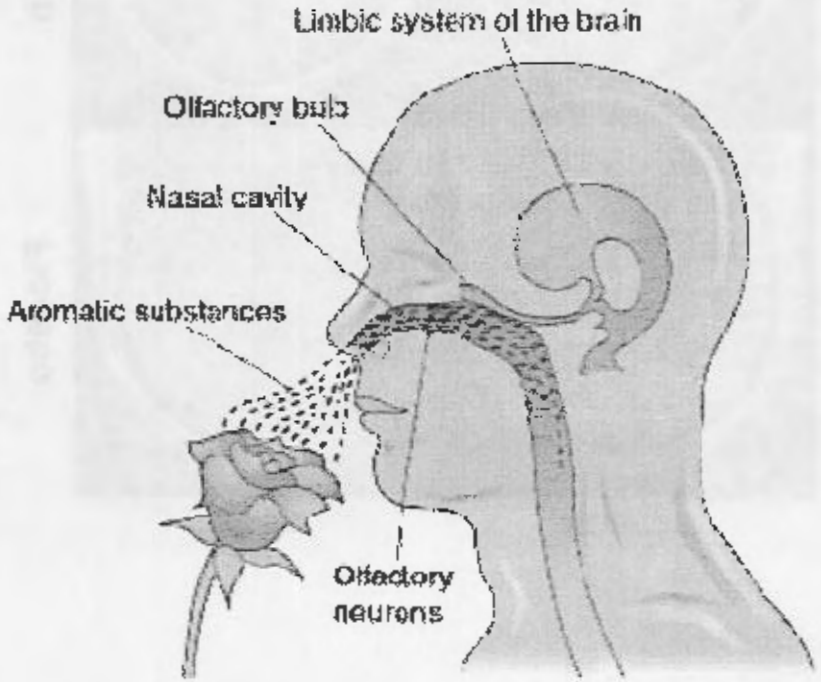
Scary room/happy room?





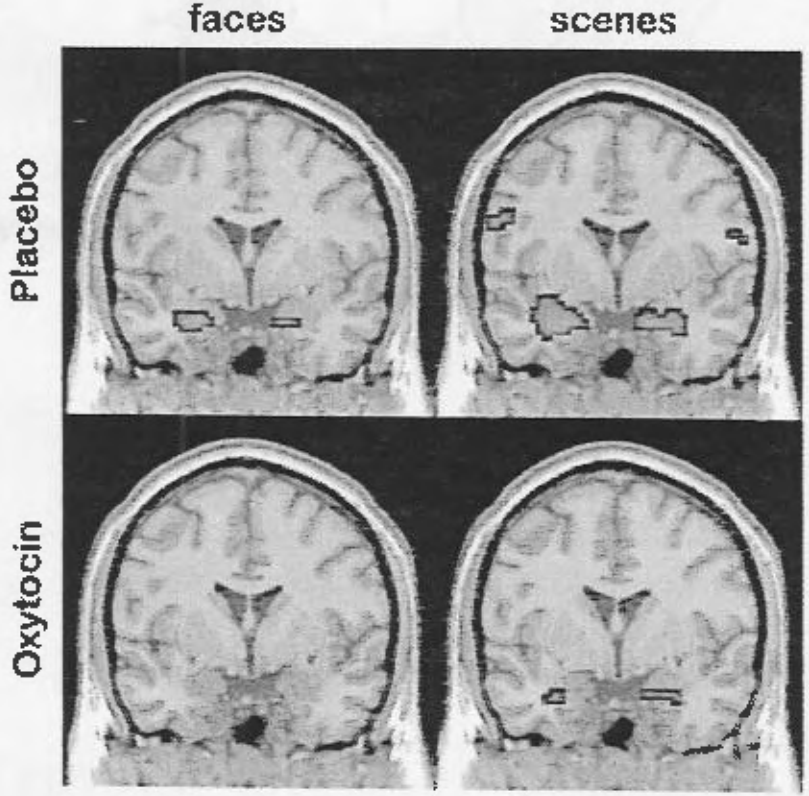
Can you soothe?

- How?
- When does it help settlement?

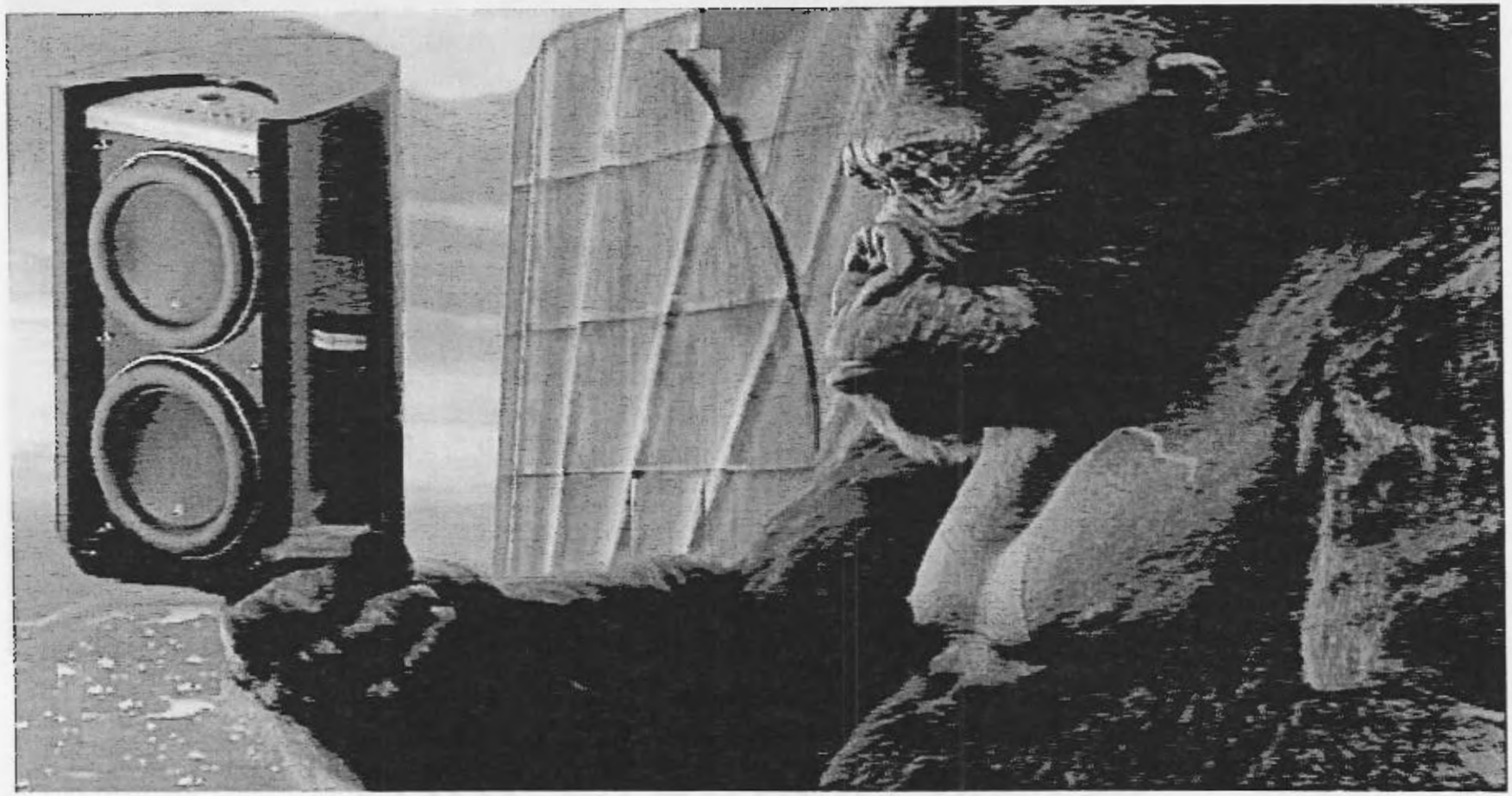


Food and pharmacology

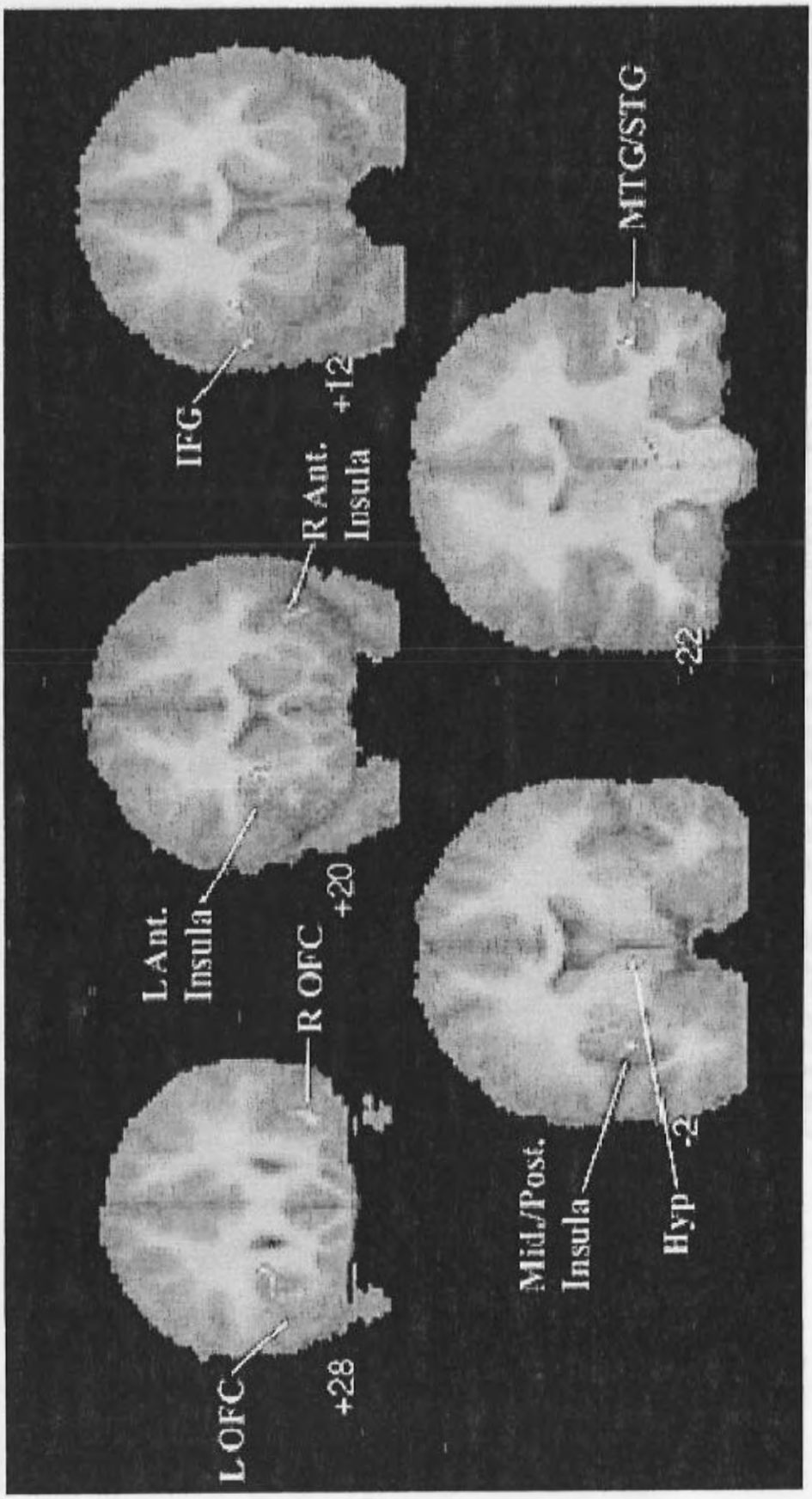
- oxytocin



What about music?



Your Brain on Music



ABA DR Section
February 25, 2009

Mediating With Emotion

David W. Plant
New London, NH, USA
DPlantADR@aol.com

Prologues "Diplomacy is the art of letting them have your way."
"Always put yourself in the other person's shoes."
"Understand the deal from the other side of the table."
"Solve the other side's problem as the means to solving your own."
"Sustainable results are more often achieved when all parties perceive the process as personal, respectful, straightforward, and fair."
"Avoid interpreting your side's information in a self-serving way."
Do not undervalue other side's case, or become entrapped by biased perceptions.
Per Felix Rohatyn: "Most deals are 50% emotion and 50% economics."[1]

I. Evidence of, or Triggers of, Emotion

A. "We regard people like you as patent terrorists."

B. "Your offer is offensive; it's ridiculous – an insult."

C. "She is not negotiating in good faith"

D. "I cannot let this bully push me around."

E. "They have ruined the market [i.e. caused prices to erode, margins to shrink, and margins to decrease]."

F. "I can not be in the same room with him."

G. "He left the mediation without even shaking hands."

H. "My annual review is set to occur in three days."

I. "I invented the subject of this patent. My boss's company now owns it, and he is giving it away."

---

[1] From James K. Sebenius, "Six Habits of Merely Effective Negotiators", Harvard Business Review, April 2001.

II. Interested Person/Organizations Who May Make Statements or Feel Emotion

A. Lead negotiator at the table.

1. Senior business person.
2. Counsel.

B. Other team members at the table.

1. Senior business person's colleagues.

a. Business people.
b. Technical people.
c. Financial people.
d. Marketing.
e. Manufacturing.
f. R & D.
g. Human resources.
h. Labor representatives.
i. Negotiator of agreement in issue.
j. Past liaison with other parties.

2. Counsel's associates.

a. Counsel's partners.
b. Counsel's associates
c. Negotiator of agreement in issue.
d. Past liaison with other parties.

3. Key players.

a. Father of the arrangement in issue.
b. Inventor/creator of subject in dispute.
c. Designer of accused product/software/advertisement.
d. Project manager/developer.
e. Marketing people.
f. Producer.
g. Shipper.
h. Distributor

4. Experts.

Interested Persons/Organizations ... (continued)

D. Others not formal parties to this specific dispute.

1. Investors.
2. Insurers/indemnitors.
3. Creditors.
4. Parents/Affiliates.
5. Partners.
6. Competitors.
7. Licensors/Licensees.
8. Labor
9. Vendors/vendees.
10. Government agencies.

Should they participate in this negotiation/mediation?

E. Mediator.

1. Single mediator.
2. Co-mediators.

G. "Good Offices" Intermediary.

What To Do? (continued)

H. Identify Further Information You Need.

1. From your team.
2. From them.
3. From other sources.

J. Identify Objectives.

1. Yours.
2. Theirs.
3. Others.

K. Explore Options.

1. Before the mediation.
2. At and throughout the mediation.

L. Stand in the Other Person's Shoes.

M. Determine How You Expect to –

1. Gather information.
2. Share information.
3. Express your views.

N. Listen

1. Empathetically.
2. Confirm your understanding is correct.
3. Demonstrate respect.
4. Acknowledge other side's interests and needs.
   a. Financial
   b. Emotional

O. Remember ··

The biggest problem with communication is the illusion it has occurred.
(G. B. Shaw)

Appendix

Evidence of, or Triggers of, Emotion

Statement or Feeling — Person/Organization

1. "We regard people like you as patent terrorists."
2. "Your claim is entirely without merit and demonstrably ludicrous."
3. "Your offer is offensive; it's ridiculous."
4. "It's an insult."
5. "He is known in the industry as a cheat."
6. "He/they has/have stolen my technology."
   "... and gotten his own patent on my idea!"
7. "He is not negotiating in good faith"
8. "I cannot let this bully push me around."
9. "They have ruined the market [i.e. caused prices to drop and margins to shrink]."
10. Three other competitors are ready to move in."
11. "I can not be in the same room with him."
12. "He left the mediation without even shaking hands."
13. "I can not find a way to pay my company's loan, due tomorrow."
    a. Company to me.
    b. Bank to my company.
    c. Other party to my company.
14. "My annual review is set to occur in three days."
15. "My principal investor will not accept less than $50 million."
16. "Their principal investor is a gambler – for him, four losses out of five lawsuits is not bad."
17. "My insurer values this case at no more than $50K."
18. "I invented the subject matter of this patent. My boss's company now owns it, and he is giving it away."
20. "I sold my boss on buying into this project. I cannot let the other side off the hook for their failures – no matter how weak my case."
21. "I do not understand this technology."
22. "I do not understand the financial subtleties of this deal."
23. "I have no one to discuss this with."
24. "My sloop has the tallest mast in the harbor."
25. "I fly my own jet – intercontinentally."
26. "I have no idea how to move this negotiation toward a positive resolution."
26. "I do not like him."
27. "I do not trust him."
28. "I am not getting either candid or complete answers."
29. "I am tired."

COGNITIVE BARRIERS to effective negotiation and how to OVERCOME THEM

BY DWIGHT GOLANN

The author is a professor of law at Suffolk University Law School in Boston. He trains legal mediators and has written extensively on dispute resolution.

Students at Harvard are preparing to negotiate the settlement of a personal injury case. Before they begin, the students are told to make a private assessment of the plaintiff's chances of winning based on their confidential bargaining instructions. What the students don't know is that there is nothing confidential about their information: Representatives of the plaintiff and defendant have received exactly the same instructions. Since both sides have the same data, they should logically come out with the same answer—but this is not what occurs.

In fact, hundreds of law and business students told to negotiate for the plaintiff assessed her chances of winning at nearly 20% higher than did the students assigned to the defense (the figures appear on page 7). When they were asked to estimate the damages that a jury would award the plaintiff if she did win, there was a similar disparity: Plaintiff bargainers estimated her damages at almost $100,000 higher than did the defense negotiators.

What caused these distortions? It was not that the negotiators were uninformed about the case, since they all had the same information. Nor was it due to their lack of experience: When I posed the same problem to experienced litigators in training to become mediators, a similar pattern emerged: Lawyers assigned to the plaintiff were consistently more optimistic than those assigned to the defense. Experiments in other settings also confirm the existence of an "advocacy effect" in case evaluation.

In real-life negotiations lawyers on opposing sides often arrive with sharply differing assessments of the odds of winning in court. In my experience as a mediator, the sum of these estimates commonly totals well over 100%. Even allowing for the inevitable "puffing" that occurs in bargaining, both sides honestly believe that they have a better than even chance of prevailing. These variances in perception obviously can affect the outcome of a negotiation, since bargainers who value a case differently will find it very hard to agree as to what constitutes a "fair" settlement.

These and other hidden barriers to successful negotiation lie in the domain of cognitive psychology, the science of how people assimilate information and make decisions. This article focuses on four common cognitive obstacles that pose challenges even for experienced negotiators and mediators, and gives some practical ideas about how to overcome them.

Selective Perception

The first factor that explains the results at Harvard, as well as problems that arise in real-life bargaining, is that negotiators often miss key data in the case that would be apparent to an outsider. This phenomenon, known as "selective perception," happens in this way: Whenever we encounter a new problem, we must interpret a stream of unfamiliar, often conflicting data. We respond by instinctively forming an hypothesis about the situation, then organize what we later see and hear with the help of that

image. The problem is that our hypothesis also operates as a filter, protecting us from conflicting data by automatically screening it out—which in turn reinforces the belief that our initial view was correct.

Selective perception is a universal phenomenon. Henry David Thoreau was probably thinking about it when he said, "We see only the world we look for." One typical (and embarrassing) example occurred to me and my wife around a neighbor's party invitation. We received the invitation in late June, complete with a red, white and blue border of flags and firecrackers. We arrived on the Fourth of July—only to find our neighbor's house completely empty. Back at home, we looked again at the invitation: It plainly said "Saturday July 3." But we hadn't seen the date because we already "knew" when the party would be held from glancing at the invitation's border. Selective perception affects lawyers and clients as well as partygoers.

Every piece of litigation involves a story, and lawyers usually hear only one version of that story from their client. Based on this data, they tend to form an hypothesis about the dispute. In many instances selective perception then takes over to "protect" both lawyers and clients from the dissonance of conflicting evidence. How can you address this problem?

- *Don't misinterpret this behavior as intentional. If your opponents are hobbled by selective perception, they are not consciously disregarding facts that are clear to you: Rather, they are unable to hear or see your evidence at all.*
- *Instead of repeating yourself, listen to the other side—then summarize what you have heard ("Let me be sure I've heard you right..."). You should feel free to state clearly that you disagree, as long as you make clear that you've heard your opponent. As a mediator, I find that litigants are often surprised and disarmed to realize that an adversary has actually listened to them. Moreover by listening, you create an implicit bargain: Your counterpart should reciprocate by listening to you.*
- *Ask questions focused on points that your adversary has missed, using a reasonable, let's-review-the-pros-and-cons tone. This will usually be more effective than the aggressive questions that litigators are trained to pose. Your goal is to engage the other side in a genuine discussion.*
- *Supplement your presentation with visual aids. An opponent who is not able to "hear" you will sometimes respond to a chart or exhibit. As a mediator, I have seen this kind of "deafness" cured by an advocate's deft use of exhibits. Enlarged or color documents can be especially effective for this purpose.*

Cognitive Distortions in Case Evaluation

Will the plaintiff win her case?	Plaintiff's Counsel	Defense Counsel
Harvard Business	61%	43%
Harvard Law	65%	48%
If so, what damages will she recover?		
Harvard Business	$286,000	$189,000
Harvard Law	$264,000	$264,000

Optimistic Overconfidence

Assessing the value of a legal case requires predicting events that are uncertain, for example, how an unknown jury will react to evidence that may or may not be admitted. These assessments are often unreliable. For one thing, people are consistently overconfident about their ability to assess uncertain data. To demonstrate this phenomenon I sometimes ask the audience to answer a series of questions about which they are likely to know almost nothing. Almost every audience answers more than half of my questions incorrectly. For example, I might ask them, "What is the diameter of the sun?" To make it easier I tell them to pick a range of numbers wide enough apart that they have a 90% chance of being right (*e.g.*, "10-1 billion miles" would almost certainly be correct). One would think that almost everyone would select a range that was wide enough. But most people answer with ranges that are too narrow—for example, "400,000-500,000 miles." (The actual diameter of the sun is 861,400 miles).

Why is this? The problem is that when we don't know something—even a fact that we aren't expected to have at our fingertips—either we are embarrassed to admit our ignorance or simply feel a competitive urge to be right. So we give a more precise answer than our knowledge can support: We are overconfident, in other words, about our ability to assess uncertainty.

There is a related problem. When people in an uncertain situation are asked to estimate the likelihood of a good or bad outcome, they consistently underestimate the chances of an unfavorable result. The reason, it appears, is that we like to believe that we are in control of events and thus able to bring about good results, even when we cannot.

These tendencies become even stronger when the person making the judgment acquires a personal stake in the outcome. In psychological experiments, for example, subjects who have wagered that a horse will win a race are typically more confident, both about their ability to handicap races and about the chance that their chosen horse will win, than are people who have not placed a bet.

How do these forces affect negotiations over lawsuits? Lawyers are often asked to estimate the likely outcome of court proceedings at a point when they have little basis for offering an accurate assessment. In such situations, to maintain their reputations as expert litigators and to avoid appearing ignorant to a client or another lawyer, they are likely to offer an overoptimistic estimate, and have more confidence in the correctness of their forecast than their knowledge supports. To make matters worst, both lawyers and clients "bet" on their cases by investing substantial amounts of time and money in them, thus accentuating the inherent tendency to err. How can a negotiator or mediator overcome optimistic overconfidence?

- *Work to distance the "players" from their "horses" by lessening the effect of their emotional attachment to the case. Try to induce the parties to discuss the dispute as an abstract problem rather than as the matter in which they have made a large investment. Break the case down into a series of issues rather than a simple question of value; this will also encourage analysis that is less affected by wishes and emotions.*

Continued on page 8

Continued from page 7

• *Take the focus off this particular dispute and analyze the range of results in similar cases. What do statistics say about possible outcomes for this sort of claim? People tend to think that their own case is "special," an exception to the rule. By discussing large numbers of disputes, it becomes easier for litigants to appreciate the likelihood that their case will follow a similar pattern.*

• *Before you start to negotiate, carefully list both the strong and weak points of your case and analyze them one by one. Since few advocates are willing to share an honest analysis with an adversary, this technique is useful primarily for internal discussions with clients, and during a mediator's private caucuses with disputants.*

• *Consider using "decision analysis," an analytic technique that helps to expose unreasonable assumptions and identify the cumulative impact of risk. Certain clients, such as accountants, engineers and some business executives, are especially likely to appreciate this kind of hardheaded quantitative analysis.*

Loss Aversion

No one likes to lose, whether the issue is money or an abstract legal argument. Recent studies have made us aware, however, of just how strongly feelings of loss can affect bargaining decisions. The results of this research require modification of one of the pillars of modern negotiation—the search for "win-win" terms. Creating interest-based bargains is certainly valuable, but it turns out to be even more important that neither side in a negotiation feel that it has "lost."

To understand the impact of loss on bargaining, consider the following experiment: Students who had expected to attend a seminar without charge were told after they arrived that because of unexpected expenses, they would each have to pay $20. They could, however, spin a roulette wheel, with three chances in four of not having to pay the $20 and one chance of having to pay $100. These odds discouraged gambling: Since the average cost of spinning the wheel was $25, the smart choice was to pay the $20. However, a large majority of students chose to spin the wheel. Having expected to pay nothing, they apparently experienced the demand for $20 as an unwelcome loss, and were willing to take an unreasonable risk to avoid it.

This phenomenon, known as "loss aversion," affects legal bargaining because litigants usually enter negotiations with a clear view about what is the "right" settlement in their case. In effect they carry a mental benchmark about the expected settlement value, a figure that is often distorted by optimistic overconfidence and includes recovery of their legal expenses. For example, the plaintiff in a case that is objectively valued at $75,000 may honestly believe that it is worth $90,000. Since he has had to pay $25,000 in legal expenses to pursue justice, the plaintiff may have a settlement benchmark of $115,000 in mind. The defendant, however, may well see the same case as being worth only $60,000, even before factoring his costs of defense. In situations like this one, no settlement is possible, either through direct negotiation or mediation, unless at least one party accepts an outcome that is significantly worse than his or her internal sense of what is fair. This inevitably produces strong feelings of loss. To avoid that loss, litigants often elect to spin the roulette wheel of litigation, even when the objective odds are against them. What can be done to prevent feelings of loss from distorting negotiators' decisions?

• *Be alert for selective perception: If information will lead a party toward a result that it views as a loss, the litigant may unconsciously fail to see it at all.*

• *Look for settlement terms that have not previously been discussed—especially items other than money. This is helpful for two reasons: First, because the other side has probably not attached a benchmark value to them, such terms will not trigger feelings of loss. Equally important, the new terms may help to distract an opponent from any concerns about losing. Henry Kissinger is said to have remarked that his key to mediating peace agreements in the Middle East was to make deals so complicated that neither side could decide who was winning. This is a form of "win-win" bargaining, but undertaken more for the purpose of diverting people's attention from feelings of loss than for the intrinsic value of the new terms.*

• *Don't be overoptimistic about obtaining a deal that requires a party to trade something that he or she had expected to keep in return for a new item, even if the trade seems to produce net value for the recipient. Studies suggest that people discount the value of gains and overvalue unexpected losses. Thus, the acquisition of a dollar feels as if it is worth only about half that sum, while the unexpected loss of the same dollar feels like the expenditure of two to three dollars.*

• *People feel losses and gains more when they occur in a series of small steps than if they take place as a single event. (Readers who believe that it hurts less to yank a bandage off than to peel it away bit by bit will understand this intuitively.) Similarly, people tend to feel that a series of small gains are more valuable than the same total gain provided in a lump sum. (Imagine taking small mouthfuls of a favorite dessert, as opposed to gulping it in a single swallow.) As a result, if you must propose terms that the other side will experience as a loss, you should bundle them together and offer them at one time. Similarly, negotiators should unbundle "gain" terms, offering them one by one for maximum impact.*

• *Characterize the situation in a different way, moving the listener's internal benchmark so as to reduce his or her feeling of loss. A person's internal benchmark is often entirely subjective or based on flimsy information. Thus, changing a person's benchmark ("re-framing," as mediators call it) can be effective in overcoming resistance to settlement.*

Example: A corporation sued a supplier over an allegedly defective product. After a year of litigation, the plaintiff's vice president was discussing a defense settlement offer with his outside counsel. The offer made objective sense to the litigator in light of the company's damages and the objective risk of losing at trial, but the executive refused to consider it. He insisted that any recovery had to include not only damages, but also the nearly $50,000 that the company had paid in legal costs to bring the case. Indeed, perhaps because he felt responsible for the decision to sue, the executive seemed to care more about recovering the legal fees than the damages themselves. The company's lawyer was in a bind because she knew that there was no basis for

seeking attorneys' fees in a breach-of-warranty case.

"You need to think about this like a hard-headed businessman," she argued. "At the point you came into my office, the defendant was offering you zero. You've made an investment in this case, and you're now being offered a return on it. How does the deal look—money in versus money out? What are the pros and cons of cashing out now, versus investing more and looking for a better payout later?"

After some resistance, the executive began to talk about what should be considered the "capital" in this situation, and gradually became less emotional. Eventually, with a few "sweeteners" that obscured the money terms, he decided to take the deal.

Reactive Devaluation

Imagine that you are defense counsel in a lawsuit. Your opponent is demanding that you pay $100,000 to settle, but appears sure that you will never agree. Now you decide to offer that sum. Is your adversary pleased? To the contrary, her first reaction is likely to be that she has undervalued the case; it must be worth more than $100,000, because you are the enemy and would never offer a fair deal.

We all have a tendency to reject offers made by anyone we see as an adversary, a phenomenon known as "reactive devaluation." Our instinctive response to an opponent's offer is reminiscent of Groucho Marx, who vowed never to join any club that would have him as a member. How can you respond to reactive devaluation when it occurs?

- *Mediators have an enormous advantage because they are not subject to this problem. Over and over again I have seen litigants approach with open minds an idea that the mediator proposes when they would instantly reject the same proposal if it came from an opponent. (Of course, if a party sees the mediator as simply transmitting an adversary's offer, reactive devaluation will apply with full force.)*
- *The best approach is to arrange for a mediator, or another person whom your adversary perceives as neutral, to "adopt" your offer as his or her own. This may not be feasible, however: Often disputants will not agree to mediate, and even when they do, mediators are cautious about assuming responsibility for proposals, knowing that they will lose most of their effectiveness if either side suspects them of advocating a biased solution.*
- *If you can't arrange for a mediator to adopt your offer, you can still gain a moral advantage by suggesting that a neutral outsider review it for fairness. Your willingness to submit to outside scrutiny will be strong evidence that you view your proposal as objectively fair.*
- *Another option is to discuss the pros and cons of a proposal in the abstract, without actually offering it. Like B'rer Rabbit, who pled not to be thrown in the briar patch, your very reluctance to endorse a proposal will sometimes make it more attractive to the other side.*
- *In some cases it may be possible to propose two packages that have equivalent value to you, and ask your opponent to choose whichever he or she prefers.*

Conclusion

Advice about negotiation often focuses on conscious strategy and tactics. In fact, some of the most important factors affecting our judgments and those of our negotiating partners operate beneath the surface of our minds, outside our awareness. Knowing that these forces exist, and how to deal with them, will make you a more effective negotiator. ■

Note: Key research into the cognitive effects discussed here was done by Daniel Kahnem and Amos Tversky. For an excellent, in-depth analysis of how cognitive obstacles influence negotiation, see Richard Birke & Craig R. Fox, "Psychological Principles in Negotiating Civil Settlements," 4 *Harv. Neg. L. Rev.* 1 (1999).

PROVISIONAL RELIEF

Continued from page 1

other temporary remedies granted before final resolution of the dispute.

An arbitrator or court will have the authority to issue provisional relief in connection with an arbitration even if the subject is not mentioned in the parties' arbitration agreement. In fact, most arbitration agreements are silent on this issue.

By addressing in their arbitration agreements the arbitrators' power to issue provisional relief, the contracting parties can ensure that the arbitrators will fully understand the potential importance of provisional relief to the parties' contractual relationship, as well as the scope of their authority to issue provisional relief. Parties can also clarify their right to seek provisional relief from the arbitrator or the court. And they can assuage any concerns that a court asked to issue provisional relief may have about interfering with a dispute entrusted to arbitrators.

Basis of Authority

Addressing interim relief in the arbitration agreement signals its importance.

The arbitrator's authority to issue provisional relief usually is addressed in the governing arbitration rules. Most international arbitration rules provide that the arbitrator has the authority to grant provisional measures. They also provide that resort to a court for interim relief is not incompatible with arbitration and will not constitute a waiver of the right to arbitrate. Examples include the arbitration rules of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the United National Commission on International Trade Law (UNCITRAL), as well as the American Arbitration Association (AAA) International Arbitration Rules. The AAA Commercial Arbitration Rules and the AAA Construction Industry Arbitration Rules, which apply in cases that are not international, contain similar provisions.

The arbitrator's power under the Federal Arbitration Act to order provisional relief is broad. It is not limited to the subject matter of the arbitration. And provisional relief apparently can be issued without

Continued on page 1

Evaluation and Economic Views In Mediation

GENERATING MOVEMENT THROUGH PROBLEM-SOLVING AND PERSUASION

This chapter contains 8 DVD tracks, totaling approximately 27½ minutes.

§9.1 INTRODUCTION

Neither a comprehensive agenda nor a sophisticated strategy for discussing negotiation issues can ensure success in producing a mediated resolution. Even if they have revealed a great deal of new information, the parties may cling to positions that must be relaxed or abandoned if resolution is to occur. In the next two chapters, we analyze the mediator's efforts to bring about such movement, through persuasion and problem-solving.

Much of the material in this chapter is based on established persuasion principles from the fields of social psychology, communications and sales. As you read about specific techniques, ask yourself whether or not, and under what conditions, you would be comfortable with their use. We will return to this topic and explore the ethical limits of proper mediator persuasion in Chapter 12.

§9.2 THE PREVALENCE OF PERSUASION IN MEDIATION; PERSUASION AND PROBLEM-SOLVING DEFINED

Many mediation trainees, especially those with a law school background, are at home in a persuasive role. However, over the years some of our students have expressed discomfort with the idea that mediators engage in persuasion at all. To them, the word has a connotation of pressure or excessive influence that the more friendly "problem-solving" does not.

Some practicing mediators do wield influence—over the outcomes as well as the process of mediation—in quite heavy-handed and, we think, inappropriate

ways. Certainly the idea of persuading the parties to accept a particular proposal just because the *mediator* favors it is antithetical to accepted norms of mediator neutrality.

Nevertheless, as mediation scholar Josh Stulberg has written, "generating movement is the heart of the mediator's work." [1] For most practicing mediators, at least those working with the kinds of disputes that are the main subject of this book, bringing about settlements is the "overriding goal that drives their activities and the primary basis they use to judge themselves." [2] And the process of change that brings about such settlements comes most often through persuasion—in which the mediator plays a key role.

If this strikes you as potentially unseemly, raising visions of sleazy car salesmen pressuring worn-down customers to "close the deal," consider three points:

First, persuasive efforts are used by many we think of as working in the helping professions. The family doctor tries to convince her sedentary and overweight patients to develop a healthier lifestyle. The clergyman guides his parishioners and the therapist counsels her patients to help them confront their personal problems and take productive action to resolve them.

Second, some fairly benign interventions we have already described in this book are exercises in influence and persuasion. Mediators commonly engage in persuasion, for example, when they urge court-mandated participants to give mediation a good faith try, tout the benefits of mediation in their opening statements to get "buy-in" to the process, or model good listening behaviors with the goal of convincing the parties to consider each other's perspectives.

Third, persuasion in mediation is a two-way street. Long before a mediator might try to influence the parties to moderate their demands or consider the other side's point of view, chances are good that each participant will have tried to convince the mediator that he or she is right and the other side is wrong. In many instances, the parties will try to align themselves with the mediator—or negotiate with, deceive and even threaten her—in the hope that she will favor *his* or *her* cause. Under such circumstances, persuasion by the mediator can be seen as a way to neutralize the parties' "gaming" of the process.

Persuasion and Problem-Solving Defined. We use the term *persuasion* in accordance with its common meaning: as an attempt to alter another person's attitudes or actions.[3] It is a mistake, however, to think of persuasion as something one does to someone else. Research demonstrates that most effective persuasion is done *with* others, not *to* them. Competent adults generally cannot be persuaded to do something unless they want to do it. Effective persuasion is therefore an interactive process in which the persuader must work closely with her subject to evaluate whether the advantages of taking a certain course of action outweigh the disadvantages.[4]

1. Joseph B. Stulberg, Taking Charge/Managing Conflict 105 (1987).
2. Deborah M. Kolb & Kenneth Kressel, *The Realities of Making Talk Work*, *in* When Talk Works 470 (1994).
3. Charles J. Stewart & William B. Cash, Jr., Interviewing: Principles and Practices 301 (10th ed. 2003).
4. *Id.* at 302.

Problem-solving in mediation involves the effort to achieve resolution through more than mere haggling over concessions from stated positions. It too is interactive. As we use the term, it describes a process that (a) pierces party positions so that each party's interests, priorities and constraints can be understood; (b) develops a variety of potential solutions to the issues confronting the parties; and (c) examines how well those solutions meet, or do not meet, the parties' interests compared to their available alternatives. Problem-solving is thus not *distinct* from persuasion; rather, it is a *mode* of persuasion in which satisfaction of underlying needs, rather than mere compromise, is the goal.

§9.3 EFFECTIVE PERSUASION: A CONCEPTUAL OVERVIEW

Before we examine the specific ways in which mediators influence the progress of negotiations, we think it is important to ask a broader question: What makes for a persuasive messenger or message generally in everyday life?[5]

The Messenger: Personal Credibility Matters. When a political leader you like (or don't) makes an important speech proposing or defending a new policy, how do you react? If you are like most people, your reaction to the message often depends greatly on your evaluation of the *source*. Social psychology tells us that the objective credibility of any persuasive message is important, but the credibility of the source is often more important. Interpersonal persuasion is relational as well as substantive.[6]

When a mediator attempts to establish credibility with the parties early in a negotiation, it is to provide a foundation for persuasive interventions that may come later. As we will see, when it comes time to generate and evaluate proposals, attributes such as likability and authoritativeness can be key ingredients in the mediator's ability to generate party movement.

The Message: Logic, Data and Evidence Matter. You have known it since you were a child asking *"why?"*: Mere exhortations, declarations and conclusions don't sell. Appeals and arguments are not persuasive unless they are grounded in facts, logic and evidence. In particular, people cannot be persuaded to engage in a new course of action unless they are convinced that the advantages of taking that action outweigh the disadvantages. *"Is this suggested course of action workable? Reasonable? Better than the available alternatives, taking into account my needs, values and beliefs?"*[7]

Suppose that you are about to purchase your first laptop computer. You are prepared to spend up to $1,200, which is a lot for you. You do not know much

5. Many of the ideas in this section are based on the influential book by Robert Cialdini, Influence: The Psychology of Persuasion (1984).

6. Gary Woodward & Robert Denton, Persuasion and Influence in American Life 211-213 (4th ed. 2000).

7. Herbert Simons, Persuasion in Society 155, 158-159 (2001). Reason is at the center of everything a mediator does, which sounds obvious but can be challenging because of the impact of partisan biases and strong emotions on the negotiation process.

about computers. You go to an electronics store and the salesman tries to get you to spend $300 more than you have budgeted to buy the latest fifteen-inch wide-screen model, with lots of add-ons and accessories, weighing almost seven pounds. What will it take for you to be convinced to go for the model he wants to sell you?

In order to persuade you, the salesman will need to support his ideas thoroughly, explicitly and by means of evidence.[8] He will need to learn about your specific needs in order to help you select the most appropriate computer for *you*. Will you do a lot of traveling? Are you strong enough to carry a seven-pound model, plus all the attachments? Will you be watching DVDs, editing photos or playing video games? The effective salesman tries to create a dialogue with you, working from the general to the specific — from your needs, priorities and criteria for selection to the particular models you might wish to consider.[9]

So it is in mediation. Mediation participants being urged to consider settlement will want to know the specific factors that make their trial or other nonsettlement options unattractive and settlement in general preferable. They will need to be persuaded, based on facts, logic and evidence, why a particular resolution option should be chosen instead of others.

The Role of Feelings in Persuasion. But persuasion based on reason alone seldom suffices. As we have observed throughout this book, humans are emotional creatures. Thus, attempts to persuade must also appeal to what people are feeling, especially when they have "dug in." Many of the communication tools we have already discussed — helping people to express their feelings productively, actively listening, reframing and disentangling the effect of people's conduct from their intentions, for example — are not only tools to improve the communication flow but persuasive devices as well. The use of such skills evoke empathy and can soothe injured relationships, often making problem-solving and resolution more achievable.

Many successful persuasive appeals play to positive emotions: They attempt to make people feel good through the use of optimism, hope, humor, flattery and appeals to pride. But not all persuasive appeals to emotions are so positive. Why, for example, do politicians use "attack ads," if not to create fear and anger about their opponents? Why do prosecutors want to show jurors graphic, gory pictures of the victim and crime scene in homicide prosecutions? Because they know that photographs tell a story that words alone cannot convey, appealing to the jury's revulsion (and making conviction more likely). Rightly or wrongly, appeals to negative emotions, such as fear, guilt and anxiety, can be effective in mediation too.

The Importance of Reciprocity. Reciprocity is another persuasion norm, and a particularly potent one. The idea that we should repay in kind what another person has given us is pervasive in all human cultures, going back to food and skills sharing at the beginnings of human society.[10] This is why those who don't

8. Stewart & Cash, *supra* note 3, at 326.
9. *Id.* at 240 ("The foundation of all persuasion is a thorough understanding of one's audience.").
10. Cialdini, *supra* note 5, at 17-18.

reciprocate are called "moochers" and "ingrates."[11] Reciprocity works as a tool of human persuasion because most people find it disagreeable to be in a state of indebtedness.[12]

We see examples of the power of reciprocity — positive and negative — in all walks of life. If a schoolmate or work colleague pays for our morning coffee, we may say *"Thanks a lot. I'll get the next one."* The posh resort offers us greatly reduced prices for the weekend getaway if we will just attend their time-share sales presentation, knowing that this "gift" creates a sense of obligation and makes it more likely that we will buy. On the negative side, if your neighbor says he's too busy to help you jump-start your car when your battery dies on a frigid January morning, chances are that when he wants a referral for a good estate lawyer, you won't break your back trying to find him one.

In negotiation and mediation, reciprocity is a fundamental expectation. If a custody mediator can convince the father to say something nice about the mother, he can then turn to the mother for a reciprocal statement. If a supervisor acknowledges some degree of fault or responsibility in his dealings with an employee, the mediator can point that out, looking for a similar acknowledgment from the subordinate. Perhaps most important, negotiators who fail to make reasonable bargaining concessions in response to their opponent's concessions are considered to have violated the reciprocity norm; when this occurs in mediation, the mediator can use the expectation of reciprocity to urge more meaningful concessions.

The Role of Consistency and Commitment in Persuasion. In most people's view, consistency is considered a virtue, inconsistency a vice. This is why leaders who "stay the course" are considered strong, while "flip-floppers" are not. According to Cialdini, all human beings have a desire to be perceived by others as acting consistently.[13]

Salespeople understand this. Once they get their customers to take a stand, it is easier to ask them for a commitment to act consistently with that stand. To return to our earlier computer example, if the electronics salesman can get his customer on record as being concerned about long-term reliability and technical assistance issues, he is halfway home to selling him an extended warranty with 24/7 technical assistance. *"You said you were concerned about these issues,"* he will say. *"I have an inexpensive plan for you that addresses them."* The customer, not wanting to be seen as inconsistent, will be more likely to buy it. (And here, of course, is where the store makes much of its profit.)

As we will see, effective mediators exploit the consistency principle as well, from the opening stage (asking questions like *"Are you here today to resolve this problem if possible?"*) to later efforts to persuade (*"I wonder: How does that position square with your earlier statements that both parents should have 'quality time' with the kids?"*).

11. *Id.* at 19-20.
12. *Id.* at 30, 35.
13. *Id.* at 57-97.

Scarcity as a Persuasion Tool. A friend tells the following story: He and his partner were at a Manhattan art fair, moving about among various booths, unable to decide whether to buy an expensive painting they had admired an hour earlier. An older suburban couple arrived at the booth where the painting hung and casually began to express interest in it. Spying the older couple from across the room, our friend ran back, pulled out his check book and purchased it.

This story is a clear example of the "scarcity principle" in action: Opportunities become more valuable to us when their availability seems limited.[14] Why does the scarcity principle work? Because when people feel that they are losing an opportunity, they fear that they are losing part of their autonomy as human beings.[15]

We see the scarcity principle in action in many human endeavors. The rarer the stamp or classic baseball card, the higher its value. The closer the deadline on the "everything must go; final close-out" sale, the more likely that we will drop everything and go. In negotiations, effective bargainers know that a credible "exploding" offer (i.e., one that will expire soon) can often induce acceptance. This is why, if a car salesman wants to get the best possible price from you on that used Toyota Camry, he will tell you he has another buyer in the wings, and if you want the car, you had better buy it *today* (at his price, of course). Mediators can also harness the power of scarcity by creating deadlines and emphasizing the "now or never" nature of mediation during its later stages.

§9.4 SETTING THE TABLE FOR PERSUASION: "CONDITIONING" THE PARTIES

Now let's start to look more closely at how persuasion works in mediation. We begin with another story—from a law professor we know.

When she was a junior in high school, our friend came home one evening and announced to her parents at the dinner table that she wanted to be a high school English teacher. She came from an affluent family and had been given the best of everything. Her parents were unenthusiastic, to say the least. "*High school teachers are underpaid and have very little status in this society,*" her father said. "*I worry that you would be unhappy if all your friends made more money than you did and could afford to do things you couldn't.*" Upset, she ran out of the room. To her, elementary and secondary teaching was a noble profession. For many years after that, she thought about that conversation with indignation.

While in college, our friend flirted with the idea of becoming an English professor but rejected that plan and decided on law school. Then, after a few years in law practice, she "drifted" into law school teaching. She hadn't been thinking about a career change, but she heard about a teaching opening at a nearby law school and applied for the position. That was more than twenty years ago, and she's been happy in her work ever since.

How did our friend come to reject high school teaching in favor of the more lucrative, higher-status position of law professor? According to her, there was no "aha!" moment when she realized that just maybe she agreed with her parents.

14. *Id.* at 238.
15. *Id.* at 244-245.

Instead, she experienced a gradual change in her thinking, without even being aware of the change.

Noted Harvard educational psychologist Howard Gardner suggests that most "self-persuasion" is like that. It occurs gradually—as a result of small shifts in perceptions and slow, unidentifiable changes in viewpoint—rather than as the result of any single argument or sudden realization.[16]

So it is in mediation. Bringing about change takes time. It is subtle, incremental and often encounters resistance. Effective mediators, even facilitative ones, therefore do not wait until formal bargaining starts to try to induce change. They "condition" the parties for flexibility through a variety of persuasive interventions that start at the opening of the mediation (if not in pre-mediation discussions) and continue throughout the process.[17] How is this accomplished?

Creating a "Seize the Day" Atmosphere. First, a mediator who can impress on the parties the feeling that mediation provides a unique and maybe final opportunity to achieve settlement has a leg up in persuading them to reach agreement. This approach harnesses the power of the scarcity principle. Watch how one of our personal injury case mediators uses this "*carpe diem*" rhetorical theme, beginning at the start of his opening statement and continuing throughout it. **Track 9-A.**

Mediators may also try to cement a shared sense of a special "settlement event"[18] by obtaining "buy-in" from the parties. Obtaining a *"yes"* response to a question such as *"Would you both like to put this behind you today if possible?"* may help create a pattern of progress over time. If a party later gets stuck and refuses to budge, the mediator can remind her of her earlier stated desire to achieve resolution. This technique thus exploits the consistency principle.

Establishing Deadlines. Mediators also commonly use deadlines to create the sense that time is running out on the (scarce) opportunity to settle. Actual, externally imposed deadlines are the best motivators; this is why so many cases settle on the day of trial and at the courthouse steps. But deadlines imposed by mediators themselves *("I will end the mediation if substantial progress isn't made by 4 p.m.")* also work to induce settlement. Setting such time limits is not without potential risks, however. Can you think of any?

Building Intimacy and Rapport. A recent survey of thirty highly experienced labor and commercial mediators asked them to identify the "essential strengths and techniques" that most contributed to their ability to settle disputes. More than 75 percent rated their ability to develop rapport with the parties—a relationship of understanding, empathy and trust—as the most important ingredient of their success—much more important than other, often highly touted mediator skills, such as the ability to generate novel solutions to a problem.[19] Even mediators

16. Howard Gardner, Changing Minds 4, 173 (2004).
17. Some of the interventions we analyze in this section have been discussed earlier. Nevertheless, it is useful to review them again, through the distinctive lens of persuasion.
18. Dwight Golann, Mediating Legal Disputes 41-44, 154-162, 181-184 (1996).
19. Stephen B. Goldberg, *The Secrets of Successful Mediators*, 21 Negot. J. 365 (2005).

working with hard-nosed, distributive bargainers understand the importance of being liked as a tool of persuasion.

Developing rapport with the parties starts with the mediator's opening statement and continues throughout joint sessions, with many of the listening and communication skills that we have already discussed—active listening, attending to feelings and summarizing—for example. But certain methods of friendly persuasion—techniques used to "move towards persuadees psychologically so that they will be moved to accept the persuader's position or proposal for action"[20]—can most effectively be accomplished in private. *Intimacy* is a powerful factor affecting our willingness to comply with requests.[21] In mediation, a sense of "we-ness"[22] between the neutral and each party can best be established in a caucus.

What are the hallmarks of intimate interactions? Mediators seeking to "connect" with disputants (who are usually strangers) engage in pre- or early mediation small talk in order to trade on shared interests or experiences and demonstrate interest in the disputants and their lives.

Mediators also may invite each participant in caucus to share his or her *personal* reactions to the process as well as to proposals, by asking questions such as *"How is this process working for you so far?" "I have the sense that you weren't entirely comfortable when we were talking together with Mr. Romero. Am I off base?" "Are there things you didn't feel comfortable talking about in joint session that you would like to discuss now?"* These kinds of "just between us" statements convey the message: *"I am here to help you. You can trust and confide in me."*

Conversing, Not Preaching. Effective persuasion is a "conversation, not a lecture."[23] People differ greatly in their attitudes (about what is good or bad), beliefs (about what is true or likely) and values (about what is important, worthwhile, fair, etc.). Thus, telling individuals what to do is generally not nearly as effective as having discussions with them that are tailored to their unique beliefs and values.

How do mediators discover the disputants' true beliefs and values? By using question forms that invite complex thinking and self-revelation. These include:

- **"Explore with me" questions.** In general, questions that ask respondents to *"explain," "explore with me," "share with me," or "walk me through your thinking"* are more useful in inducing dialogue and analysis than simple response *"how do you react to X?"* types of questions. For example: *"If you could create your ideal dream solution here, what would it be?"* Or *"Share your thinking with me: What do you see as the pros and cons of their proposal?"*[24]
- **Feelings questions.** Questions that ask *"how would it feel to do Y?"* are likely to produce more revealing responses than questions such as *"are you*

20. Simons, *supra* note 7, at 74.
21. Woodward & Denton, *supra* note 6, at 221.
22. Cialdini, *supra* note 5, at 185 ("Compliance professionals are forever trying to establish that we and they are working towards the same goals . . . [that] 'we are teammates.' ").
23. Woodward & Denton, *supra* note 6, at 4. *See also* Roderick Hart, Modern Rhetorical Criticism 9 (1990).
24. *See* Charles D. Brennan, Sales Questions That Close the Sale 68-75 (1994).

willing to consider doing Y?"[25] For example: *"Tell me if I'm off base here, but could it be that you're afraid that something really bad could happen if he has the kids this summer?"*

Other Ways of "Connecting." Other kinds of "friendly persuasion" that the mediator may attempt, usually in caucus, include the roles of *protector*, *coach*, *ally*, *admirer* and even *advocate*.

Examine the mediators' choice of language in the following excerpts. What exactly are they doing in these video examples to create intimacy and rapport? Do all of these interventions seem sincere? Are they consistent with a neutral and impartial stance? If you were the party at whom these interventions were directed, would you find them persuasive? As a mediator, are there any you would not feel comfortable employing yourself? Could you see yourself trying to connect in these ways with a party you mistrusted or found offensive? **Track 9-B.**

Conveying Authority. Rapport with the parties, as important as it is, may not suffice as a foundation for persuasion. As we have noted, studies show that mediation and subject-matter expertise are highly valued by users of mediation services.[26] Consumers — both those experienced and inexperienced in disputing — often want their mediators to wield an authoritative voice before they will be willing to be persuaded.

Authority-enhancing statements by mediators can take many forms. Evaluative mediators often talk about their experience litigating similar cases or trumpet their past successes in resolving similar disputes. Sometimes, they confidently predict how a case will be decided if it is not settled through mediation. Facilitative mediators convey authority by emphasizing their mediating experience and the training that equips them for the role and by expressing their general confidence in the parties and the mediation process.

Evaluate the following video example. As a newer mediator, would you feel comfortable making these kinds of statements? If not, what can you do to enhance your authority with the parties? **Track 9-C.**

Keeping the Mood Positive. Finally, throughout the mediation, persuasive mediators try to keep the parties hopeful about the process and its chances for success. As we have noted, research suggests that enhancing positive emotions (feeling happy or optimistic) and reducing negative ones (feeling anger or distress) are correlated with improved negotiating conduct and outcomes.[27]

One way to pre-condition the parties to be optimistic is to extol, at the beginning of the process, the positive benefits of mediation, including high settlement rates, high party satisfaction rates and high levels of compliance with mediated agreements. (We saw a good deal of this in connection with mediator opening

25. Woodward & Denton, *supra* note 6, at 68-86; Brennan, *supra* note 24, at 99.
26. John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 Fla. St. U. L. Rev. 839, 856-879 (1997).
27. Clark Freshman et al., *Adapting Meditation to Promote Negotiation Success: A Guide to Varieties and Scientific Support*, 7 Harv. Negot. L. Rev. 67 (2003).

statements in Chapter 6.) Research supports the validity of such claims about the process even in cases where the parties have been compelled to try mediation.[28]

Employing humor can also pay dividends. Breaking the tension that tends to pervade mediation sessions by the use of humor can accomplish a number of useful goals in addition to increasing the mediator's "likability" quotient. If used appropriately, humor can provide momentary perspective: As serious as the dispute may be to the parties, it is not *deadly* serious; life has other fun parts that will resume when this case is over. Gentle, nonmalicious teasing — of a party, a lawyer or the mediator himself — can be a subtle way of suggesting to the parties that they might consider lightening up on a position or a behavior that could threaten the process. For the parties, sharing a laugh with one's "adversary" can provide a pleasant experience that demonstrates their shared humanity.

Watch how one of the mediators in our premises liability matter uses humor (directed at a lawyer he knew before the mediation) to leaven his otherwise highly directive style. Would you have been comfortable acting the way this mediator did? **Track 9-D.**

§9.5 GENERATING MOVEMENT: A "PROGRESSIVE" MODEL OF PROBLEM-SOLVING AND PERSUASION

So much for general conditioning of the parties. In this section, we set out a progressive model of mediator persuasion and discuss more specific approaches aimed at moving the disputants away from problematic perceptions and inflexible commitments.

How is this model a progression? In general, it prefers participant self-persuasion to mediator persuasion and prescribes a continuum of approaches that move in that direction. Like other models in this book, this one must be applied flexibly to adapt to the circumstances of each case. Nevertheless, we recommend this progression as the best — if not necessarily the straightest — path to generating real movement.

Our model reflects what research suggests: that "soft sells" generally work better (and are resisted less) than "hard sells."[29] The idea is that movement and change are more likely if people come to their own realization that the decisions they are making are in their interests than if they have to be convinced of this. This model is also consistent with our general belief that party-determined, rather than mediator-directed, decisions are the best prescription for satisfying, durable agreements.[30]

What produces "self-persuasion"? In general, self-persuasion occurs when an alternative point of view penetrates the thinking of the target audience. For most people, it occurs through subtle rather than blunt messages, and through questions that make them think or get "under their skin."

28. Craig McEwan & Richard Maiman, *Mediation in Maine: An Empirical Assessment*, 31 Me. L. Rev. 237 (1981) (indicating equivalent satisfaction in voluntary and mandatory settings).
29. *See* Woodward & Denton, *supra* note 4, at 210-216.
30. *See* McEwan & Maiman, *supra* note 28, at 237.

"Ask, Don't Tell." In reviewing the specific approaches to persuasion that follow, you will notice a pattern: Most of them start with the mediator asking questions that bring the listener into a dialogue and only later move to the mediator's making explicit statements or recommendations. Studies suggest that when audiences are forewarned that a persuasive message is coming, the forewarning tends to make the message less persuasive.[31] People—especially those who are psychologically dug in—often tune out lectures and mount defenses to them, mentally rehearsing their counterarguments while the other person is speaking.[32] They generally react better to questions that permit them to reach their own conclusions in their own time. As one commentator puts it: When trying to persuade, it is generally better to "ask rather than tell."[33]

This progression also tracks and ideally harvests the rewards from the approach to information gathering we outlined in Chapter 7. There, we laid out a sequential process in which the mediator develops information from which first the seeds of empathy, then of satisfaction, and finally of doubt, are planted. Here the mediator uses that information in much the same sequence to bring about flexibility in bargaining.

In the pages that follow, we analyze an array of problem-solving and persuasive interventions, ranging from less directive to more directive. Even though our progression starts "soft," none of the forms of persuasion we discuss are free from the mediator's active involvement.[34] And make no mistake: Soft selling will not work in every case. Thus, a mediator concerned about achieving resolutions needs to master more directive modes of influence as well.

§9.5.1 PERSUASION BASED ON EMPATHY: ROLE REVERSAL

Role reversal is a method by which each party is asked to step into the shoes of the other party and consider how a situation or an issue might look from that person's perspective. The goal is to have each person acknowledge—verbally if possible—that the situation might look differently when viewed from the other side's point of view.

Interventions using role reversal generally ask parties to (a) put aside their own perspective for the moment; (b) try to see the issue the way the other side does (not the way *they* would see it if they were the other side); and (c) articulate that other perspective. Once they have heard themselves say these words, the other side's perspective may become more understandable (even if not totally convincing), and opposition to it may soften. On a deeper level, role reversals can trigger empathy for the other side and even produce some thawing of strained relationships.

31. William L. Benoit, *Forewarning and Persuasion*, *in* Mike Allen & Raymond Preiss, Persuasion: Advances Through Meta-Analysis 146 (1996).
32. Simons, *supra* note 7, at 52-53.
33. Stewart & Cash, *supra* note 3, at 327.
34. Related to this, we do not think the mediator should try to conceal her objectives at this stage, even if she could. Indeed, some participants may recoil from subtle rather than direct efforts to persuade, resenting what appears to be the mediator's "pulling punches."

There are many variations on this basic concept, all of which involve the mediator's helping a party see the other perspective even if at first they cannot or will not. As examples, the mediator can help the parties to:

- Consider how their *own* past statements and actions may have been understood (or misunderstood) by the other side, as in *"If you were your neighbor, how would your conduct (proposal) look?"* Or *"Put yourself in Mr. Lopez's shoes. What do you think he might have thought when you said {X}? . . . I know you don't agree, but try to say what he could have been thinking."* If this fails to produces an empathic response: *". . . Can you understand how he might have thought {Y}?"*
- Consider how the *other party's* past actions might have a different and more innocent explanation, as in *"Looking at it from Ms. Taylor's perspective, why might she have acted the way she did?"* If this doesn't work: *"Is it possible that she acted the way she did because of a concern for her daughter's safety rather than anger at you? Is it possible that communications between the two of you had broken down so much that you misunderstood her intentions?"*
- Better appreciate each other's arguments. A mediator can ask each party, *"If you were the other side, what arguments would you make in support of their position?"* If the party is unable to identify an opponent's arguments: *"Would it surprise you if she argued that her rights as their mother should take precedence over your rights as the kids' grandmother?"*
- Consider how a party's own bargaining proposals might affect or be viewed by the other side—for example: *"If you were the landlord, concerned about avoiding a large, publicized settlement in this case, would your intended demand—that they pay you $10,000, with no promise of confidentiality—be attractive?"*
- Consider how the other side's negotiation proposals might look from their perspective, as in *"You say that $7,500 is totally inadequate as an offer to settle this case. I wonder: Is your landlord a wealthy man? . . . And we know that he doesn't have insurance that covers this kind of claim. In light of that, do you really think that $7,500 is a 'lowball' offer from his perspective?"*

Notice in each of these examples the progression of mediator directiveness. The mediator starts by asking questions, using neutral, even tentative language, rather than making statements. In doing so, she tries to get each party actively engaged in recognizing and articulating the competing perspective. One could easily change the mediator's rhetoric to make the language less neutral and a lot more directive, such as in, for example, *"C'mon. This landlord obviously isn't a rich guy. Don't you think that $7,500 is a significant amount of money for him?"* While this sort of directiveness might be needed to promote movement with intransigent disputants, we believe that it should be used only when time is running out or after softer approaches have failed.

The empirical literature on persuasion supports this approach. Empathy is best developed by *helping*, not *forcing*, parties to recognize the legitimate

perspectives of the other side.[35] Role reversal works most effectively when the parties are *invited* to suspend judgment and open their minds to new points of view.

The Challenges of Role Reversal and the Mediator's Role. Getting parties to engage in productive role reversal can be difficult. Some disputants have limited ability to empathize with the perspectives of others. Some will resist the invitation to reverse roles because they are blinded by their disagreement with the other side's views or are unwilling, for strategic reasons, to concede that any other view may have legitimacy.

Success in this potentially powerful form of persuasion therefore often requires the mediator to prepare the parties for it. For example: "*Ms. Chang, I know how strongly you disagree with what Mr. Snow has said and done. But I'm going to ask you to put your own views on hold for a few minutes. Try to put yourself in his shoes. I know you disagree strenuously with him, but try to imagine and then put into words — his words — how this situation looks to him. If it helps, start with the words 'he thinks' . . . And try not to say 'but' at the end of a sentence. Can you try?*" Some mediators might feel capable of orchestrating such an effort in joint session.[36] However, given the resistance that is to be expected, it is usually more productive to do this kind of preparatory work in caucus.

Now watch how one of our child custody mediators, after starting down a more directive persuasion path, shifts gears and tries to get Bob, the father, to consider and articulate Jane's strengths as a mother. Watch Bob struggle as he tries to adopt the mother's perspective even for a few minutes, reverting to his own perspective after each word of praise for her. This excerpt is an excellent example of how self-persuasion works: gradually and often after great resistance. **Track 9-E.**

§9.5.2 PERSUASION THROUGH HEALING: APOLOGY

Bernice Wilson, the homeowner in our consumer case, sought money from her contractor to complete the kitchen renovation he never finished. But she was also angry about how she had been treated in the process. Her case is typical: Most claims of past or ongoing wrongdoing involve a combination of tangible (e.g., pecuniary and proprietary) and intangible (emotional, interpersonal and psychic) harms.

Addressing only the tangible harms will often produce a mediated resolution. But in many cases, the mediator's ability to produce flexibility on tangible issues will depend on dealing adequately with intangible injuries as well. Obtaining an apology or some other articulated acknowledgment of a harm done can often be a key ingredient in producing movement. And, of course, beyond helping to settle cases, such statements can provide the basis for real healing.

---

35. Robert A. Baruch Bush & Joseph P. Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition 159-161 (1994).

36. Gary J. Friedman, Jack Himmelstein & Robert H. Mnookin, *Saving the Last Dance: Mediation through Understanding* (Program on Negotiation Clearinghouse 2001) (videotape depicting no-caucus mediation model).

Helping parties offer and receive apologies in order to produce movement is another form of party-generated persuasion. To achieve this goal, the mediator must first ensure that the injury that needs addressing is identified. Where the parties are open and verbal, the mediator can encourage enough emotional expression to take place so that intangible harms are brought to the surface and the wrongdoer can hear that the victim feels wronged.

Where these psychic harms are not stated explicitly, the mediator must listen actively to see if they lurk beneath the surface, using her intuition (*"There seems to be something he's not saying. In my experience, most victims would feel that their privacy was violated by that conduct. Does he?"*) and, through questions, confirm their existence. She must look for opportunities to help the parties express regret for past mistakes and misunderstandings. She must also draw attention to statements implicitly acknowledging responsibility or regret when they naturally occur in the conversation, repeating or paraphrasing such statements to make sure the other party has heard them. (*"So it seems, Mr. Gomez, like what you're saying is that you didn't expect things to escalate the way they did and that you're sorry for your part in what happened."*)

But none of these efforts or statements by the *mediator* is a substitute for an effective apology offered *personally* by the offending party to the party who feels wronged. How do mediators, sensing that an apology may be a helpful or necessary element of persuasion, bring one about?

The Challenges of Making Apologies. First, mediators must appreciate the many reasons why apologizing is difficult for people—even those who do feel sorry about their behavior or its effects. Many people find it hard to acknowledge the guilt or shame they feel as a result of having caused another person injury.[37] Others are inexperienced at giving apologies, a factor that may be influenced by the way apologies are sometimes viewed in American culture. (As John Wayne once said, "*Never apologize, mister. It's a sign of weakness.*"[38]) Those who have been accused of (or sued for) what they feel is a minor offense may feel like victims themselves and thus may be resistant to making amends.

Second, in a legal dispute context, the mediator must be aware of powerful strategic and evidentiary barriers impeding the offering of apologies. Many litigants fear that an apology will be pounced on by their adversary to justify a higher settlement demand. Despite the confidentiality of the mediation process in general, and the explicit protection given to acknowledgments of fault in settlement discussions in many jurisdictions,[39] some litigants are deterred by concern that such a statement could later be admissible at a trial as proof of fault.[40]

---

37. *See* Carol Liebman & Nancy Dubler, *Bioethics Mediation: A Guide to Shaping Shared Solutions* (2004); Douglas Frenkel & Carol Liebman, *Editorial: Words That Heal*, 140 Annals of Internal Med. 482 (2004).

38. Dialogue of Captain Nathan Brittles *in She Wore a Yellow Ribbon* (Argosy Pictures 1949).

39. Fed. R. Evid. 408.

40. *See, e.g.*, Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. Cal. L. Rev. 1009 (1999); Deborah L. Levi, *Note, The Role of Apology in Mediation*, 72 N.Y.U. L. Rev. 1165 (1997). In legal disputes, we have found that it is often easier to promote statements of regret around the edges of the conflict—about the parties' interactions and how they have treated each other or about the effects of their conduct—than apologies for conduct that is at the core of the parties' competing legal claims—the "who is right" and "who is wrong" of the dispute.

Third, even if a party is open to apologizing, the mediator must understand that certain forms of apology are ineffective, and perhaps counterproductive, as a means of persuasion. Whether due to the apologizer's inexperience, embarrassment, resistance or shame, many attempted apologies come out badly. Here are three common examples:

- **The "safe" or partial apology.** *"I'm very sorry this happened to you."* This form of apology is carefully worded, seeking to have it both ways: softening the victim by showing empathy for her situation but taking no responsibility or blame for it. This form of apology is often used to avoid making any "admission" of fault.
- **The "not responsible" apology.** This takes the partial apology one step further by adding a specific rejection of responsibility to the expression of regret. It is commonly used in personal injury litigation where the defendant strongly contests liability on factual or legal grounds. An excellent example occurred in one of our premises liability negotiations, in which defense counsel (after arguing earlier that plaintiff's case was *"a bunch of baloney"*) stated: *"First of all, I'd like Josh to know on behalf of Mr. Stevens and his company that we certainly feel badly about what happened to you. Certainly no one would want that to happen to anyone and we're hopeful that you make a full recovery. At the same time, let's put this in context of what really happened. . . ."* (The attorney went on to argue, among other things, that the plaintiff lost "only" $350 and an iPod, was assaulted for "only" fifteen minutes, and tried to minimize the plaintiff's claim of post-traumatic stress.)
- **The apology of justification.** Here the apologizer equivocates, acknowledging responsibility but then explaining or justifying the wrongful conduct. He says, in effect, *"I'm sorry I did this, but I had good reasons."* In extreme cases, he tries to blame the victim as part of the justification. A famous example is President Clinton's Monica Lewinsky apology: *". . . I know that my public comments and my silence about this matter gave a false impression. I misled people, including even my wife. I deeply regret that. I can only tell you that I was motivated by many factors. First, by a desire to protect myself from the embarrassment of my own conduct. I was also concerned about protecting my family. The fact that these questions were being asked in a politically inspired lawsuit, which has since been dismissed, was a consideration too."* (President Clinton then went on to attack the independent counsel investigation that led to the exposure of his affair.)

What do all of these apologies have in common? They seem to lack any real contrition. They risk leaving the person who is owed an emotional debt feeling shortchanged and angry. And although in some circumstances, a halfhearted apology may be better than none at all, there is recent evidence suggesting that, where fault is clear, "no responsibility" apologies may actually make things worse.[41]

---

41. *See* Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 Mich. L. Rev. 460 (2003).

All of this raises the obvious question: What makes for an effective apology—one that will cause the victim to soften in response? Most research suggests that effective apologies are those that (a) appear to be sincere; (b) contain an acknowledgment of the wrongful act and the impact on the victim; (c) accept responsibility; (d) if applicable, promise to refrain from such conduct in the future; and (e) offer compensation for any tangible loss as well.[42] In short, they are *complete* and *unconditional.*

Orchestrating Apologies. How does a mediator orchestrate an apology to maximize its potential for the parties and the process? First, she works to ensure that the needed words will be spoken, and spoken constructively. In the privacy of a caucus—having established a degree of intimacy—the mediator can explore with the disputants whether they have any regrets about their own contributions to the dispute and whether they are willing to share those regrets with the other side. Role reversal, discussed in the previous section, may help a party appreciate the opponent's need for such words. If there is resistance, the mediator might seek to understand and address it.

In appropriate cases, the mediator can coach the uncomfortable party on how to express an apology in a way that the other party might accept. This can include role-playing as practice and advice about the kind of backsliding or equivocal statements that can make things worse. Note in this regard that effective apologies generally do not come from agents: The parties themselves, not their representatives, must do the talking.

Next, the mediator must work to maximize the chances that the apology will be well received. In addition to coaching about the content of what is offered, effective mediators understand that an apology that is offered spontaneously and seeks nothing in return is more likely to seem sincere than one that is offered only after it has been requested, or that comes across as just another bargaining chip. Thus the mediator should refrain from treating potential apologies or other acts of contrition as mere agenda items to be negotiated.[43] And the mediator should avoid another common pitfall: asking the victim if he or she would like to receive an apology (who wouldn't?), and surely should not do so before the other side has even agreed to offer one. Finally, once an apology is offered, the mediator must intervene to prevent an angry recipient from rejecting it out of hand and further raising tensions.[44]

If such orchestration seems manipulative and manufactured to placate the victim, consider this: Clinical evidence tells us that a successful apology can also benefit the *wrongdoer*, by allowing him to reclaim his sense of self-respect

---

42. Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 Wash. L. Rev. 1121, 1130-1145 (2002).

43. There are exceptions, however. In certain formal and public negotiation contexts involving, for example, matters of international diplomacy, the language of "public apologies" might be the subject of direct and intense negotiation. *See* Richard B. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 Va. J. Int'l L. 433, 436-441 (2006).

44. Some mediators believe in coaching the prospective recipient of an apology on how to receive it *before* it is actually offered, again through role-playing exercises in caucus. (*"If Mr. Pomeroy were willing to apologize for his role in what happened, do you think you could accept his apology? Would hearing him speak words of apology be helpful? If he said something like [x], what might you say in response?"*) Note, however, that such coaching likely detracts from the spontaneity (and thus the power) of the apology if and when it is offered.

and ridding him of the guilt or shame he may have been carrying around.[45] Given its restorative (as well as settlement-promoting) potential, we think that the effective management of apologies can be one of the most valuable exercises of process expertise a mediator can offer.

§9.5.3 PERSUASION BY APPEALING TO INTERESTS: PROBLEM-SOLVING

As we have emphasized throughout this book, attempting to end conflicts by problem-solving—meeting the parties' real needs—is likely to be less competitive and more likely to produce satisfying, sustainable resolutions than efforts to forge mere compromises on positions. It therefore makes sense to see if solutions can be built on party interests—especially those that are shared or not in conflict—*before* trying to persuade the disputants to make positional concessions on zero-sum issues.[46]

Before problem-solving can occur, however, the disputants must be open with the mediator about their interests. As we have seen, considerable probing by the mediator (usually in caucus) is often needed to accomplish even that much. And even if the parties have been forthcoming with the mediator, additional work is often needed to promote real problem-solving with the other side. As we have emphasized, disputants are often reluctant to share their true needs with an opponent out of fear of exploitation. Sometimes, they are not able to think of interest-based solutions without considerable help from the mediator. Often the parties will not agree to try interest-based bargaining until more conventional distributive bargaining approaches have hit an impasse. If the mediator decides that the conditions are right to try problem-solving, what does this form of persuasion involve?

Getting Needs on the Table: Transparency and Further Probing. The first step is a return to probing to ensure that interests have been identified. (The process for doing this was discussed in Chapter 7.) Here, however, the mediator can make explicit her goal of problem-solving and articulate the reasons why the party should buy in: Adversarial bargaining can be difficult and limited; by comparison, the parties may find that interest-based bargaining potentially presents great advantages.

If the mediator is successful at learning more about the parties' interests than has been previously disclosed, she can then seek permission to reveal those interests to the other side. Party hesitation can be addressed by the mediator promising not to reveal party interests unless she deems it useful or to disguise such interests, without revealing them, as hypothetical mediator proposals. Such "trial balloons"—ideas that appear to have been thought of by the mediator instead of either party—serve a number of useful purposes, which we discuss in Chapter 10.

---

45. *See* Beverly Engel, The Power of Apology: Healing Steps to Transform Your Relationships 12-14, 132-133 (2002).

46. To relate this section to the previous one, an apology can be viewed as a solution based on satisfying emotional interests. An effective apology can be a powerful interest-based form of persuasion in that it moves the recipient toward being open to dealing with the wrongdoer.

Encouraging the Parties to Think Creatively. In addition, parties who are used to thinking only of conventional positional approaches to resolving the matter may need to be encouraged to think more imaginatively, for example:

- *"Just for a few minutes, forget what you thought was possible or what the other side might be willing to do here or what you think they'll reject. Instead, try to imagine an ideal solution or even several ideas that you'd like, regardless of whether they'd work or you feel silly proposing them."*
- *"Are there any services or other things that you could use or that you could give—regardless of what you think the other side would think of it—that could be put in the pot here to make this soup we're calling a resolution?"*

When the parties are reluctant to reveal information openly, this is best done in caucus. When conditions warrant, a group brainstorming session might be held in which multiple options can be considered with everyone present. We discuss this format in Chapter 10.

Thinking Creatively Yourself. Regardless of whether the parties come up with needs-based ideas, the mediator can. After first eliciting proposals from the parties (on the theory that they are most familiar with their own needs and must live with the consequences of their decisions), effective mediators often offer their own ideas and refinements. Many newer practitioners aspire to do this but feel stymied.

How does the mediator develop this ability? First, she must be willing to suspend certain social inhibitions and conventions based on standard or legalistic thinking. She must use her own imagination and hypothesize solutions that might satisfy the parties' interests: promises, acts, things that the parties can exchange—and then test them out. If such solutions are not apparent, she can indulge her curiosity and do more fact-digging. It is a matter of looking for possible trades that can benefit both parties or at least help one without costing the other, as well as looking for possible ways to bring outside resources to bear on the problem and ease the negotiations.

Case Examples. The following mediator questions and ideas ("supposals"[47]) have generated responses leading to settlements in actual cases—all of which involved difficult disputes:

- *"Ms. Williams, what do you do for a living? . . . Oh, you own a gift shop. Hmm. Do you ever need seasonal help? Could Joey pay off the car damage by helping out before Christmas?"*
- *"Mr. Thomas, I see you're wearing a shirt with a moose logo on it. Does the moose have any special meaning? . . . You have a cottage on a lake in Canada? Is it out of the question to talk about the idea of the Allens using it for a vacation in lieu of the price reduction on the house that they're demanding?"*

47. Because such ideas for solution are often couched in questions that start with "*Suppose* . . . " they have been dubbed "supposals."

> *"I noticed that the child who is out in the waiting room with your husband has a disability. Is she your daughter? . . . If the movers aren't willing to pay you for the items that you claim they lost in delivery, would you be open to their making a donation to the cerebral palsy research foundation instead?"*

This kind of creativity isn't magic, and it can be learned. But it does require imagination, a lack of inhibition in seeking possible "connections" and sometimes tenaciousness in seeking the next idea when the previous one doesn't fly. This kind of creativity can be difficult to harness when working alone; having a co-mediator can be helpful.

The Limits of Problem-Solving. However, success in shifting the negotiation from positions to needs provides no assurance of smooth sailing. Interest-based negotiations commonly address only part of the problem; the remaining issues may well be distributive in character. For example, even after a sincere apology, the accident victim and the drunk driver must usually still haggle — hopefully less competitively — over a monetary settlement amount. In a child custody mediation, parents with flexible work schedules might agree to an interest-based approach that helps each parent with child care while the other is working but still have to divide all non-work and vacation time. In that remaining bargaining, the parties might return to aggressive tactics, including overly confident assertions about their claims, in order to "win" the distributive aspects of the negotiation. When this occurs, the mediator's only persuasion option may be to attempt to inject more uncertainty into their thinking.

§9.5.4 PERSUASION THROUGH DOUBT: PROVIDING FEEDBACK AND EVALUATION

As we discussed in Chapter 2, even the most able and experienced negotiators often come to the mediation table with excessive optimism about their claims. A skilled mediator — the only person in the room with a disinterested perspective — can dampen that overconfidence by exposing the negotiators to feedback. Doing so can be viewed as a more direct way of conditioning the negotiators to moderate their positions. As stated in Chapter 3, we view properly conducted evaluation as a valuable, often welcomed and sometimes justice-enhancing form of persuasion.

Evaluation Defined. Most law-trained mediators equate evaluation with assessing the *legal* strengths of the parties' positions. However, mediator evaluation is broader than that; it encompasses feedback on any aspect of a party's proposals or positions, including their practicality, wisdom, fairness and, in rare cases, morality. In this chapter, we confine our discussion to legal evaluation. For the most part, however, the considerations that govern legal evaluations are applicable to all forms of doubt-based persuasion.

Because raising doubt by means of evaluation is a potentially confrontational intervention, we list it last in our "progression."[48] But if a party's overconfidence and refusal to discuss interests is threatening to cripple the mediation, the mediator

48. This is parallel to the approach to information expansion we recommended in Chapter 7, in which probing for doubt comes after probing for empathy and interests.

may have to resort to this approach earlier. However, even within this most mediator-driven type of persuasion lies a "softer to harder" range of choices.

Gradations of Legal Evaluation. In roughly ascending order of directiveness, "legal evaluation" includes:[49]

- **Asking parties to discuss the strengths and weaknesses of their case.** (*"Of all of the claims (defenses) you have, which do you see as the strongest? The weakest? What are the problems, if any, with your claim of fraud? What percentage chance do you see of its being rejected? What is the worst case scenario?"*)
- **Questioning parties about elements of their case, evidentiary problems, etc.** (*"What evidence do you have to support your claim of inadequate security? Is it a problem that there is no direct evidence of how the intruder got in?"*)
- **Asking one party to respond to another party's legal arguments.** (*"Defense counsel argues that the break-in was not reasonably foreseeable because the town has a low crime rate and there had never been a previous break-in at his building. How do you respond to that?"*)
- **Providing legal information without applying it to the facts of the case.** This is often directed at parties who are representing themselves: (*"As the plaintiff in this case, you have to persuade the jury that the defendant's negligence caused you harm by a preponderance of evidence. What this means is . . . ."*)
- Providing a legal opinion about an *evidentiary* or *procedural* **question by applying the law to the facts.** (*"My opinion is that the court will exclude that letter, because it is hearsay." "Anything's possible of course, but I don't think it's likely that the judge will grant your motion for a continuance based on the facts you present."*)
- Providing a legal opinion about a *substantive* **element of the case by applying the law to the facts.** (*"My sense is that the plaintiff will almost certainly get to the jury on the question of whether the duty of reasonable care was breached. It seems to me that, as the defendant, you have significant risk on that issue."*)
- **Making a prediction about possible or probable court outcomes.** (*"If this case gets to a jury, and I think it will, I see the most likely jury award as being in the range of $50,000 to $75,000."*)
- **Proposing or recommending a specific settlement based on analysis of the law and the facts.** (*"If you want my opinion, I think you should accept their $60,000 offer."*)

As you can see, the first three types of evaluation are doubt-raising (and thus self-persuading) *questions* of a kind already discussed in Chapter 7. In the others,

49. *See generally* James H. Stark, *The Ethics of Mediation Evaluation*, 38 S. Tex. L. Rev. 769, 774 (1997); M. Shaw, Evaluation Continuum, Prepared for Meeting of CPR Ethics Commission, May 6-7, 1996 (on file with James Stark).

the mediator provides increasingly direct and comprehensive feedback to the parties by means of declarative statements.

Note that a mediator evaluation need not be so technical or predictive in nature as to require substantive expertise as a foundation. In its most elementary form, the evaluation can simply involve the mediator getting the parties to acknowledge reality: that there is risk in uncertainty. Unless a disputant feels that the other side's perspective is *wholly* unworthy of credit, even the most headstrong disputant must concede (at least to himself) that the desired court outcome cannot be assured.

The Challenges of Legal Evaluation. It is hard to do legal evaluation properly and well. First, because it depends on imparting information designed to shake a party's confidence, its "bad news" aspect is often greeted by considerable "push back" or even anger. Second, if improperly done, evaluation creates the risk that the mediator will be perceived as non-neutral. Third, because of this risk, more directive forms of evaluation tend to be provided in caucus, a setting that presents the potential for questionable mediator conduct. Fourth, even the most experienced subject matter experts must concede that any prediction of court outcomes—especially when lacking the full adversary presentation of a trial—is far from a science.

It is also difficult to provide universal generalizations about how a mediator should provide legal evaluation, because cases and litigants vary so greatly. How intelligent the parties are, whether they are represented by counsel and whether they have had previous encounters with the court system will all affect how explicit an evaluation needs to be in order to be understood. How emotionally entrenched the parties are in their positions, how much they trust the mediator and how invested they are in the mediation process may dictate how direct the mediator should be in her approach. The substantive content of the evaluation itself also matters: An evaluation that strongly favors one side must be handled with considerably more tact than an evaluation that points out substantial risks and problems on both sides of the case.

Providing Effective and Proper Evaluation: Concrete Suggestions. Nonetheless, here is a list of concrete suggestions on how to provide parties with legal feedback based on the literature on persuasion, the writings of other mediation scholars[50] and our own experience:

- **Evaluate only when necessary.** Provide legal evaluation only in a "merits" dispute, when the parties are stuck because they have different predictions of what the case is worth or what will happen at trial if the case doesn't settle. If the principal barrier to settlement is something else (poor communication, personal hostility, reactive devaluation, etc.), don't evaluate until efforts to address those impediments have been exhausted. Any evaluation still needed at that point may become easier for the parties to accept.

50. *See, e.g.*, Marjorie Corman Aaron, *Evaluation in Mediation*, *in* Dwight Golann, Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators 267-305 (1996).

- **If possible, evaluate in caucus.** While it is possible to provide direct feedback in joint session, the caucus setting provides two major advantages. First, the parties will fight your evaluation less if it's given privately rather than in front of a hostile adversary, because there is less potential for loss of face. Second, it is easier to tailor your message, by making it simpler or more complex as needed, or softening it by starting with statements expressing empathy. If you do give feedback in joint session, be sure to ask hard questions of, and point out weaknesses to, *both* sides to maintain the appearance of impartiality.

- **Ask permission.** If you want to give the parties explicit feedback about the strength of their case, it is helpful to ask if they are open to hearing your views. If a party declines, is that the end of the matter? You might feel that you should respect their choice; ultimately it's their choice and their case. Besides, if they don't even want to hear your opinions, what chance is there that they will be persuaded by them? But sometimes a "no"—especially an adamant one—may betray a sensitivity to having a weak case and a desire to avoid exposing it. When this happens, you can choose to accept the decision or try to engage the party in a dialogue about their lack of professed interest in what may be new and helpful information or at least another perspective to consider.

- **Be transparent and explicitly evenhanded.** How do you react when a doctor simply performs a procedure with no advance explanation? When it comes to more direct forms of evaluation, most disputants will be more open to listening to the mediator's message if the mediator explains what she is about to do and her purpose in doing it. Even more appreciated—especially by those who still wish to "punish" the opponent—may be the knowledge that the other side will receive the same evaluative treatment. Such preparatory explanations can protect against the appearance that the mediator has lost her neutrality. Here is an example of this technique in action, from the *Resnick* mediation: **Track 9-F.**

- **Begin with questions; proceed to evaluative statements only if necessary.** Consistent with the literature on self-persuasion, asking questions tends to be more effective in producing movement than making evaluative statements. Questions actively engage disputants in the process of reassessing their positions. Evaluative mediator statements, by contrast, can more easily be tuned out or otherwise defended against. And they run the risk of alienating the parties by appearing overtly confrontational. Watch the following excerpt from a caucus with the plaintiff homeowner in our consumer mediation and consider: Would this have been more effective if done via questions instead of statements? **Track 9-G.**

- **Make direct evaluative statements as late in the process as possible.** If a disputant does not seem to "get" the message contained in less direct forms of evaluation, explicit statements may be necessary. A helpful rule of thumb here is: The later the better. The longer you wait, the more you will learn about the dispute. The more you know about the dispute, the more informed your evaluation will be. The more informed your evaluation, the more credible it will appear to the disputants, who, when all is

said and done, must decide whether it has value to them. And by waiting, the parties may surprise you and reach a resolution based on other considerations, before you ever get around to having to make a direct evaluation.

- **Use stories, analogies and metaphors.** People tend to understand and accept information more readily when it is conveyed in stories, metaphors and analogies. These devices can be used to make difficult messages simpler and more digestible. They are also a form of self-persuasion: In contrast to a lecture, which may cause the listener to defend against an obvious message, a story, metaphor or analogy conveys the same point more indirectly and subtly, requiring listeners to stop in their tracks and use their mental faculties to ponder the message's meaning and apply it to themselves.[51]

  Thus, instead of predicting that *"the judge will probably find against you because the delays were caused by your taking on too many jobs at one time,"* a mediator might say to the contractor in *Wilson*: *"Even the best juggler has trouble keeping too many torches in the air; if one drops, he can get burned."* Or, in an effort to persuade the same contractor to consider one approach for resolving the *Wilson* dispute, he might draw an analogy to airlines trying to maximize profits by selling more tickets than there are seats on given flights. For example: *"Some friends of ours got bumped last month from a flight to Orlando because the airline overbooked it. As I understand it, that's most airlines' regular practice. But not only did the airline put our friends on the next flight out the following morning, they paid for their hotel and gave them a voucher for free travel anywhere in the continental U.S. for the next year."*

- **Provide balanced evaluations.** Research suggests that two-sided statements — arguments that present both sides of an issue while suggesting why one side may be more persuasive than the other — are generally more effective forms of persuasion than one-sided statements.[52] By acknowledging that there is more than one side to any question faced or decision to be made, and by helping an interviewee consider the pros and cons of those different points of view, the persuader appears forthright, helpful and fair.[53] Note that this is another "soft sell" technique.

  In the *Resnick* case, for example, there was conflicting evidence about how the burglar got into the building. A balanced, two-sided evaluation with the defendant might have sounded something like this: *"You are quite right, Mr. Stevens, that there is no direct evidence of how the burglar got*

51. On the use of such figures of speech in mediation, *see* Michael Benjamin & Howard H. Irving, Therapeutic Family Mediation: Helping Families Resolve Conflict 66 (2002).

52. *See* Mike Allen, *Comparing the Persuasive Effectiveness of One- and Two-Sided Messages, in* Mike Allen & Raymond Preiss, Persuasion: Advances Through Meta-Analysis 96 (1996).

53. This generalization must be qualified to take into account the fact that individuals have widely differing capacities to weigh and analyze complex arguments. Persons of average or greater intelligence are in general hard to persuade, but more likely to be persuaded by two-sided arguments. Less intelligent people are in general easier to persuade, but persuasive messages directed at them must be simpler to be understood. Simons, *supra* note 7, at 15-16, 37-38. Therefore, you must tailor your arguments to your audience.

into the building. That could be a real problem for the plaintiff in proving his case. But the circumstantial evidence—the unlocked window on the stairwell and the broken glass indicating forced entry there—is, I fear, a real problem for you. I worry that the judge will let this issue go to the jury and, if so, that you face a serious risk of losing on that issue if the jury hears this evidence."

As with probing for doubt, discussed in Chapter 7, success in evaluating is thus aided by the mediator's looking for what is unclear, rather than what is clear, in each situation. Seeking and embracing ambiguity is at odds with the natural inclination of many mediators (especially law-trained, evaluative types) to want to find *the* right answer.

- **Lead with the "good news."** Here's a related point: If you think the party's case has both strengths and weaknesses, mention the strengths first. Say, *"For what it's worth, I think your claim for emotional distress damages here is quite strong, because your psychologist seems like a very credible witness. I do have concerns, however, about the viability of your claim for lost tuition expenses. . . . "* Providing good news first softens up your audience for any bad news to follow and furthers the goal of appearing fair and objective. You don't want to appear as though you are trying to settle the dispute by "beating up" each party with only negatives.

- **When delivering bad news, externalize your predictions.** Rather than expressing the assessment as your own view of what will happen (which might be read as your view of what *ought* to happen), blame the decision maker and commiserate. For example: *"Unfortunately, I think that the judge will probably not admit this letter into evidence. I think she'll rule that it's inadmissible hearsay."*

- **Don't evaluate unless you know what you're talking about.** Although this should go without saying, many neutrals will—out of a desire to produce movement—venture into opinion areas in which they are guessing more than professing. If the main reason to evaluate in mediation is to help parties make more informed decisions, assessments ought to be grounded and accurate. If you are asked a substantive, procedural or evidentiary question to which you don't know the answer or are not sure and the question is crucial to a party's ability to decide on an important concession, try to make arrangements for the parties to obtain an answer by adjourning the mediation to do further research or by referring the question to a knowledgeable outside source.

  But outside referrals may not be an available option in time-limited situations, and the parties may sometimes prefer an educated guess to nothing at all. How precise must your knowledge be to warrant offering an evaluation? With appropriate disclaimers (*"Now, to be clear, I am not an expert or even experienced in this area . . . "*) the mediator can provide "another view", for example:*"I'm not making a prediction; I'm only providing another way in which a third party such as a judge might see this."*

- **Explain fully and don't pull your punches.** On the other hand, if you *are* confident of your predictions and you think that a direct evaluative statement would be useful, don't undermine the effort by hedging unduly or

giving a half-baked answer. Remember that direct language and authoritativeness are persuasive.

It is also important to take the time to explain the rationale for your predictions fully so that the parties can understand their basis in law and fact. (Recall: "reasons" persuade.) A full explanation of a mediator's prediction would include the rule on which it is based, why the disputed facts would call for applying this rule in this instance and, if the rule itself is a source of resentment, the reason or policy behind the rule. The credibility of the message may be further enhanced by citing authoritative sources.[54]

- **Don't exaggerate your evaluation just to produce movement.** It is natural to want to "push" parties who are stubbornly dug in to unreasonable stances. But being direct is not a license to provide overstated—or deliberately incomplete—evaluations. If, for example, some judges might be inclined to allow an unrepresented party to introduce a hearsay letter, a balanced evaluation to such a party would include an appropriate qualifier: "*On the other hand, this is a small-claims court; you are appearing without a lawyer; and some judges might let the letter in. I don't think it's likely, but it is possible.*"

- **In rare situations, confront.** Certain rare circumstances warrant bluntness. When a party is taking a stance or making a decision based on offensive views or patently wrong reasoning, the mediator ought to deal with such ideas, carefully but directly, in caucus. (*"Mr. Jenkins, you seem to have a conviction that people like Ms. Johnson can be refused the opportunity to rent units in your building, solely on the basis of their race. Where did you get that view from? . . . I see. Well, this is a society where each person is entitled to hold opinions as they wish. But I have to tell you that your views are incompatible with how the law regards housing opportunity and, based on my experience, I can assure you they will not prevail at the hearing. Moreover, if you persist in that stance, and given her reaction, I will have no recourse but to terminate the mediation.*")

The Range of Evaluation: Video Examples. As you watch the following efforts to produce movement through evaluation, consider: What do you like and not like about the mediators' different evaluation styles? What are principal differences in their approaches? What factors in each example made it more or less effective? How, if at all, does the presence of counsel affect the above suggestions for providing effective and proper evaluation? **Track 9-H.**

54. William L. Benoit, *Forewarning and Persuasion*, *in* Allen & Preiss, *supra* note 52, at 149.

Alternatives

to the High Costs of Litigation

CPR Institute for Dispute Resolution Vol. 14, No. 8 September 1996

DIGEST

ADR Tools. When parties lock horns in a bitter confrontation over money, settlement often seems impossible. But a mediator can do a lot to move the parties in that direction, writes **J. Michael Keating, Jr.**, a mediator with the law firm of Christopher H. Little & Associates. Mr. Keating offers tips about how to keep the parties talking even after they insist that a demand or offer is the "absolute bottom line." ..... *Page 93*

How to Screen Neutrals. Until uniform disclosure requirements become generally endorsed within the dispute resolution community, ADR Counsel must be sure to get adequate disclosure when screening and selecting a neutral, writes **Harry N. Mazadoorian**, assistant general counsel at CIGNA Companies. Mr. Mazadoorian, a member of CPR's Commission on Ethics and Standards of Dispute Resolution Practice, offers a comprehensive overview of the questions ADR Counsel should ask. ..... *Page 95*

Mainstreaming ADR. In a candid roundtable discussion at CPR's Spring Meeting, leading corporate counsel and law firm members discussed some of the frustrations they face when trying to incorporate ADR into the mainstream of legal practice. They identified strategies other ADR Counsel can use to institutionalize ADR. ..... *Page 98*

Settlement Obstacles. Other programs at the Spring Meeting took audience members inside the mediation room to identify emotional obstacles to settlement and hone their bargaining techniques. An innovative session that combined lecture with role-play showed how negotiators can turn an initial adverse decision into a resolution. ..... *Page 99*

Practice Notes. In disputes over stale claims, cases that were meant to be arbitrated can wind up in court. But well-drafted time limits in arbitration agreements can avoid that problem. **William J. Nissen**, of Sidley & Austin, analyzes the lessons of a recent case and offers some tips for drafting business agreements. ..... *Page 94*

Private Judging. Even when a dispute has reached litigation and there is no predispute ADR clause, advocates should consider private judging, writes **Joseph J. Dehner**, a lawyer with Frost & Jacobs. He describes two recent cases in which private judging achieved quicker, more economical results than the parties could have expected with other dispute resolution methods. ..... *Page 97*

Departments

Briefs ..... *Page 101* Drawing by Baloo ..... *Page 101*

Mediating In the Dance For Dollars

By J. Michael Keating, Jr.

Virtually every conflict involves a struggle over resources. Litigation, which characteristically transmutes wrongs into dollars, is full of "distributive" disputes that require parties to divide a sum of money representing the spread between a demand and an offer.

Unlike "integrative" disputes—those with lots of issues and opportunities for tradeoffs (based typically on the parties' continuing relationship)—distributive disputes involve an unadorned "dance for dollars." That makes distributive disputes among the most difficult to mediate.

What does a mediator do when the dispute consists largely (if not solely) of a monetary demand and offer, with no future relationship at stake, as in personal injury and some contractual disputes? Once parties identify reasonable parameters or anchors in a distributive negotiation, they will reach settlement (if they settle) very close to the mid-point. The operative term here is "reasonable." A mediator must engage the parties in a serious search for reasonable parameters, and help the disputants move to a mutually acceptable mid-point.

In the dance for dollars, a party will occasionally begin with an even lower

(continued on page 103)

J. Michael Keating, Jr. is Of Counsel to the law firm of Christopher H. Little & Associates in Providence, R.I.

Routing Slip • See Back Page

Vol. 14, No. 8 September 1996 CPR Institute for Dispute Resolution Alternatives 103

How to Keep Parties Talking When Money is the Issue

(continued from front page)

offer or higher demand than was on the table before the mediation began. Even when parties are fully conscious of the need to reach some sort of accommodation, they are reluctant to begin bargaining: they worry about sending the wrong signal or being exploited by the other party.

The mediator can provide both guidance and safety in these situations, principally through the use of the caucus. (See *Alternatives*, July/August 1996 at p. 83.) In an initial round of caucuses, a mediator will want to explore with parties the general nature of their demand or offer; gauge the flexibility of each party, and understand each party's level of sophistication about the negotiation. It is not even necessary to emerge from this first round of caucuses with a new offer or demand. You want to begin building empathy and trust with the parties, communicate your understanding of their positions and show you're dedicated to a fair bargaining process that will protect them from exploitation.

Reasonable Anchors

The mediator needs to be endlessly patient in distributive bargaining. Resist the temptation to push immediately for settlement. Reasonable anchors rarely surface immediately. Especially useful in the quest for those anchors is your insistence that parties provide detailed justifications for their demands or offers, and for their rejections of the other side's offers or demands. This helps you understand better the strengths and weaknesses of their positions, and arms you for the difficult push to reality that may follow.

Sometimes parties who are reluctant to begin bargaining need assurance that the give-and-take will be reciprocal. Part of the mediator's task is to protect the bargaining process by making sure that concessions are responded to in a meaningful way. That can curb, or at least reduce, the fear of exploitation that often inhibits productive bargaining.

Initial concessions in distributive negotiation are usually the largest and tend to come most quickly. As the process continues, concessions shrink and take longer to elicit. Surprisingly, many negotiators seem oblivious to this pattern: They begin with piddling or insulting openings, discouraging the other party from serious bargaining, and prolonging the negotiation process. The mediator needs to help the parties think through the likely impact of their initial concessions.

Lengthy Bargaining

Another thing sophisticated parties and counsel must understand is that an offer of $40,000 to $60,000 is perceived as a commitment to $60,000; a demand for $40,000 to $60,000 is interpreted as a demand for $40,000. Many people aren't prepared for lengthy bargaining: they prefer to think that their first concession will bring the process to a quick end, as the other party gratefully and immediately embraces the new offer. The mediator needs to educate participants about the pace of bargaining, and orchestrate its progress.

Even in distributive disputes, the mediator must look for ways to introduce integrative elements. The timing of payments, creation of a structured settlement, payment in kind or services, rebates or discounts, are all ways of maneuvering a seemingly inflexible distributive dispute. The idea is to enhance the payoff to the payee, while reducing the cost to the payor. If the gap between the parties' positions is close, such a gambit may help close it.

One characteristic of a fierce distributive confrontation is the tendency of parties to demonize each other's motivations and behavior. A mediator has to focus the parties on bargaining and, without assuming the role of advocate for the missing party, take the venom out of the dialogue.

Too often, parties and counsel allow infatuation with their perceived legal alternatives to preclude meaningful bargaining. In such cases, I urge the parties to put their expectations on hold, and ask them to work together in crafting the best possible deal. Only when parties have that proposed settlement, should they weigh it against the option of litigating.

Many distributive negotiations involve a lump sum divisible into a variety of components. A personal injury case, for example, may include medical expenses, lost wages, pain and suffering, interest, and attorney's fees. Typically, each element is analyzed and subjected separately to the push and pull of bargaining. But parties may place widely different values on each component of the recovery; once such differences become evident, the smart mediator moves back to bargaining over the lump sum. That leaves the parties free to rationalize distribution of the sum in any manner they choose.

Joint Session

While much of this bargaining process may best be executed in the caucus, if the parties remain significantly apart the mediator ought to bring them back together in a joint session. The mediator then needs to help them rehearse their differences as calmly as possible, without interpersonal unpleasantness, so both sides understand the nature of (and reasons for) the remaining gap. This may be the most critical point in developing a mutually acceptable bargain.

The mediator's goal is to get the parties to bridge the remaining gap, and that requires positive, forceful intervention. It is time for the mediator to put a range of numbers, somewhere near the mid-point of the difference between the parties, on the table. It is not the correctness of the range that counts. The aim here is simply to keep the parties' dialogue—their "dance for dollars"—alive.

Ideally, the mediator should present the numbers not as an evaluation of what the case is worth, but as sums at which the parties might be able to settle. They may react with outrage at the suggested figures, and the case may not settle anywhere near the suggested range. But meanwhile we want the dialogue to continue. Distributive disputes

(continued on back page)

Routing Slip:

Please circulate this copy of *Alternatives* to colleagues who should be aware of developments in alternative dispute resolution:

Keep Talking

(continued from previous page)

will eventually settle if the gap between the last demand and offer is sufficiently narrow at the conclusion of the session for parties to keep negotiating.

Patience and optimism are always virtues in a mediator, but that's especially true in a distributive dispute. "No gap too wide" is the motto, even when parties seem impossibly inflexible. A mediator never knows what the parties will accept in the end. Therefore, a party's description of a demand or offer as the "absolute bottom line" is meaningless. I have watched many parties plummet through "bottom lines." The tactic, in the face of a solemn declaration of a party's bottom line, is simply to ignore it and move on.

Even with parties locked in a bitter confrontation over money, a mediator can do a lot to help. Mediation is just as relevant in distributive as in integrative situations. In both, the mediator's role is to navigate parties through what looks like a stormy and unmanageable negotiation.

CPR Institute for Dispute Resolution
366 Madison Avenue
New York, N.Y. 10017-3122

BULK RATE
U.S. Postage
PAID
New York, N.Y.
Permit No. 3748

Alternatives

TO THE HIGH COST OF LITIGATION

INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION VOL. 24 NO. 4 APRIL 2006

DIGEST

ADR ADVOCACY

Eleanor Barr, of Los Angeles, describes a path for analyzing decision-making in evaluating settlement offers. She provides a method of charting out the risks and the dollar amounts for developing the best settlement choice.....Page 65

CPR NEWS

CPR President Thomas J. Stipanowich will depart to become academic director at Pepperdine University School of Law's Straus Institute. Full details on the move are provided, along with information on CPR's Annual ADR Award winners; a new commission on facilities for mass claims' resolution, and more.....Page 66

ADR SKILLS

There often are deep-seated reasons for mediation impasse. **Russell Korobkin**, of Los Angeles, discusses psychological biases that can impede mediation success. In the face of two parts, he covers negotiators' "unoptimistic overconfidence," and attribution biases. He also provides interventions to deal with the problems....Page 67

ARBITRATION

Scott M. Pearson, of Los Angeles, analyzes the February U.S. Supreme Court decision of *Buckeye Checking Inc. v. Cardegna*, following up the preview article he co-wrote last year.....Page 71

DEPARTMENTS

CPR News.....Page 66
Appoint Info.....Page 66
ADR Briefs.....Page 74
Opinion by Chase.....Page 75
Index Info.....Page 78
Letter to the Editor.....Page 79

CPR
International Institute for Conflict Prevention & Resolution

Making Sound Decisions: How to Help Your Client Evaluate Settlement Options

BY ELEANOR BARR

Imagine these two scenarios.

Scenario 1. A plaintiff's lawyer represents a client who has filed a sexual harassment suit against her employer. At mediation, the lawyer makes an initial demand of $500,000. This number reflects the lawyer's assessment of his client's best-case scenario. In private, the lawyer discusses with his client the risks and uncertainties of litigation, and the possible outcomes if the case goes to trial. He tells his client that she has a "good" chance at winning on liability and a "pretty good" chance at collecting a "six-figure" damage award.

Scenario 2. A defense lawyer represents a corporate client who is the target of a suit filed by another company for breach of contract. At mediation, the plaintiff's initial demand is $750,000. The defense lawyer tells her client that she believes the client will "probably lose" on liability, but that she doesn't think that plaintiff could collect "anything near" $750,000.

Have these lawyers clearly explained to their clients the potential upsides and downsides of their cases? No, they haven't.

Sure, lawyers use words to describe potential litigation outcomes. But since words alone can be interpreted in a wide variety of ways, they often can lead to real misunderstanding. For example, when three people were asked to explain in a percentage what a "pretty good chance" of winning means, they gave three different responses: 40%, 60%, and 75%.

In order to make sound, appropriate decisions about whether to settle or go to trial, clients need clear information that is not susceptible to that kind of potential misunderstanding.

This is where decision analysis can be very useful.

Decision analysis, also known as litigation risk analysis, can help clients evaluate multiple uncertainties in a suit, thereby helping them make better decisions about whether or not to settle a case.

Decision analysis boils down to the following three steps:

1. Determine the possible outcomes of the suit and the likelihood of their occurrence;
2. Determine the net cost or net gain with respect to each outcome; and
3. Determine whether nonmonetary factors are influencing your client's decision.

A decision tree is a simple visual way to depict this process. Building a sample decision tree will demonstrate, step by step, how this process works. For those who have math phobia—fear not! A decision tree only requires basic arithmetic and can be easily performed with some paper and a calculator.

Assume you are representing a client who is facing a suit for breach of contract.

Step 1: Determine the possible outcomes and the likelihood of their occurrence.

You begin the process by asking two pivotal questions: First, what are the chances of winning and the chances of losing on liabil-

(continued on page 73)

The author is an attorney-mediator in Los Angeles. She mediates business, employment, real estate, environmental and personal injury law. Her Web site is www.eleanorbarr.com. She is a fellow in the International Academy of Mediators.

Sound Decision Analysis

(continued from front page)

ity? And second, if your client loses, what damage amount would be awarded and what is the likelihood of this occurring?

In this case, you estimate that there is a 70% chance that a trier of fact will determine the contract was breached, and a 30% chance that a trier of fact will determine no breach occurred. You note the probabilities on the tree's branches, as depicted in Figure A below.

You then continue the tree from the breach branch to identify the next uncertain event: damages. Your evaluation considers the merits of the plaintiff's claim for actual as well as consequential damages.

You may decide that if damages are awarded, there are a variety of possible outcomes. If so, it is useful to organize them into ranges. For example, an evaluation of the damage range might be $200,000 (low), $450,000 (medium) to $600,000 (high).

These three potential outcomes can be drawn on the damages branch. See Figure B below.

Finally, assign probabilities to these three outcomes, based on the strength of the plaintiff's damage claims, and put them on the tree, as depicted in Figure B. In this case, you believe that the plaintiff's claim for actual damages is strong but the claim for consequential damages is weak. For example, the probabilities can be depicted as a 70% chance for $200,000, a 20% chance for $450,000 and a 10% chance for $600,000.

The tree is complete. Remember, decision analysis is only as good as the estimates used, so it's important to make the most realistic estimates possible.

The next step is to evaluate the outcomes.

Step 2: Determine the Net Costs Or Net Gains to Your Client.

To evaluate the outcomes, multiply the possible outcomes of each event by their probability of occurring. For example, the value of the high range if a breach occurs would be 70% x 10% x 600,000 = $42,000.

Then add the products of each potential outcome. See Table I above.

The $203,000 figure is sometimes called the expected value, or from the litigator's perspective, the average amount that a trier of fact would award.

Next, estimate the litigation costs, including attorneys' fees. Assume you estimate these costs to be $70,000. This amount should be added so that the client has a complete picture of the net result. See Table II above.

The $273,000 amount can be characterized as the total average costs for the defendant to take the case through trial. Clearly, decision analysis does not guarantee what will happen at trial. But it provides a single number that your client can use to compare the potential costs of trial with his or her current settlement position.

If you do not want to reduce the possible outcomes of trial to a single number, then don't take this final step. You would simply diagram the tree, as outlined in this article and depicted below, with the range of possible outcomes on liability and damages. This, by itself, can help your client evaluate settlement options by comparing them with the potential consequences of trial.

Table I

Low Range		Medium Range		High Range		Average Damage Awa Award
(.70 x .70 x 200,000)	+	(.70 x .20 x 450,000)	+	(.70 x .10 x 600,000)		
$98,000	+	63,000	+	42,000	=	$203,000

Table II

Average Damage Award		Estimated Attorneys Fees and Costs		Total Average Costs
$203,000	+	$70,000	=	$273,000

Step 3: Determine Whether Non-Monetar Factors Are Influencing Your Client's Decision

Decision analysis can be used to evalua the non-monetary factors such as tim emotions and attitude toward risk. Whe helping clients evaluate settlement option it's important to explore these intangibl factors, because they may affect the client' settlement range.

These intangible factors can be quanti fied, and added to the decision tree using the analysis described above. But it's ofter just as useful for your client simply to identify these intangible factors and then determine whether or not they should play a role in increasing or decreasing his or her settlement position.

Taken together, the three steps of decision analysis help quantify the key factors, both monetary and nonmonetary, that govern good decision-making. It brings welcome clarity to a process that is inherently uncertain, and is therefore an invaluable tool for you and your client.

DOI 10.1002/alt.20119

(For bulk reprints of this article, please call (201) 748-8789.)

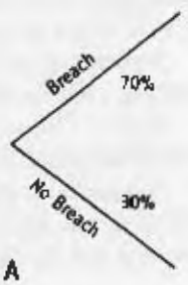


Figure A

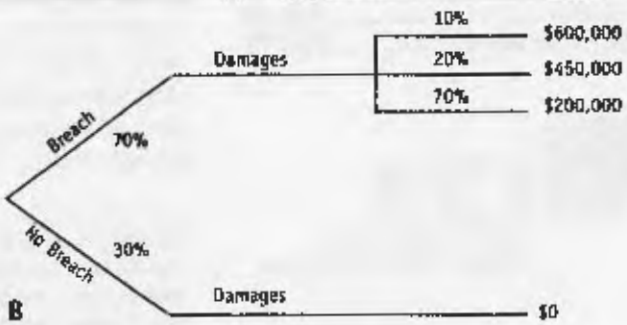


Figure B

Evaluative Mediation Techniques Help Achieve Success

by Jeff Kichaven

Jeff Kichaven writes on mediation for the International Risk Management Institute. First published on IMRI.com.

A March 2008 report of the American Bar Association's Task Force on Improving the Quality of Mediation confirms what is obvious to all who participate in commercial mediation: There is "overwhelming support" for the conclusion that lawyers want mediators to provide "analytical input," or, as we more commonly call it, "evaluative mediation." The marketplace has spoken.

The Task Force's conclusion allows litigators and mediators to enter into a new discussion about how all parties can work together to serve clients better. We no longer have to beat the dead horse of the debate between "evaluative" and "facilitative" mediation. In commercial cases, both evaluative and facilitative techniques are necessary for mediations to succeed. The new discussion can probe different aspects of "evaluative mediation" more deeply, understand them more thoroughly, and use them more intelligently.

Evaluative Mediation Questions

"Evaluative mediation" is not one-size-fits-all. There are many ways a mediator can analyze and evaluate a case. The litigator's responsibility includes distinguishing between those ways and using the resource of the mediator in the ways that best serve her client's interest. Here are some practical questions for litigators to consider— and discuss in advance with their mediators —so that mediators' analytic and evaluative techniques can work as well as possible in any given case.

Is the Mediator's Evaluation Welcome?

While the answer is generally "Yes," sometimes it will be "No." In some cases, the mediator's evaluations will be needed only by the other side and not by you (though there is generally some benefit to the mediator sharing some analysis or input with each party). If you don't want the mediator's analysis or evaluation, please tell the mediator in advance. But be warned, it's hard for mediators to refrain from evaluation entirely. Through tone of voice, facial expressions, word choice, and otherwise, you will get some impression of what the mediator thinks of your case.

When Is the Mediator's Evaluation Welcome?

Timing is everything. A common mistake among newer mediators is to lay on too much evaluation too early. Remember, most experienced mediators would list "evaluation" among "techniques for breaking impasse." It generally takes some time at a mediation for an impasse to reach the point where "evaluative techniques" become appropriate. Distinguishing that point can be difficult, and you know your clients' temperaments best. So, litigators, if the time for evaluation seems ripe to you, please say so if the mediator doesn't raise it first.

What Form Should the Evaluation Take?

A mediator's evaluations can take as many forms as there are stars in the heavens. The Task Force's report lists some of the most common:

- Ask pointed questions that raise issues or imply answers.
- Give an analysis of the case, including strengths and weaknesses.
- Make predictions about likely court results.
- Suggest possible resolutions or specific settlements.
- Apply some pressure.

Most experienced mediators are adept at all of these techniques, and more. Are some likely to be particularly effective with your client? How much pressure do you want the mediator to exert? Again, litigators know their clients best. If they share their insights with the mediator in advance, the mediator is more likely to perform in a way that helps all involved.

Should the Mediator's Analysis Be a Negative Evaluation? The conventional wisdom about "evaluative mediation" has long been that litigators want mediators to tell the other side that they have a weak case. Sometimes, that is indeed the request, but, at least as often, litigators want mediators to help break bad news to their own clients. If that is the assistance needed, it helps to tell the mediator in advance, to share what hasn't worked so far, and also to share, in the litigator's best judgment, what is likely to work at the mediation.

Should the Mediator's Analysis Be a Positive Evaluation? Another piece of conventional wisdom about "evaluative mediation" is that mediators just tell everyone involved that they have a weak case. This is not how experienced mediators practice. And, it's a bad reputation for a mediator to have. If a mediator reflexively demeans people's cases, the mediator will do her thing, leave the room, and then have a lawyer turn to his client and say, "She tells that to everybody. Don't believe her." Rather, it can be refreshingly liberating to hear a mediator say, "You know, there are no guarantees in life, but you have a pretty good case. I think you're likely to win. Now, are there some reasons you might want to consider settlement anyway?"

What If the Mediator's Analysis Differs from the Litigator's?

At times, a mediator will analyze and evaluate a case differently than the litigators involved. The mediator might have a blind spot—or the participants might. In any event, both benefit if the mediator knows in advance how the litigators would like the mediator to handle this possibility. There are many ways for a mediator to bring these differences to the attention of the litigators, and they probably have enough self-awareness to know the ways that will work best. If the mediator knows the preferences in advance, the process of evaluation at the mediation will go much more smoothly.

Evaluative Mediation during the Bargaining Phase This checklist deals with a mediator's evaluations of the strengths and weaknesses of legal claims and defenses—the most common evaluations that mediators provide. There may be many other things that mediators are asked to evaluate as well, and one deserves special mention.

During the bargaining phase of a mediation, a mediator can help litigators evaluate how other parties are likely to respond to an offer or demand. The principal purpose of contemplated offers or demands (defendants make offers, plaintiffs make demands) is to generate a next demand or offer in response. Yet, some of the worst deer-in-the-headlights looks during mediations come when a mediator is asked to convey a proposed offer or demand, and then asks that counsel, "How do you think the other side will respond?"

In at least three ways, a mediator can help litigators evaluate whether a contemplated move is likely to generate the desired response. First, the mediator can share her own opinion. Second, the mediator can caucus with the other parties, ask how they would likely respond to a contemplated offer or demand, and report back, with the permission of those other parties. Third, the mediator can facilitate a meeting between opposing counsel, generally without clients, so that litigators can obtain and assess the information for themselves. All of these techniques can help prevent a contemplated move from provoking the other parties to leave the mediation, or otherwise backfiring.

Proper Preparation Is Key

None of these evaluations, though, can happen without proper preparation. Three steps are critical.

First, there needs to be communication between litigators and mediators regarding the expected evaluations. Ideally, counsel and the mediator will be able to discuss these issues on the telephone before the mediation. Mediators serve counsel better when they know in advance exactly what is expected and have the benefit of the parties' thoughts as to what is likely to work! If the conversation can't take place before the mediation, there will likely be opportunities for counsel and the mediator to huddle privately during the mediation day to make sure that the process is on track.

Second, to enable private meetings between counsel and the mediator to take place, your clients need to understand that there may chunks of the mediation in which they will not take part. In a healthy lawyer-client relationship, clients trusts their lawyers enough to

overcome any misgivings about being excluded from part of the process. Sometimes, the explanation is that, to get the other lawyer away from her "difficult" client for more productive conversations with the mediator, symmetry requires that your client be excluded for a short time as well. The keys are that the client not be taken by surprise, and understands that these conversations are a normal part of the process.

Finally, evaluation generally begins best with each litigator's opening statement in a joint session. When counsel puts its best foot forward, the mediator can then take what the litigators have said into caucus with the other side and drive these points home without appearing to argue. For example, a mediator may say in caucus, "The other lawyer just made some interesting points in support of her position, and we need to talk about them. What do you think of Argument X?" Conversation, rather than argument, is likely to follow, and these points will likely be taken seriously.

By contrast, if there have been no opening statements, the mediator has a harder time putting those words into the mouths of the litigators. She is more likely to express evaluations as her own opinions: "I think the other side makes some interesting points in support of its position, and we need to talk about them. What do you think of Argument X?" This frames what comes next as a debate of the mediator's opinions rather than a discussion of the points of the case. Progress requires concessions to the mediator, and nobody likes to concede anything in a debate.

Conclusion

Litigators benefit when they make it easier for mediators to do their job. Advance consideration of the issues related to "evaluative mediation" and preparation to meet those issues will result in better performance by mediators, more settlements, and greater client satisfaction.

Jeff Kichaven biography and additional articles: http://www.mediate.com/people/personprofile.cfm?auid=518

Insurance & Mediation; Risk Analysis; Decision Trees

The Language of Numbers:
Mediating and Negotiating the settlement of insured claims

By

J. Anderson Little, President
Mediation, Inc.

This paper has been prepared for inclusion in materials for the ABA's Dispute Resolution Section's 2009 Annual Meeting and serves as a supplement to my workshop presentation on the recurring problems (and solutions) in the mediation of insured claims. In it I outline the main ideas underlying the techniques I developed for handing those problems, which I fully explored in my book Making Money Talk which was published by the ABA in 2007.

Making a Place for Traditional Bargaining in Our Models of the Mediation Process.

Traditional (or, position based) bargaining has a bad name in mediation circles. Most of the literature of mediation is devoted to the problem-solving model, moving people away from position-based bargaining. Why is that? Position-based bargaining quickly leads to impasse. Parties compare opening positions and say, "No way this can settle" and quit the negotiation.

In addition, achieving settlement in position-based bargaining is characterized by a series of concessions. How's that for motivation to settle? To achieve settlement, I have to keep giving up something. A process of concessions, giving up more and more, feels very much like a lose-lose proposition. It's difficult psychologically for a negotiator to make a seemingly endless stream of concessions. So, traditional bargaining is difficult to get going and keep going.

The flip side of this discussion is that most of the negotiations we conduct in the real world have a traditional bargaining flavor to them, particularly when they involve money. Whether we're buying a car, selling the house, or shopping for supplies, we constantly engage in traditional, position-based, money-oriented bargaining.

This is especially true in personal injury claims, wrongful death cases, or workers' compensation claims. Occasionally, we can problem solve our way to a new and creative solution in those cases. But most of the time, a personal injury negotiation is about one thing, money. Someone wants as much of it as they can get; and someone else wants to keep as much of it as possible. Negotiations in those cases usually start with money and end with money.

So, is there any way we as mediators and negotiators can do traditional bargaining in personal injury cases better? The good news is that we can. First, from Fisher and Ury's well-known book on negotiation, Getting To Yes, we get the idea of legitimacy. Simply put, **legitimacy** is the notion that you need to document your claim.

We need to provide the other side with independent verification of our point of view whether it's about permanency, causation, medical expenses, wages, or any other issue in the case. And we need to provide it well in advance of the settlement conference, so that the other side can review it as necessary to satisfy themselves of its accuracy. If we want someone else's money, we need to supply them with the information to justify their decision.

Attorneys should carefully review their case before a settlement conference to see if any issue needs further documentation. If so, then documentation should be provided forthwith, so that the settlement conference will be a productive one. The most frequent complaint I hear from the defense side of the table is that they have not been provided documentation of some aspect of the claim. It's not enough to bring that information to the conference. It should be provided for review by the defense well in advance of the settlement conference.

Another important contribution Fisher and Ury have made is the concept of **B.A.T.N.A., the Best Alternative to A Negotiated Agreement**. Fisher and Ury suggest that a negotiator should know his/her best alternatives to achieving settlement. Answer the question, "What will I do, what will I get, if I don't settle this case?" In the litigation context B.A.T.N.A. analysis means what I will get at trial and what it will cost me to get it. This is just plain, old-fashion risk analysis.

Why do we do risk analysis? So we can have a framework for deciding where to start our money negotiations and for deciding when we've moved far enough. In other words, to know at what point we are better off taking our chances with the judge or jury instead of taking what has been offered in negotiation. Risk analysis is fundamental.

Do attorneys always conduct a risk analysis before settlement conferences? Do we conduct our risk analysis with our clients before coming to the settlement conference? Even if we've conducted risk analysis with our clients, have they absorbed it? The fact that the answer to these questions is often "No" explains why mediators typically spend a lot of time in private sessions with the plaintiff in the early stages of a mediated settlement conference. We're going over B.A.T.N.A. stuff; we're helping you and your client do risk analysis.

Litigation risk analysis is a service mark registered by Mark Victor, a west coast attorney who has taught a course by that name throughout the country since the late '70s. Mark applies a weighted probability analysis to cases in litigation. That's a technique taught in business schools, sometimes known as a decision-tree analysis. I highly recommend Mark's course for all litigators and mediators.

Mark uses this approach not only to assist lawyers and their clients in settling litigation but also to direct limited discovery resources to the issues in the case which can cause the most dramatic shift in value.

So, expect to spend time in mediated settlement conferences talking about the case, the factual disputes, legal disputes, any decision the judge or jury will have to make and , most importantly, the damages, in order to identify your risk factors and articulate their probability of occurrence.

One additional word about damages. In my experience, plaintiffs spend more time and energy on the liability portion of a personal injury case than do defendants. Defendants are always asking me in private sessions, "What does the plaintiff think he/she will get if he wins?" This is where the concepts of legitimacy and risk analysis come together.

We suggest that you find ways to collect and document settlements and jury verdicts in the types of cases you intend to handle. How many of you keep notebooks on settlements and verdicts that your office has handled, records that can be shown to clients and claims representatives alike? How many of you talk with the clerks, bailiffs, and lawyers after a term of court to determine what happened to the injury cases tried that week and what the verdicts were? How many of you meet regularly with a group of trial lawyers to discuss recent settlements and verdicts? These are techniques, and there are many more, which can enhance your own case evaluation, as well as provide a source of legitimacy which might not exist otherwise.

Are these concepts helpful in a money negotiation? Absolutely. Risk analysis grounds the parties in the realities of their case and produces a more realistic negotiation.

The Nature of Money Negotiations

Mediators have these models in mind as we work to facilitate negotiations. About four years ago, however, I began to doubt that these models adequately describe what goes on in money negotiations and began to wonder what a mediator or negotiator can do when movement from one position to another stalls.

In particular, I began to notice two phenomena that occur repeatedly in injury cases. The first is that money negotiations are characterized by multiple rounds of bargaining which continue long after discussion about case evaluation or risk analysis has run out. At some point in a personal injury negotiation, the conversation is less about the merits of the case and more about swapping money positions. This is the phase of money negotiations that I jokingly called "the used car sale".

I first noticed this characteristic in a personal injury case during the early years of the mediated settlement conference pilot program in Fayetteville. Two excellent attorneys, who routinely met with me after the second or third round of offers, declined my invitation to talk attorney to attorney. At the end of 12 complete rounds of offers and counter offers, the case finally settled. As I recall, we quit talking about the merits of the

case at round 3. By the way, the plaintiff started her negotiations at $10,000 and the defendant started at $2,500. Twelve rounds later, they settled at $4,700.

More recently, I mediated an injury claim in which the plaintiff started at $125,000 and the defendant started at $90,000. Nineteen full rounds later the case settled at $115,000. Little mention was made of the merits of the case after the second set of offers. These cases are extreme examples of what happens to some extent in almost every personal injury case I mediate. I began asking myself, "What's going on here?"

The second phenomenon also dawned on me gradually. After starting a settlement conference with a civil discussion in a general session, parties to money negotiations often become surprisingly emotional during private sessions. People become angry and frustrated with the other side as if they had been cursed or shouted at and even though no one has spoken an ill word of them.

It's intriguing to me. An offer is passed from one side to the other. And yet, the intensity of feeling displayed by one side upon the arrival of the proposal from the other is often strong, even hostile. People get mad at each other not because of some personally degrading remark but as a result of receiving proposals that are deemed to be unacceptable.

Mediators hear all kinds of phrases signaling discontent or anger. I've catalogued these under the heading of "settlement conference cliches", because I hear them over and over. "I'm not even going to dignified that offer with a response" is one of my favorites. What does that mean, and what is going on to stir such strong emotions? What insight can we provide to move the parties along?

Unfortunately, I have found nothing in the literature of mediation and negotiation that speaks directly to this problem. I've discovered that in an effort to promote the value of the problem-solving model, theorists have neglected to study the negotiation of money claims. Yet, this is the arena in which we operate every day of our professional lives.

Over the past several years, I've given these phenomena considerable thought and have come to some conclusions, loosely collected under the theme, "the language of numbers".

Money Negotiations as a Form of Communication

When people get mad at each other, threaten to pack up and go home, send low-ball or high-ball numbers in retaliation for unacceptable money proposals from the other side, it is safe to assume that those people are communicating something with their proposal that goes beyond the proposal itself. In other words, we send "a message" with our proposal. How else can we explain the sometimes strong, negative reaction we hear when an unacceptable proposal is received?

Some time ago, I began to think of money negotiations as a form of communication. We send messages with our proposals and our opponents react to those messages. If that is true, what is the subject matter of our communication?

My conclusion is this: the parties to a money negotiation are trying to communicate about the range in which settlement is appropriate for them. They are trying to tell the other side where the case can settle. But if that's true, then why don't we just go to our best number from the outset. Why do we dance around, first saying we can settle here; then, there? Why can't we communicate directly about our number, or our range?

The answer is simple. We can't (or rather, don't) because we fear the other side will take advantage of us. If we tell them our best number, two things will happen. The first is that the other side will begin to put downward pressure on us to go below that number. The second is that we will not be able to get more money from the negotiation than the lowest figure at which we're willing to settle.

So, not only is the other side trying to take advantage of us, we're trying to take advantage of the other side. Perhaps that's a little strong. We want the most money we can get out of the negotiation. To communicate our rock-bottom price at an early stage of negotiation means that we forego the opportunity of settling at a higher level.

And so, we don't dare communicate directly about our final numbers. Rather, we communicate about settlement indirectly, with a series of moves or positions. In the process, the parties begin to learn where settlement can occur, without absolutely revealing their walk-away number.

The central problem in money negotiations is that we can't communicate directly; we have to communicate indirectly by making movement from one position to another. I appreciate the need to do that as a trial lawyer. But I also know that indirect communications frequently lead to miscommunication and misunderstanding. When we communicate indirectly, our intended messages are often garbled, misunderstood or misinterpreted.

A concrete example comes to mind. Plaintiff starts at $100,000. We learn later that the plaintiff's bottom line is $35,000. Defendant believes this is a $15,000 to $30,000 case and that the plaintiff is outrageous in her demand. The defendant wants to quit negotiations, believing that the case will not settle. The mediator talks him back to the table, but the defendant low-balls with $5,000. The defendant sends the mediator back to the plaintiff with that number and tells the mediator, "We want them to get the message that they need to get real."

Plaintiff now hears defendant's low-ball and goes ballistic. "That's not negotiating in good faith", he says. "OK, he went $5,000, I'll drop $5,000. My next number is $95,000.

This is a fairly typical personal injury settlement conference scenario. The Plaintiff started too high; the defendant responded in kind; the plaintiff followed by responding in

kind; etc.; etc. I ask you, "What have the parties communicated to each other about where this case can settle?"

On the negative side, they have communicated nothing about where the proper range of settlement is. In fact, they have miscommunicated about that aspect of the negotiation. The defense now thinks the plaintiff's range is much higher then it actually is, and the plaintiff thinks the defendant's range is much lower. They will soon become pessimistic about the prospects of settlement.

On the positive side, the parties have told each other that their positions are way out of the ball park of settlement. But the import of that part of the message is lost, because negative reactions to the proposals are beginning to cloud the judgment of the participants.

What is missing from this scenario? What's missing is a clear and convincing game plan for negotiation by either party. Both sides have lost sight of the goal of negotiations, which is to find the range in which the case can settle. If each side had made proposals consistent with their theory of the case instead of reacting to the other side's proposals, movement toward settlement would have occurred.

Now, this brings me to another conclusion I've reached in the past several years about money negotiations. **Movement toward the other side breeds movement.** The closer we come to the other side, the more incentive there is for the other side to move. Movement creates the perception that settlement is possible and that perception creates a further impetus to move.

Conversely, the perception that the parties are far apart breeds impasse, or minimal movement. Parties tend not to move, or tend to move in minimal amounts, if they believe a case won't settle. So, **lack of movement or minimal movement actually slows the progress of achieving settlement.**

When I mediate a claim for money, I try to achieve movement from both parties. I have learned that if the parties can keep movement occurring and not stop it by over reacting to the other side, they will see a reason to keep working and keep moving within a range that they have determined is acceptable.

I encourage parties to pay attention to the movement that's occurring within the negotiation. Most importantly, I encourage the party I'm working with at the moment to think carefully about their next proposal and how it presents an opportunity to encourage the other side to put more money on the table.

I ask, "Is the movement you're about to make consistent with your game plan? Or is it only a reaction to the other side's movement? Is it communicating where the case can settle, or is it communicating a settlement range much higher than intended?"

Let me be careful to interject a qualification at this point. I am not saying that I'm trying to encourage people to move when their case evaluation says they should not. No, as a mediator I will respect your case evaluation. In other words, I will respect the range within which you say you can settle the case and the point at which you can go no further. What I am saying is that I try to encourage movement between the parties when it has stopped short of their best numbers because of some reason other than case evaluation.

Let me explain this in greater detail. Recently I pulled from my files about 50 of the sheets on which I record money positions advanced by both sides to the settlement conference. Almost without exception, the place where the plaintiff was willing to settle was at least three times less than their initial offer. Also, almost without exception, the plaintiff either: was ready to quit the negotiations as futile, offered a smaller figure than usual in retaliation for a small movement by the other side, or contemplated not moving at all until the other side "got serious".

Since these case settled, it's clear to me now that the plaintiff could have moved lower (that is, hadn't exceeded the lower limits of his risk analysis) but didn't do so because of some negative reaction to the other party's proposal.

I've observed another phenomenon about movement in money negotiations that occurs as the parties begin to get close to their best number: we tend not to move to our bottom or top lines if we don't think the case will settle. However, what may seem instinctive to us is, in this instance, counter-productive. In my experience, **most cases will settle if the parties eventually state what their best numbers are**. Again, it's the proximity idea. If the parties know that the true gap separating them is small, more often than not they will find a way to bridge it. So, once the parties have concluded that they have to reach their best numbers to settle the case, I encourage them to continue movement toward their best numbers.

Why do we resist going to our bottom line when it appears that a gap between the parties' positions will still exist? I have asked this question over and over but have never received a reply that's persuasive. What I hear the most is, "I won't have any more room to move." Usually that means the speaker fears someone will put downward pressure on him as the case approaches trial.

This is a common fear. And it's realistic in that the other side is always putting downward pressure on us. But when negotiators realize and exercise the control they have in a negotiation, they know no one can force them to settle in a range that is not consistent with the value of the case.

Additionally, since the implementation of mediated settlement conferences throughout the State, trial judges are now more likely to put a case before the jury than they are to engage in the arm-twisting settlement efforts they were accused of conducting many years ago.

The second observation about money negotiations is this: **parties to a money negotiation will get angry with each other while swapping proposals.** They will refuse to make another move, start packing their bags, or sling low-ball or high-ball proposals at each other. This kind of behavior occurs even though the parties have not reached their bottom lines or their best numbers.

What is happening here to stop movement when a party's bottom line has not been reached? Why do we become emotional when the other side has said nothing insulting to us, when they aren't even in the same room with us? Why do we take settlement proposals personally? People tell me all the time that they are "insulted" by an offer. How does a money offer made by one party become insulting to the other party?

There are at least two explanations. The first stems from our tendency as human beings to become angry when someone disagrees with what we say or do. Disagreement with our views equates to criticism of us as people. That is why one of Fisher and Ury's maxims in Getting To Yes is, "Be hard on the problem; be easy on the people."

This happens most powerfully in wrongful death cases. Often the plaintiff explodes in anger when the defendant's offer is perceived as too low or his/her movement as too slow. The plaintiff instinctively translates that offer into a negative statement about the value of the decedent's life. Thus, the offer is taken as an insult.

On the other side of the table, the defense also reacts with strong negative emotion when the plaintiff makes a demand that is "too high" or moves too slowly. (By the way the defense team calls the plaintiff's offer to settle a "demand". Do you hear the personalizing and demonizing going on with the use of that term?) However, my sense is that the defense doesn't feel insulted in the same way that plaintiffs do, although they may use the same words.

Typically, the flavor of this reaction is, "He's just wasting my time." So, the defense is insulted, but for a different reason than the plaintiff. "I've got better things to do than sit around and let some inexperience, uninformed, money-grubbing plaintiff's attorney waste my time." In almost every personal injury case I mediate, strong negative emotions will be generated by the seemingly innocuous act of passing money proposals from room to room.

I've concluded that mediators and negotiators would be well served by viewing money bargaining as a form of communication. The subject of the communication is the ballpark in which the case can settle.

We sometimes compare money negotiations to "a dance." In my experience, the dance begins very slowly in most negotiations about money. In fact it looks more like a junior high prom with girls on one side and boys on the other, than it does a singles' club where

everyone is looking for action. Money negotiations tend to begin slowly, bog down in the middle, and generate more emotion than the subject matter would suggest.

When one side thinks the other is out of the negotiating ballpark, the result on a personal level may be anger or frustration. The result is slow movement or no movement at all. "Let's quit and go home." "This isn't going anywhere." "I'm wasting my time." If we decide to make another proposal, our movement often will be smaller than ordinary. Our intent is to send "them" the message that they are in the wrong ballpark.

When movement stops in a money negotiation, it may be because the parties have different case evaluations. More often than not, however, the parties stop because one party is reacting to his/her perception that the other side is "out of the ballpark".

I have observed that the defense will stay low if they think the plaintiff is too high and that plaintiffs will stay high if they think the defendant is too low. Once again, great distance between the parties will breed stagnation or impasse. Proximity or movement toward each other will breed additional movement.

That is the irony of money negotiations. If you want someone to come to you (that is, put more money on the table), you need to move toward them. Your movement toward them will tend to increase their flexibility within the range they think is appropriate.

Now, that runs counter to our instincts. One of our settlement conference cliches is, " I need to send them a message that they're just too low. So, I'll only move a hundred dollars." Do you hear that? "I want to send them a message." Number proposals are intended to send messages; the intent is to communicate. Once again, the problem in money negotiations is that we communicate indirectly. As a result we miscommunicate and don't get the results we want.

So the proper test for our response to another's proposal is not, "How much do I move in relation to their move?" It's, " How much do I move in relation to my bottom line?" Our goal should be to communicate, "You're too high", by showing the other side where the proper range of settlement is, not where it isn't.

If we move a dollar, from 100 to 99, in retaliation for what we perceive as a low-ball, we have communicated that the case will settle between 90 and 100. Now, if that is our range, fine. We've done it right. But if our range is 60 to 100, we've sent the wrong message with a one-dollar move. We have miscommunicated about the ballpark of settlement. We have done nothing to create the perception that the case can settle and, thus, nothing to encourage the other side to put money on the table.

If we act on our instinct to retaliate, we wind up paying more attention to what the other side is doing than what we're doing. Please understand that I'm not saying we shouldn't pay attention to what the other side is doing. In fact, I encourage everyone to graph the moves each party makes in order to discover patterns which may tell us something about

the other side's intentions. Are they slowing up? Are they continuing to move? Will they meet in the middle?

However, the mistake most negotiators make is that they don't pay enough attention to how their own movement signals or communicates the proper range of settlement. The proper test of your response to another's movement is not, "How much do I move in relation to what they have done?" It is, "How much do I move in relation to my bottom-line?"

Of course, if you haven't determined your bottom-line (or at least, a target number) before negotiations begin, then it's tough to plan effective movement during negotiations. My experience is that, more often than not, plaintiffs spend the first half of the settlement conference doing risk analysis with their clients. Their first number typically does not accurately reflect their ultimate assessment of the proper settlement ballpark.

To the extent that you can do risk assessment or case evaluation before the conference, and plan your positions accordingly, your early proposals will more accurately reflect your range of settlement. And movement is more likely to occur earlier in the conference.

I should acknowledge here that clients do not always absorb and understand your thoughts about the value of their case. For this reason, settlement conferences often are helpful to you in achieving greater communication with your clients, thus improving the attorney-client relationship. This is a legitimate use and goal of mediation.

The second reason we react to the other side's movement with a small movement of our own is a bit more subtle. Their move suggests to us that they will end up in a ballpark that is unacceptable to us when compared to our own risk analysis, case evaluation, and settlement range. We resist being pulled into their range or ballpark by shortening up on our moves. "We're not going there, so we're not going to move as much as we would have if they had made a bigger move." I've heard that a thousand times. It must be human nature.

But like much in human nature, it is counterproductive. By shortening up on our moves, we send a signal about our range. We're telling them that we're getting near the bottom of our range by tightening up. If that's true, okay. But if it's not true, tightening up will produce a reaction from the other side that is something you don't want. They will tighten up too. And they will stop putting more money on the table.

To properly signal your own range, you have to keep moving without regard to what the other side is doing.

After several rounds of proposals, I often hear the following: "If we keep matching each other we'll end up in the middle. That's below our bottom line and I can't go there. So, I'll slow up and signal them that I can't get there." Wrong! We send a signal that we can't go there when we get to the end of our range, not in the middle. By slowing up

before we get near the end of our range, we're sending the wrong message about where the case can settle.

We send the wrong signals because we're concentrating more on what they're doing than on what we're doing. Why do we do that? Because we fear being pulled into settlement territory that's lower than we want to go. When we experience fear, we pull back; we draw up; we tighten up; or we strike out. Those are the behaviors we exhibit when we react instinctively and without reflection.

When, in a money negotiation, we fear being pulled into the unacceptable range of settlement, we instinctively tighten up with our movement. When we tighten up before we get to the end of our negotiating range, in reaction to the other side's movement, we send the wrong signal. We've told them that we're ready to quit, when in reality, we haven't reached the end of our range. And **when we tighten up at the end of our range, we've sent the appropriate signal, "Enough! That's as far as we'll go."**

I find the work of William Glasser in his book, Control Theory, exceedingly helpful on this point. Glasser points out what is in reality an obvious fact: we can only control what is in our power to control. We can only control our own behavior.

We cannot control judges, juries, or the movement our opponents make in negotiations. We can not keep them from evaluating differently than we, or from opening with a low-ball, or from moving slower than we wish. But we can control our own case evaluation, our own negotiating ranges, how much we move at any one time, and, ultimately, to stop when we've reached the end of our range. No one can make us go beyond our range to settle a case.

Feeling pushed by the other party, many negotiators begin to lose a sense of control and react instinctively by tightening up their movement. Not surprisingly, a mediator can play a useful role at this point by helping parties evaluate their reactions, weigh their options and formulate a proposal that will communicate the right message --- the proper range within which this case can settle. In short the mediator can help parties regain a sense of control.

Summary

Mediators are not needed if the parties are negotiating well on their own. When trouble develops, a mediator may help by insuring that clear communications occur and that everyone has been heard, by focusing the parties on meeting their own goals and objectives, by facilitating the flow of information needed for decision-making, by encouraging and facilitating risk analysis and case evaluation, and by helping the parties formulate positions which accurately communicate the appropriate range of settlement and encourage movement from the other side.

In a negotiation about money, the problems experienced by negotiators in creating movement toward settlement can best be understood as communication problems. This is

something that commentators on the mediation process have written about extensively but have never applied to money negotiations.

In closing, let me call your attention to the story about a little boy who asked his father where he came from. After listening patiently to his father's awkward discourse on the birds and the bees, the boy looked up quizzically and said, "Joey told me he came from Brooklyn. Where did I come from, Dad?"

You see, it's all about communication.

NEW YORK STATE BAR ASSOCIATION

NYSBA

Dispute Resolution Section

White Paper Subcommittee

Insurance Disputes

11111

NYSBA

DISPUTE RESOLUTION SECTION

January 2011

"Disputes arise across a broad spectrum of relationships and substantive areas of the law. Alternatives to litigation may best serve client needs for resolving many of these disputes. The NYSBA Dispute Resolution Section hasprepared a series of White Papers to setforth some of the special advantages of mediation and arbitration in the various contexts in which disputes commonly arise."

Edna Sussman, Chair, NYSBA Dispute Resolution Section
David Singer, Chair, White Paper Subcommittee

INSURANCE /REINSURANCE ARBITRATION AND MEDIATION

BY CHARLES PLATIO, PETER A. SCARPATO AND SIMEON H. BAUM *

At the heart of the insurance business is the resolution of claims. Insurers routinely adjust claims and provide for indemnity and defense. Accordingly, some have said that the business of insurers is litigation. In fact, it is more accurate to say that the business of insurers is dispute resolution: including negotiation, mediation, neutral evaluation, and arbitration, as well as litigation.

Where insurers and reinsurers find themselves consistently involved in matters that are heading towards or involved in litigation, it is no surprise that the industry currently makes extensive use of a variety of dispute resolution processes. In this paper, our focus will be on mediation and arbitration, in handling: (1) insurers with an obligation to defend/indemnify the insured, (2) subrogation matters; (3) insurance coverage disputes between insurer and insured, (4) disputes between insurers, and (5) reinsurance disputes.

As with other areas covered by this series of White Papers, the mediation and arbitration processes offer a wide range of benefits to the insurance industry, providing effective and efficient processes for the resolution of disputes. We will consider both benefits and special uses of alternative dispute resolution processes in these various scenarios. In all areas of insurance it pays to apply the questions of "who, what, when, where, and why": who should or

will be attending the dispute resolution process; what process should be selected; the ideal timing of the use of that dispute resolution process; the forum or venue for the procedure – court-annexed or otherwise; and the reasons for selecting one process over another – keeping in mind the players, goals, opportunities and circumstances.

1) Insurance Defense and Indemnity -Third Party Claims

The typical liability policy requires the insurer to defend and indemnify the insured against claims asserted by one or more persons. These are known as "third party claims" because the persons asserting the claim against the insured are not parties to the insurance agreement. By contrast, first party claims are those presented by the insured party to its insurer under policies that cover the insured against risk of harm or loss to its own person or property. In this section, we will focus on the use of alternative dispute resolution processes for third party claims. Third party coverage is offered in a wide range of areas, including, *inter alia:* automobile, homeowners, commercial general liability, professional liability (also known as Error & Omissions), Directors & Officers, employment practices liability, and products liability insurance.

Arbitration is used in a number of arenas for the resolution of third party claims, including automobile no-fault cases, small claims and civil court matters, and for certain Workers Compensation[1] claims. Arbitration, for these and commercial matters, can be an effective means of obtaining a decision from a neutral without going through a trial. Mediation is frequently used across the board for third party claims, both privately and through court-annexed panels. Mediation vests control in the parties, offering an informal, flexible and inexpensive process, with resolutions tailored for and by the parties. Mediation's popularity is reinforced by the benefit derived from a neutral who can keep parties and counsel engaged in constructive dialogue, and from the fact that there tend to be no pre-dispute arbitration clauses running between third party claimants and the insured.

---

[1] Workers' Compensation insurers may initiate subrogation arbitrations to recover payments of health benefits from third parties if the defendant companies or their insurers and the subrogated insurer are parties to a Special Arbitration Agreement. In addition, persons involved in the administration or determination of Workers' Compensation benefits hearings may also arbitrate their own claims. *See,* NY Workers Compensation Law, Section 20.2.

There has been much discussion on "when" – the ideal timing for holding a mediation. As a general rule, the sooner one mediates the better. This enables the insurer to take funds that would otherwise be used in the defense of a claim and instead contribute them to the settlement pot. The sooner a dispute is resolved, the less parties will harden in their positions, and the less there will be a build up of emotion and resentment (not only by parties but also by counsel). Early resolution lessens the sunk cost phenomenon, in which parties and counsel who have invested time and expense hold out for a better return on investment -making it harder to settle a case. Another consideration that impacts timing is the need to develop information. Parties might feel a need to conduct an Independent Medical Examination, do destructive testing, nail down certain testimony in a deposition, test legal theories with a motion to dismiss or for summary judgment, or obtain an expert's report. At each juncture there is a balancing test of whether the information to be gained will offset the benefit of settling before the outcome is known. Conversely, its pursuit might, hydra-like, simply lead to additional questions, uncertainty, cost, and hardening of positions. Certain parties observe that "the heat of the trial melts the gold," and prefer to wait until they are at the courthouse steps – or even with an appeal pending – before conducting a mediation. Frankly, mediation can be useful at any stage. It is our view, however, that the earlier done, the better. In all instances, good judgment dictates giving serious consideration to the timing question.

In order most effectively to utilize the mediation or arbitration process where an insurer is involved, perhaps the most significant of our questions is *"who* is involved and what role should the insurer play?" It is critical to be sure that the proper parties are engaged in deciding to enter mediation, preparing for the mediation, and attending the mediation session. Whether it is an adjuster with responsibility for monitoring the case,[2] or a lawyer or other official of the claims department, the person involved should have a full appreciation of the way mediation or

---

[2] A number of people are ordinarily involved in handling claims presented to an insurer. Chief among them is the insurer's claims department or claims handling unit. This can be a group within the insurer and can also involve outside adjusters or third party administrators. Claims handlers are involved from the moment notice of a claim is received, through initial efforts to assess and possibly adjust a claim, and through all stages of litigation. The claims group triggers the issuance of any letter to the insured accepting the claim, assuming the defense but reserving rights to deny coverage. Claims appoints or approves counsel to handle the defense; sets reserves for the risk; and monitors the defense of a case. Moreover, claims evaluates case strengths and weaknesses, assessing liability and damages, and ultimately determines whether and under what terms to settle the claim. Other key players are counsel who are appointed to defend and must routinely report to the insurer; any counsel separately responsible for coverage questions; and, of course, the insured, who owes a duty of cooperation to the insurer. On the other side of the equation tend to be the claimant and claimant's counsel.

arbitration can be used effectively, full authority to resolve the matter, and sufficient knowledge of the case and the issues to be appropriately involved in the process and make a reasoned decision. This means that the claims department should be actively engaged in evaluating the matter and reassessing reserves, and the person with full authority, ideally, should attend the mediation session. When dealing with a corporate claimant, it also means bringing the person with full settlement authority. Ifthat claimant is an individual, say, with a personal. injury claim, it might mean seeing that certain family members are also involved or, at least, on board. It pays for claims adjusters and counsel on both sides to educate themselves well on negotiation strategy and techniques and on the nature and role of the mediator, so that they can take full advantage of the opportunities presented by using the mediation process. In addition to persons with authority, experts or persons familiar with certain facts may be helpful to have present at a mediation. Of course, a mediation is not a hearing, but the presence of these people might aid the parties in coming to a common understanding of the facts and adjust their assessment of the matter. In all instances, the best prepared attendees should be cautioned to maintain an open mind so that they get the full benefit of the mediation process, including the capacity to learn and make adjustments in accordance with reality.

The "what" and "why" of mediation include using a neutral party to help all involved conduct a constructive dialogue, getting past many of the snags that arise with traditional positional bargaining. The mediator can help cut through posturing and can keep people on course. When a large demand or tiny offer threatens to end negotiations, the mediator is the glue keeping people in the process, encouraging them to stick with it and reach the goal of resolution. The mediator can help counsel and parties understand legal risks that "advocacy bias" might blind them to, help them develop information that is key to assessing and resolving the matter, and help them as they make their bargaining moves. While some cases involve claims for damages which one party believes can best and most favorably be resolved by a jury and others involve a legal issue which call for a judicial resolution, the vast majority of claims and litigations, particularly involving insured matters, are ultimately resolved by settlement. A mediation can fast forward the camera, truncating procedures and shrinking costs, by bringing about the inevitable settlement much sooner. Claims adjusters, risk managers, and counsel are well advised to consider the myriad benefits of mediation listed in the general introduction – the "why" – at the commencement of a matter, so that they can make an informed choice of process – the "what" -initially and reevaluate process choices throughout the course of handling the claim.

Development of information needed for an informed settlement decision can, in fact, be expedited through the use of mediation in the third party claim context. Rather than awaiting depositions or extensive document production, parties can use mediation to conduct truncated disclosure -- getting the information that is most essential to the resolution decision. Good use and development of information is critical to taking full advantage of mediation in the insurance

context. Prior to the mediation session, it is good practice for the insurer's team to assess damages and liability and develop a good sense of the reserve for the case. This can include obtaining expert reports, appraisals, photographs or other key information. Pre-mediation conference calls can facilitate interparty disclosures that will provide parties with information needed to prepare or to conduct a meaningful discussion when they arrive at the mediation session. It is also valuable to help the mediator get current with information in the form of pre-mediation conference calls and written submissions, with exhibits. Further useful disclosures for the benefit of the parties can occur in the confidential mediation session, enabling parties to adjust their views and assessment of damages and liability. Even if the matter does not settle at the first mediation session, information can be further developed thereafter bringing the matter to resolution.

Additional points to keep in mind include the potential for conflicts or different interests or priorities between the insured and the primary and excess carriers and reinsurers. Also, insurance policies historically placed the burden of a complete defense on the primary carrier regardless of limits. While this is still the case in an automobile policy or an occurrence-based commercial general liability policy, a variety of claims made and specialized policies may provide for defense costs to be deducted from and be subject to the limits of coverage. Additionally, the claim may exceed the limits of primary coverage and impact excess coverage and/or the primary coverage may be typically reinsured in whole or in part. These may be important practical factors to keep in mind in evaluating the "who, what, when, where and why" of mediations and arbitrations in insured matters.

In sum, the insurer, parties, and counsel should be proactive in addressing our journalist's questions – and in developing, exchanging, and analyzing information – so that a mediation can be held at an appropriately early stage – and indeed, if not initially resolved, in pursuing further mediation as the case evolves.

Case Study: The Multi-Party Subrogation Claim

Have you ever participated in a negotiation or mediation involving multiple defendants, each pointing the finger at another? Inthe third party insurance world, this is a frequent occurrence. Often, counsel or claims adjusters will enter a negotiation with a predetermined percentage which they believe their company should bear relative to the other defendants. Moreover, they have set views on the percentage responsibility the other parties should bear as well – particularly party X, whom they deem to be the chief target, or party Y, who was in a position similar to their own insured's. The latter scenario can generate feelings among professionals not unlike sibling rivalry.

In one case involving a construction site with twelve defendants, the mediator used an approach he calls the *consensus based risk allocation model.* This approach was undertaken with the recognition that, sometimes, shifting from percentages to hard dollars, and getting people to focus on their own pot rather than the other defendants', is a good way to move from stalemate to progress. First the mediator conducted an initial joint session and one or more caucuses (private, confidential meetings with fewer than all parties) in which he got a good sense of what the Plaintiff would need to settle the case. Then he held some caucuses with the entire group of defendants and subgroups of defendants in which the mutual finger pointing became apparent. To address this problem, the mediator held a series of caucuses with each of the defendants. In each caucus he asked the same set of questions: do you think plaintiff will win at trial, and, if so, how much? What percentage liability do you think will be allocated to each defendant? How much will it cost to try this case? Answers to these questions were recorded on an Excel spreadsheet, with a line for each defendant's answer, including columns for each defendant discussed.

When the interviews were completed, the mediator created different economic scenarios: (1) the average of the amount the plaintiff was predicted to win, with and without applying predicted defense costs, (2) the amount the mediator guessed the plaintiff would need to settle the case (the realism of which was assessed in light of the first set of numbers), and (3) amounts smaller than the projected settlement number which might serve as initial pots in making proposals to the plaintiff. The mediator then applied the average of all defendants' views of each defendant's relative liability to these economic scenarios. The result was a listing of dollar numbers allocated to each defendant for each economic scenario. The mediator then held a joint conference call with all defense counsel. He explained what he had done and inquired whether they would like to hear the outcome of this experiment. Not surprisingly, all asked to hear the outcome and agreed to share with one another this information that had been derived from their private, confidential caucuses.

Essentially, the mediator presented to the defendants three packages for presentation to the plaintiff – an initial, a subsequent, and a final pot – identifying, by dollar figure only, each defendant's contribution to each of these three pots. As a result, a doable settlement path appeared in place of what had been a field of warring soldiers. Defendants got their approvals to each pot – one pot at a time – and the case settled. This is just one way mediation can help create productive order out of multi-party bargaining sessions in third party liability cases.

2) Subrogation

Another area that has lately benefited from the use of mediation is subrogation. In subrogation matters, an insurer that has already paid a first party claim for a loss suffered by its insured stands in the shoes of that insured and seeks recovery of damages for that loss from third parties who caused the loss. Over the last decade or two, subrogation has risen in the insurance industry's regard as one of the three chief ways in which insurers gain funds, along with premiums and return on investments.

The same considerations that apply to the mediation of all third party claims apply here. Unique features include that plaintiff is a professional insurer, and, typically, insurers are involved on the defense side, as well. As a consequence, some of the emotional issues that might be generated by parties seeking recovery of damage or loss to their own personal or property are diminished. Negotiations can proceed on a steady course. Yet, special challenges also arise when professionals engage in strategic bargaining. *See*, for example, the multi-party finger pointing discussed in the inset above. Some certainty on the size and nature of the loss is gained where the claim has already been adjusted by the subrogated insurer, but other issues take center stage: if the insurer paid replacement value, should the defendants' exposure instead be limited to actual, depreciated value of the property? Were payments made for improvements, rather than losses? And, of course, questions on liability, causation and allocation among multiple parties remain. Mediators can be quite helpful in organizing these discussions, developing information, assisting in assessments of exposure, and helping multiple parties stay on track to reach a conclusion. Sometimes, the mediator's phone follow up after a first mediation session is the key to keeping the attention of multiple parties, with many other distracting obligations, focused on the settlement ball.

3) Insurance Coverage Disputes Between Insurer and Insured

Disputes can arise between the insurer and the insured in either the first party (e.g., property) or third party *(e.g.,* liability) context. Such disputes can be particularly complicated in the third party context where the insurer owes a duty to defend if there is any possibility of coverage for one or more claims even if the carrier has potential unresolved coverage defenses. In all events, the carrier owes a duty of good faith and fair dealing to the insured and may have to consider settlement offers within policy limits in third party claims even if coverage issues are unresolved. Similarly, in the first party context, although the defense obligation may not be present, the carrier does have an obligation to process claims in a fair and efficient manner.

Notwithstanding these complications and obligations, the carrier does have the right to deny coverage if it believes that the policy does not cover or excludes a claim, or the carrier may defend under a reservation of rights if it believes there is a possibility of coverage, especially if

that possibility is dependent on the outcome of the underlying claim, *e.g.*, was the conduct that gave rise to the claim intentional (not covered) or negligent (covered).

A typical way of raising and resolving insurer/insured coverage disputes (after the carrier sets forth its initial coverage position generally by letter) is by a declaratory judgment action. Such an action may be brought by the insurer or the insured. In some states, *e.g.*, New Hampshire, a declaratory judgment action is required as a condition of denying coverage or requesting a denial.

As with all other disputes, insurance coverage disputes can be effectively resolved by mediation or arbitration (whether provided for in certain complex sophisticated insurance policies or voluntarily).

Mediation or arbitration is especially attractive in the first party context where the question of timing and amount of payment, if any, may turn on a prompt and efficient resolution of the insurance coverage dispute. While at first blush, it might appear that the insurer has an advantage or disincentive in this regard to the extent it could benefit from a delay in payments, there have been significant developments throughout the country, including in New York (in the *Bi-Economy* and *Panasia* cases, 10 N.Y.3d 187,200 (NY 2008)), adopting a tort of first part bad faith or other analysis or remedies which protect the insured in first party insurance coverage disputes and give the insurer an incentive to resolve such disputes.

In the third party claim context, the timing and coordination of any insurance coverage dispute and the resolution thereof is particularly sensitive. Simply put, if the underlying case is resolved by settlement or otherwise before the coverage dispute is resolved, the opportunity to resolve the coverage dispute in an effective fashion may be lost to the carrier or the insured. The parties may, therefore, have a genuine interest in resolving the coverage issues in coordination with the underlying claims in one way or the other. Mediation, or arbitration, involving some or all parties and some or all claims may be effective in this regard.

Case Study- Mediating the Dream within the Dream

In one mediation of a multi-party third party property damage case, one of the defendants had a coverage issue arise between its primary and excess insurer. The mediator called a "time out" and conducted a separate, abbreviated mediation of that coverage dispute by phone caucuses. The coverage issue was resolved and the parties then moved on to resolve the original third party claim.

Apart from these complexities, the same who, what, when, and why consideration noted above apply. In endeavoring to coordinate an underlying claim proceeding with an insurance coverage dispute, the when of any mediation and the who is involved amongst the parties and their representatives becomes critical. On the insurer side for example, there is typically and appropriately, a separation between the adjusters or claims representatives handling the defense of the underlying litigation, and those responsible for the coverage dispute. This is where they need to coordinate. The why includes the potential benefit of resolving the coverage issue which may impede resolution of the underlying claim and/or resolving the underlying claim which may be impacting the resolution of the coverage dispute. The what may involve a mechanism to bring together in a single forum, e.g., before a mediator, parties involved in different proceedings or aspects thereof.

Finally, a word about the need for subject matter expertise in mediators or arbitrators. In arbitration, expertise is what is often sought in a decision maker, although some have argued that non-experts might approach a case with a more open mind. In mediation, maintaining an open mind is essential in the mediator; and process skills are of paramount importance. Nevertheless, users of these processes in insurance coverage matters, find it helpful if their mediators or arbitrators are conversant with insurance policy interpretation and implementation.

4) Insurer v. Insurer Disputes

Another area where mediation or arbitration may be particularly effective is in insurer v. insurer disputes.

Because of the complexity of the world we live in, it is not uncommon to encounter situations where multiple carriers and policies may respond to one or more potentially covered claims. This may give rise to disputes among carriers under "other" insurance clauses which seek to prioritize coverage obligations between carriers, or pursuant to subrogation rights, or where primary and excess carriers are involved, or there are additional insured claims, etc.

Disputes between insurers present a perfect opportunity for mediation or arbitration. One reason for this is that since insurers will often find themselves on one side of an issue in one case and on the opposite side of that issue in another case, or even on both sides of an issue in the same case, e.g., with affiliated carriers or the same carrier involved for different insureds, there are multiple situations where it would be in the carriers' interest to have an efficient effective resolution of the particular case without setting a precedent for one position or an another.

Beyond the potential for setting unwarranted precedent in litigations between carriers, arbitration or mediation is simply an unusually effective mechanism for resolving disputes between entities which are in the business of resolving and paying for disputes. No entity is better equipped and has more interest in efficient effective resolution of claims and the coverage therefore than an insurance company – and insurers would prefer to avoid battling with each other, although the nature of today's' massive insured litigation is such that more often than not carriers will find themselves on opposite sides of the table from their colleagues in the industry and have difficult problems between themselves that need to be resolved. Once again the who, when, what and why become important. It is often important that insurance executives at the appropriate level recognize the significance of the issue to be resolved in the broader sense of the business rather than just the dollars and cents of a particular case. When is important in the evolution of the underlying matter and the issues between the carriers. The what is to identify an appropriate forum and mechanism and the why is because particularly with carriers it becomes a question of the best and most effective way to run their business.

5) Reinsurance

"Reinsurance" is basically the industry practice where one insurer insures all or a portion of another insurer's liabilities. Virtually all reinsurance agreements are in writing, and most contain either arbitration clauses or the occasional mediation clause. Thus, the first and best benefit of this ADR mechanism in reinsurance is that it is contractual, i.e. automatic and nonnegotiable. Unless the very efficacy of the arbitration or mediation clause is challenged, the parties cannot litigate.

Arbitration: By design, reinsurance arbitrations are meant to be faster, less expensive and more industry-focused than the usual litigation model. The typical panel consists of three individuals, two quasi-partisan arbitrators[3], one selected by each party, and a third, neutral umpire, technically chosen by the two arbitrators, who manages the proceedings. The arbitrators are quasi-partisan because parties interview them in advance to ensure, based on the pre-discovery facts as described, that they generally support the party's position. Also, in some cases, the

[3] This characteristic of arbitrators depends upon the rules under which the arbitration is conducted. For example, under Rule 17, Disqualification of Arbitrator, of the Commercial Arbitration Rules of the American Arbitration Association: "(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for (i) partiality or lack of independence, (ii) inability or refusal to perform his or her duties with diligence and in good faith, and (iii) any grounds for disqualification provided by applicable law.

parties and their arbitrators continue to have ex parte conversations throughout most of the case, usually terminating with the parties' filing of their initial, pre-hearing briefs. Ultimately, arbitrators "vote with the evidence" in final deliberations. The neutral umpire has no ex parte communications at all with either side. While the contracts technically permit the arbitrators to select the neutral alone, most do so with outside counsel and party input. Since decisions require a panel majority, the neutral umpire casts the swing vote, if necessary, throughout the case.

Another important benefit of the reinsurance arbitration model is that all three panelists are experts in the industry customs and usages of the particular lines of business, claims and practices in dispute. This is one of the quintessential aspects of arbitration that differentiates it from litigation. The people reviewing and weighing the evidence, assessing the parties' conduct and witnesses' credibility, and interpreting the agreements have been involved in the very business in dispute for years, enabling them to make infonned judgments. While arbitrators are not permitted to discuss evidence outside the record in deliberations, they may apply their knowledge of industry customs and practices to judge the facts, assess witness credibility and understand contract language.

Typically, most arbitration clauses contained a broadly worded "Honorable Engagements" clause, for example: "The arbitrators shall interpret this Contract as an honorable engagement and not as merely a legal obligation; they are relieved of all judicial fonnalities and may abstain from following the strict rules of law. " This clause, combined with their non-codified yet recognized authority, provides arbitration panels with broad discretion to apply industry standards and equity, not necessarily strict legal rulings, to resolve all manner of procedural and substantive disputes, to manage the proceedings before them, and ultimately to render a fair and just award based upon the totality of the circumstances.

This discretion is particularly beneficial to parties because it affords panels the ability to mold and streamline the proceedings to the particular facts, issues, and amounts in dispute. For example, to prevent the occasional overly zealous counsel from "over litigating," the dispute, panels may limit the availability and scope of discovery, the number and length of depositions, the amount and necessity of hearing witnesses, and many other procedural aspects of the case, especially since most arbitration clauses do not require the application of Federal or State rules of evidence or procedure. Like judges, arbitrators have authority to issue sanctions, draw adverse inferences and, where necessary, dismiss elements of an offending party's case, to maintain control of the process.

If properly molded and limited to the particular necessities of the given case, the arbitration process is designed to proceed to hearing and award much faster and less expensively than litigation. Following the hearing, most arbitration panels in reinsurance disputes promptly issue "non-reasoned" awards - essentially a few lines stating who won and the amount of damages awarded. ·The trend in more recent arbitrations and newer arbitration clauses is for parties to

specifically request the issuance of a "reasoned award." Even in that instance, panels usually issue awards much faster than courts, since the acceptable form of reasoned award requires a brief statement of factual findings, followed by the panel's ruling on each contested issue - much less than the typical length and scope of a court opinion.

The benefits of a reasoned award are obvious. First, it provides the parties insight into the panel's reasoning process and rationale for their decisions, particularly important if aspects of the panel's ruling differ from either party's requests. Second, allowing the losing party to understand how and why the panel ruled against them reduces the possibility that the award will be challenged as "arbitrary, capricious or unreasonable." And third, since many parties have business relationships, governed by the very contract(s) involved in the dispute, that continue post arbitration, a reasoned award reveals how the parties should construe the challenged terms and conditions in the future, avoiding repetitive, expensive and wasteful arbitrations over identical issues.

Mediation: The mediation model employs an impartial, trusted facilitator to help parties explore, respect and react to objective, subjective and psychological factors creating conflict between them, helping them to perceive and communicate positions leading to an inexpensive, voluntary resolution of the dispute on their own terms. Though a mediator with reinsurance industry background is preferred, the technical aspects of the specific factual and legal issues in dispute are not the most important elements of the process. In joint meetings and private caucuses, an experienced, professional mediator with no formal power to issue rulings works with the parties, using an informal, confidential process designed to suspend judgment and promote candor, to identify and understand each side's interests and goals underlying the actual dispute. To the trained and experienced mediator, disputes present an opportunity to empower parties to structure a resolution that best meets their respective short and long term needs.

Currently in the US, disputants have been slow to select mediation to resolve reinsurance disputes. But mediation, by its very nature, fits well within the reinsurance model for many reasons. First, contractual reinsurance relationships, whether from active underwriting or run-off business, typically last longer than one underwriting year. Mediators can harness the positive power of this beneficial, continued relationship to facilitate the parties' negotiations. Second, as a facilitated negotiation, mediation is symbiotic with the usual background and experience of reinsurance professionals – industry savvy business people accustomed to arms-length negotiations, but occasionally stuck within their own positions, unable to objectively assess their adversary's views. Finally, since the aggravation, expense and time required to arbitrate or litigate is on the rise, the reinsurance industry is searching for alternatives and beginning to choose mediation, either by contract or ad hoc agreement. Compared to arbitration or litigation, mediation is a less aggressive, less costly, less damaging and less divisive alternative.

The reinsurance mediation process offers participants many benefits:

Given the complexity and overlapping nature of reinsurance contractual relationships and resultant business/factual/legal issues, sufficient time and care must be given to pre-mediation preparation. Before the actual mediation session, the parties submit mediation statements containing salient documents and information supporting their positions on specific issues in dispute. Both before and after these are filed, the mediator works with the parties jointly and individually by phone or in person to uncover the underlying interests to be addressed, some of which may transcend the narrow issues briefed in their mediation statements. For example, in the usual ceding company/reinsurer relationship, the cedant and/or its broker may possess documents and infonnation that the reinsurer has requested and/or needs to fully evaluate its current position, requiring the mediation to be "staged" to accommodate such production. Proper pre-mediation planning is critical. If handled correctly, parties, counsel and the mediator arrive at the mediation room better prepared to address their true underlying needs and interests.

Reinsurance professionals are no more immune to psychological negotiation roadblocks than anyone else. In the opening joint session, the mediator first asks parties and counsel to actively listen to, understand and acknowledge their business partner's arguments, even repeating them back to one another, as a sign of their appreciation and respect for such views. This often overlooked but incredibly powerful step builds trust, breaks down barriers and actually makes the other side less defensive and more candid, producing valuable information to use in the mediation process; information which helps define the proper depth and scope of issues the participants must address and resolve.

Especially with reinsurance experts, often negotiators themselves, who well understand the merits of both parties' positions, the real work of an industry savvy mediator occurs in private caucuses. There, the mediator meets separately with and encourages each side to suspend judgment and comfortably and critically evaluate their positions, creatively explore options to resolve their disputes and, with the mediator's help, develop proposals designed to get what they need, not what they want, from a mutually-acceptable settlement. Once the mediator garners the respect and trust of both sides, s/he can deftly help parties develop, discuss and respond to successive financial and non-financial proposals, supported by an articulated rationale, designed to satisfy the offering party's needs and the responding party's interests. The very heart of the process, this unscripted, evolving and changing dynamic requires a perceptive, inventive and focused mediator, patient, calm and committed parties, and an open exchange of ever-broadening proposals that accentuate agreement and eliminate disagreement.

The true value of any mediator reveals itself at negotiation impasse. In reinsurance, internal, corporate and/or financial pressures often impact one party's ability or willingness to settle on negotiated terms, leaving a gap between the last demand and last offer. Maintaining a positive, trusting environment, the mediator should continue moving the parties to propose alternatives

and reframe the problem, remaining focused on re-evaluating barriers between them and brainstorming ways to eliminate them. A mediator who has worked in the reinsurance business can knowledgeably help the parties explore "value-generating" alternatives that lead to acceptable compromises and settlement.

* Charles Platto, cplatto@plattolaw.com, an independent arbitrator and mediator in domestic and international insurance and commercial matters, is an adjunct professor of insurance law and litigation at Fordham Law School, and formerly a commercial litigation partner at Cahill Gordon & Reindel and Chair of the Insurance Practice Group at Wiggin and Dana. Mr. Platto is an ARIAS (AIDA Reinsurance and Insurance Arbitration Society) certified arbitrator and a member of REMEDI (Reinsurance Mediation Institute) and serves on the CPR, AAA, and ICDR panels of arbitrators.

Peter A. Scarpato, an independent ADR professional, is President of Conflict Resolved, LLC, and President and Vice Chair of the Board of Directors of The Re/Insurance Mediation Institute, Inc. ("ReMedi"). He is a member of several arbitration and mediation associations, including ARIAS-US. (Certified Umpire and Arbitrator), ReMedi, Case Closure, LLC, Construction Dispute Resolution Services, Inc., FINRA Dispute Resolution and the ADR programs of the New Jersey and New York State and Federal Courts.

- Simeon H. Baum, President of Resolve Mediation Services, Inc. was the founding Chair of the New York State Bar Association's Dispute Resolution Section. He has been active since 1992 as a neutral in dispute resolution, assuming the roles of mediator, neutral evaluator and arbitrator in over 900 matters and teaches Negotiation and Processes of Dispute Resolution at the Benjamin N. Cardozo School of Law. His litigation and mediation background includes work in the insurance (first party and third party claims) and reinsurance areas. Mr. Baum has served on a wide range of court-annexed, agency, SRO, industry and private ADR panels.

Commercial Division Training
May 27, 2009 / June 3, 2009

Risk Analysis for Commercial Mediators

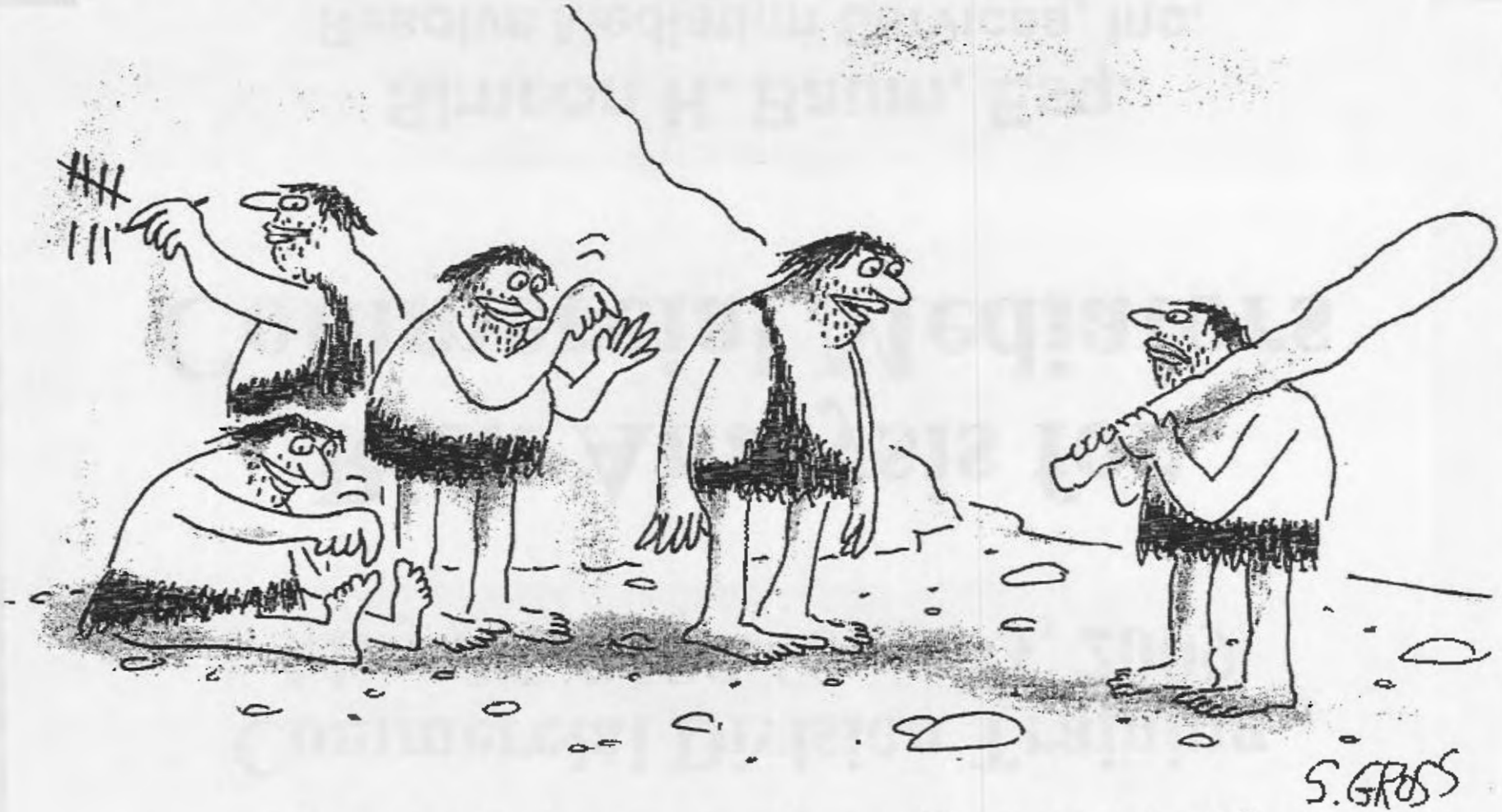
Simeon H. Baum, Esq.

Resolve Mediation Services, Inc.

New York, NY (212) 355-6527

www.mediators.com

The Higher Math of Risk Analysis



"We are neither hunters nor gatherers. We are accountants."

Reasons to Try Risk Analysis

- Creates feeling of objectivity & sense of legitimacy – not "me"
- Neutral, logical, shared structure
- Engenders dispassionate approach
- Gives feeling of doability
- Creates party Buy-In
- Addresses/sparks the FUD Factor

FUD FACTOR:

FEAR

UNCERTAINTY

DOUBT

More Reasons for Risk Analysis

- Addresses varying views of probable outcomes
- Is funnel for integrating and creating symmetry of information
- Gives Agents something to Write Home about
- Steadies Communication
- Stills Reactive Devaluation

What Is Risk Analysis?

Remember Louis Nizer?

Converting

Probabilities to $#s

(Expected Present Value)

Probable Outcomes & Factors

- Settle or Litigate
- Win or Lose Summary Judgment
- Discovery & Evidence
- Win or Lose at Trial
- Varying Damages
- Appeal Risks
- Collection Risks
- Transaction & Opportunity Costs
- Time Value of $ - interest/inflation

DEFINITIONS

■ **Decision Node**: Decision maker must choose which option to pursue.

● **Chance Node**: Decision maker has no control over the outcome. Lines emanating from the circle denote possible outcomes of an event, each bearing an associated probability (P) of occurrence. P for all branches emanating from a chance node must produce a sum of 1.0 (or 100%)

▲ **Terminal Node** is the point beyond which no activity is possible. It represents the consequence, payoff, or net value.

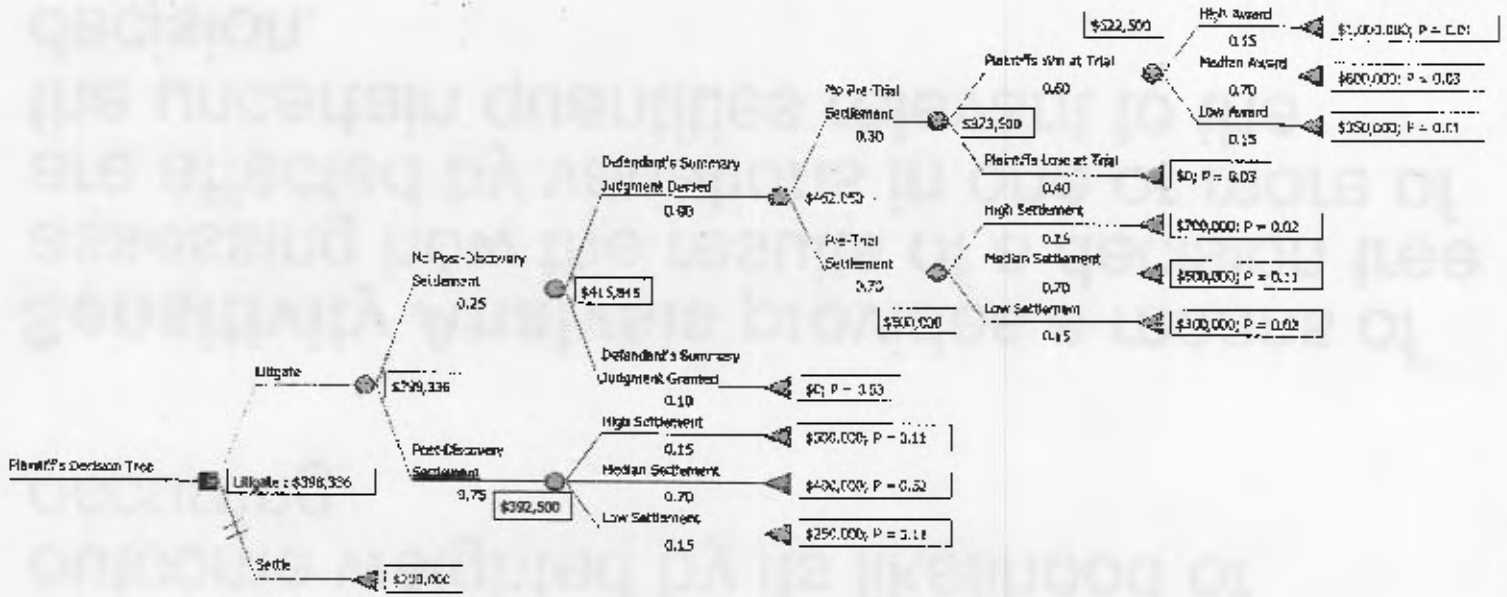
DEFINITIONS, continued

- **Expected Value** is the mean of the possible outcomes in a situation with each outcome weighted by its likelihood of occurring.

Sensitivity Analysis provides a means of assessing how the results of a decision tree are affected by variations in one or more of the uncertain quantities relevant to the decision.

e.g., likelihood of winning &
Expected Damages

Figure 2
Plaintiff's Decision Tree for Dispute Settlement-Litigation



This generic decision tree illustrates how decision analysis could be used by plaintiff parties in deciding whether to litigate or settle a dispute. The tree incorporates post-discovery and pre-trial opportunities for settlement as well as the potential impact of a summary judgment motion. The probabilities and costs (i.e., the potential awards) assigned to the various outcomes in this tree represent the more typical situation in which the plaintiff's case tends to get stronger as the case evolves. Expected values assigned to the settlement and award sub trees of the litigation option increase as litigation proceeds to trial and the pressure on the defendants to settle increases. In the example, the $200,000 assigned to the Settle branch represents the best the plaintiffs could expect to receive at this point. This settlement value could either be in the form of a demand by the plaintiffs, an offer by the defendants, or the best the plaintiffs could expect after limited settlement negotiations. The probabilities and expected values assigned to the tree result in an expected value of $398,336 for the Litigate-Settle decision node. Excluding a consideration of transaction costs and the plaintiff's risk profile, the results of this decision analysis indicate litigation would be the preferred settlement strategy. It should be noted that there are situations in which a plaintiff's case gets worse as it evolves. This may result from a lack of facts obtained during discovery or changes in the law. In these situations, the plaintiff's strategy may be to avoid or minimize the risk of losing at trial. Accordingly, the probabilities and expected values assigned to this decision tree would be adjusted to reflect this situation. In any decision analysis, the selection of probabilities and expected values tend to a lesser extent the structure of the decision tree itself) needs to be realistic.

Disaggregation

The spirit of decision analysis is divide and conquer: Decompose a complex problem into simpler problems; think straight, paste analyses together with logical glue, get program for action.

Howard Raiffa

Tao te Ching

Think of the small as large
And the few as many
Confront the difficult
while it is still easy;
Accomplish a great task
By a series of small acts

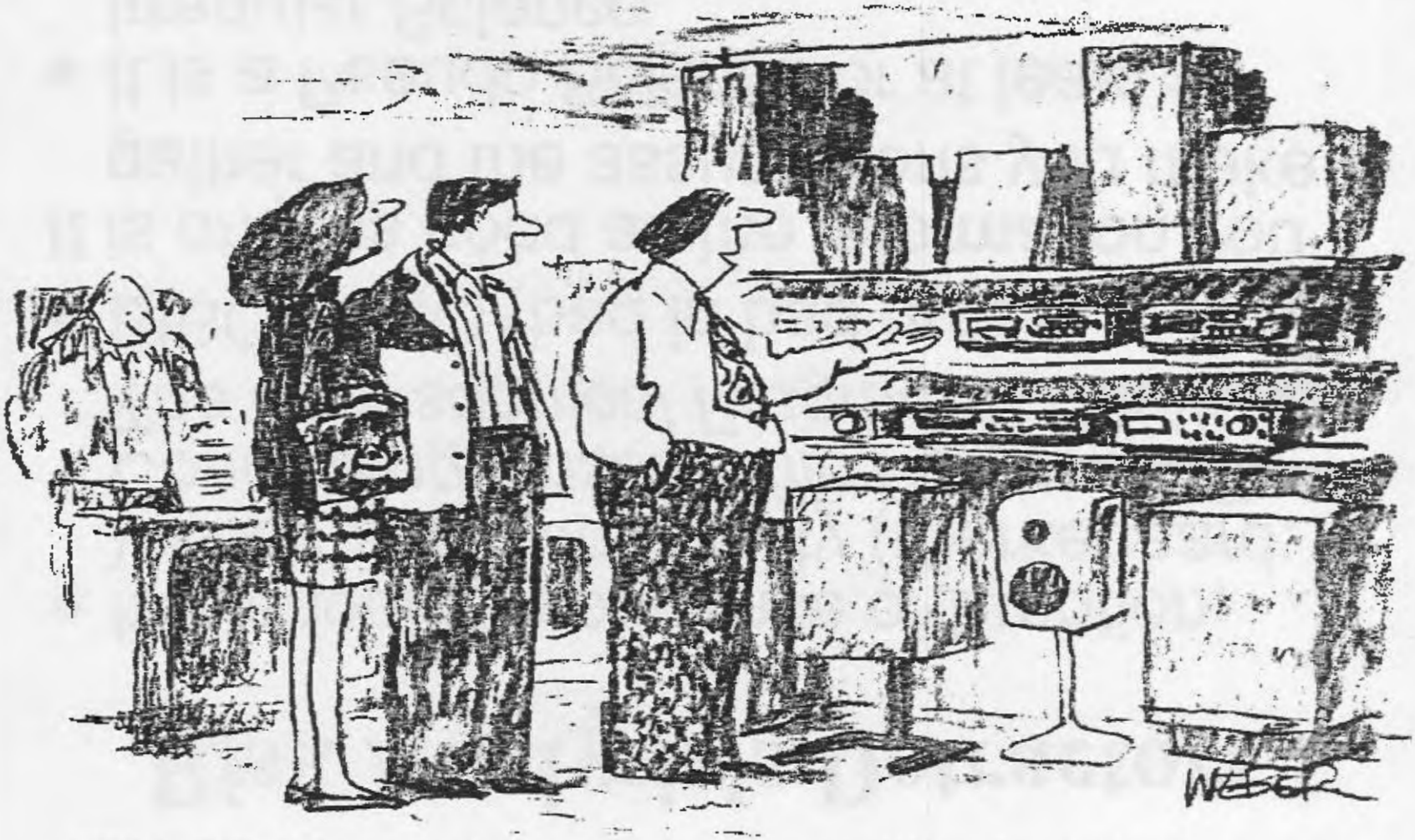
Risk Analysis's Detractors

- It overlooks importance of Emotion, Values and Subjectivity (Kierkegaard: *Concluding Unscientific Postscript To The Philosophical Fragments*, 1846)
- BIBO GIGO (bad in bad out)

It is only as good as the information you gather and the assumptions you make

- It is a Pseudo Science or at least an Irregular Science

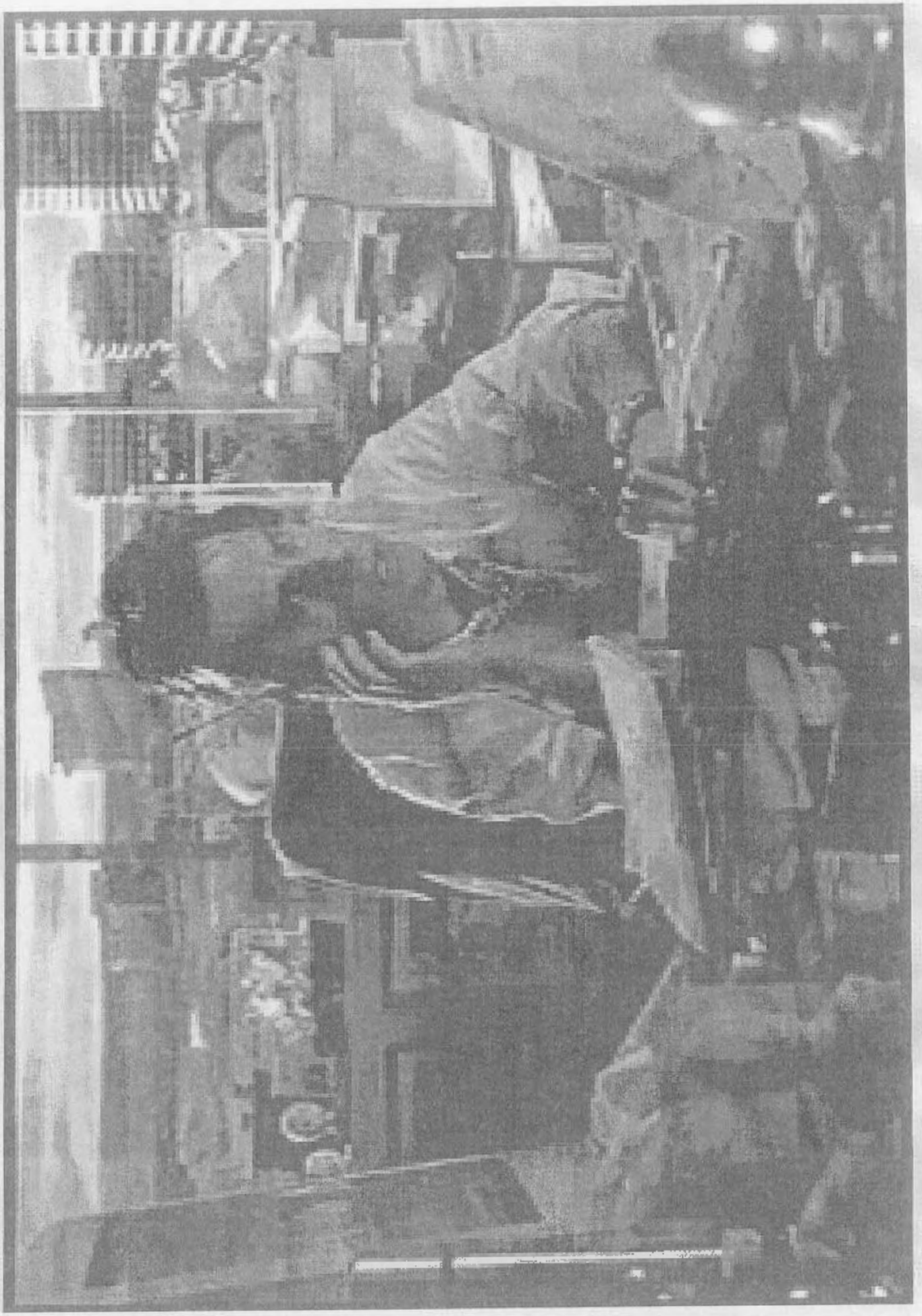
Working the #s



"This CD player costs less than players selling for twice as much."

The Art of Risk Analysis

- Gather Information
- Set the Right Tone
- Develop Trust
- Good Timing
- Involve the Parties & Counsel
- Do not Get Stuck
- Consider Caucus/Joint Session
- Couple with Transaction Cost Analysis



A Tool for Multi-Party Insurance Litigation Mediation with "Additional Insureds"

April 2008

The settlement of a basic, two-party case at mediation is often hard to accomplish. When three parties are involved, the task is generally much more difficult. With multiple parties, the challenges increase exponentially.

by Jeff Kichaven
JAMS

Advocates and mediators alike are all too familiar with the challenges that multi-party cases present. Among the most frustrating situations are those in which warring defendants or multiple plaintiffs place conflicting conditions on the negotiation that cannot be satisfied. Most commonly, parties will insist that their financial participations bear inconsistent relationships to other parties' participations. So, for example, Defendant A in a multi-party case may insist that it will not contribute 100 percent to a settlement fund unless Defendant B first contributes 125 percent. Meanwhile, Defendant B may insist that it will not contribute its 125 percent unless Defendant C first contributes 150. Defendant C then almost invariably insists that it will not put in its 150 percent unless Defendant A agrees to match it. Clearly, these conditions cannot all be satisfied at the same time.

In other cases, Plaintiff 1 announces that it will not state its demand unless it first knows Plaintiff 2's number. When that happens, you can count on Plaintiff 2 making the reciprocal announcement.

Variations on these themes are endless. Problems of these types are sufficiently common, though, that all mediation participants need as many Alexandrian Solutions as they can get for these Gordian Knots. The goal is to encourage simultaneous movement and hence eliminate the paralysis that the inconsistent conditions can create.

The Surowiecki Ballot

Here's one tool that can help with this dilemma: The Surowiecki Ballot. In a multi-defendant mediation, this ballot has three columns: the first column would list each defendant; the next, "Percentage of Fault"; and the third, "Percentage of Financial Responsibility."

Each defendant gets a ballot and is instructed to indicate, for each defendant, the percentage of fault and the percentage of financial responsibility each should bear in a settlement. The two numbers may be different—sometimes dramatically so—because of the financial resources of the

parties, the availability of insurance, the existence of additional insured endorsements on insurance policies, indemnification agreements between the parties, or other reasons. In any case, though, the percentages in each column should total 100. The ballots are not to be signed. The defendants are instructed to complete the ballots without consulting with each other.

The defendants are also told in advance that the information on the ballots will be compiled as follows: The mediator will collect the ballots and tabulate the averages. The mediator will then distribute to each defendant a summary sheet which reports those averages, and a complete set of copies of the ballots cast. (In this example, of course, the plaintiff neither votes nor learns the results.) The results are not binding but are designed to give the defendants valuable information regarding how to move forward.

Every time I've used the Surowiecki ballot system, it has worked. It breaks the impasse and the defendants are able to make a collective offer, with the defendants almost always contributing in exact compliance with the average percentage of financial responsibility numbers.

Why Does It Work?

To answer that question, we must first ask why is it called the "Surowiecki Ballot"? The Surowiecki Ballot is named in honor of *New Yorker* business reporter James Surowiecki and his 2004 *New York Times* Business Bestseller, *The Wisdom of Crowds*. Mr. Surowiecki's thesis is well-stated on the back-cover blurb of the 2005 Anchor Books paperback edition:

> (*The Wisdom of Crowds*) explores a deceptively simple idea: Large groups of people are smarter than an elite few, no matter how brilliant—better at solving problems, fostering innovation, coming to wise decisions, even predicting the future.

To prove his thesis, Mr. Surowiecki begins with a whimsical example, based on a review of every episode of "Who Wants To Be a Millionaire." On that program, when a contestant was stumped as to the right answer to a question, two of the contestant's possible "lifelines" were to call a friend or to poll the studio audience. According to Mr. Surowiecki, calls to friends (presumably the smartest people the contestants knew) yielded correct answers 65 percent of the time. Polls of the studio audience, "those random crowds of people with nothing better to do on a weekday afternoon than sit in a TV studio," however, gave a staggering 91 percent of correct answers.

Mr. Surowiecki follows this analysis through a dizzying array of examples, ranging from jellybean counting to stock market predictions to ascriptions of responsibility for the disastrous Challenger spacecraft disaster. Although counterintuitive, Mr. Surowiecki's evidence shows that "each time, the crowd did just as expected: its collective guess was very accurate, and was better than the vast majority of individual guesses," even the guesses of most so-called experts.

For the crowd's wisdom to shine through, certain preconditions must exist. According to Mr. Surowiecki, those are "diversity, independence, and a particular kind of decentralization." In the use of Surowiecki Ballots in mediation, each of these preconditions are met.

Diversity

First, the crowd must represent diverse viewpoints and perspectives, because "the best collective decisions are the product of disagreement and contest, not consensus or compromise." In the litigation context, "disagreement and contest" are usually not in short supply. Each defendant vigorously advocates its own position and is rarely shy to put its best foot forward or point out weaknesses in the positions of others. Mr. Surowiecki cautions that "collective wisdom" generally does not arise from "a group of diverse but thoroughly uninformed people." Again, in the litigation context, this is usually not a problem.

Independence

Independence results from the fact that the defendants are not allowed to consult with each other when they complete their ballots. This allows the true diversity of viewpoints to be expressed. It does, however, also create an incentive to mark one's ballot strategically, to minimize one's own share of financial responsibility. Two factors mitigate against this possible abuse of the system.

First, each defendant is allowed to record "Percentage of Fault" before "Percentage of Financial Responsibility." If its temper at work, some of that steam can be blown off in the prior column before being asked to cast a vote in the latter. And, indeed, there is generally greater variation in the percentage of fault numbers than in those which ascribe percentages of financial responsibility.

Second, the ballots are both unsigned and distributed to the group after votes are cast. The initial anonymity of the ballots is designed to protect each defendant from the fear that an honest but "politically incorrect" vote will subject the voter to unjust retaliation. The eventual distribution of the ballots to the group encourages each defendant to allocate a fair share of financial responsibility to itself. If a defendant wants to retain its anonymity, it cannot try to skew the results by letting itself off easy. Everyone will know. And, there's a risk that everyone will retaliate, perhaps by leaving our hypothetical strategist out of a settlement that gets everyone else a release. There's not much

worse in multi-party litigation than to be the "last player standing," having to bear the full costs of litigation alone and being the only defendant left at trial. So, there's an incentive to vote honestly.

Decentralization

Finally, the necessary decentralization refers generally to the way the wisdom of the crowd is aggregated. In the mediation of litigated cases, the aggregation of averages, plus the distribution of all underlying ballots to each defendant, generally results in a simultaneous move by all parties to those average "Percentage of Financial Responsibility" allocations. It's just obvious, and the negotiation can proceed.

Conclusion

In time, smart advocates will probably figure out ways to outsmart the Surowiecki Ballot, and its effectiveness may diminish. But for now, it is a tool that can help. Although this example discusses defendants who want to make a joint offer, the concept can easily be adapted to multiple plaintiffs who want to make a joint demand, multiple insurers for one defendant, or other contexts.

The key, though, is for advocates and mediators alike to remember that the collective wisdom of the crowd will be superior to the insights that any one of them may have. The opportunity to harness that wisdom, in whatever way or by whatever means, should not be overlooked.

SHB - Consensus Based Risk Assessment Model

Behind The Closed Door: Better Caucusing in Mediation Techniques
April 16, 2009

Some Positives and Negatives of Caucusing

Compiled by John Settle & Linda Toyo Obayashi

Pros:

- In particularly contentious cases, caucusing can reduce role of one party as a provocateur or motivator of the other's unproductive behavior ("button-pushing")
- Reduces the stimuli of anger, tension and defensiveness generally, and thus removes some emotion-laden hostility from the atmosphere
- Confidentiality (or at least, the absence of the other party) may enhance openness and creativity, particularly about interests, feelings, and values
- Allows a party to safely disclose dangerous, embarrassing or disadvantageous aspects of their situation, and to freely vent
- Provides an opportunity for the mediator to pay undivided (and unguarded or relatively unbalanced) *attention* to one party
- Mediator can restate what was heard in open session to verify it or to elicit what was really meant as opposed to what was said
- Mediator can be transparent about the process, discuss with the party how he/she thinks/feels the mediation is proceeding, and frankly explore any difficulties
- Provides an opportunity to overcome personal power imbalances between parties
- Provides an opportunity to identify other parties not yet involved who may have a stake in the outcome or ability to influence it
- Allows the mediator to more freely and intimately discuss, identify common areas of agreement, help analyze, and reality-check positions and options
- Allows a party to test and "try on" hypothetical or tentative solutions, and to explore potential concessions safely
- Allows the mediator to take the point-of-view of the other party for purpose of testing positions, or, alternatively, to be more positive or empathetic toward the present party's circumstances
- Allows the mediator to candidly discuss things that might be perceived as unduly positive or negative about one or the other party
- Allows the mediator to build trust with a party on that party's unique terms, including communication or cultural concerns

- Allows the mediator to meet with selected points of power (*e.g.*, just the parties' attorneys)

- Enables the mediator to facilitate discussions between a party and his/her representative or colleagues

- Allows the mediator to be more forthright in challenging a party to reassess positions or take responsibility for problem-solving, without party's loss of "face"

- Allows the mediator to individually coach productive behavior, or to help a party develop new and different ways of sharing important or touchy information

- Because of the combination of effects of many of the points above, may enhance and expedite resolution

Cons:

- May allow one party to make statements that cannot be challenged by the other party, to introduce falsehoods, to engage in character assassination, or to influence the mediator emotionally, and thereby potentially introduce mediator misunderstanding or bias

- May make a party suspicious of the mediator's involvement with the other side

- Parties outside the caucus may use the time to brood (reflect negatively) or consult others, using the time to reinforce their positions

- May allow a mediator to depend too heavily or too quickly on caucusing, to the disadvantage of the parties' engagement as full participants with responsibility for engagement in resolution efforts jointly considering a range of possibilities

- Mediator may grow to feel greater responsibility for achieving settlement and might be tempted to resort to manipulative ploys to bring about closure

- May inhibit a needed and productive openness and interactivity between the parties, limiting their development of new ideas of particular common value

- May diminish the opportunity for mutual closure and healing

- Presence of both parties may be essential to enhancing a long-term relationship, personal empowerment, or development of personal skills for later use

Some of the perspectives above are drawn from *Process of Mediation in Dispute Settlement Centers*, Pruitt, McGillicuddy, Welton & Fry, in the book **Mediation Research**, Kessell, Pruitt & Associates, Editors, Jossey-Bass.(1989); **The Art of Mediation**, Mark Bennett and Scott Hughes, 2d Ed. (NITA, 2005); **Mediation: Principles and Practice**, Kimberlee Kovach, 3rd Ed. (West, 2004). Thanks also to our colleagues Samuel Jackson and Jim Pope for their perspectives.

DOUGLAS C. ALLEN, P.A.

Dispute Resolution
Support Services

Analytical Tools & Techniques:

Decision Analysis Using Decision Tree Modeling

Analyzing the future outcome of a series of options or scenarios and their associated probabilities and costs can be a difficult task, particularly where a sufficiently complex problem precludes an intuitive answer. A probabilistic methodology called decision analysis can be used to quantitatively address this uncertainty. Decision analysis provides both an overall paradigm and a set of analytical tools to construct and analyze quantitative models of decision-making.

One frequently used form of decision analysis is a decision tree. Decision trees have long been used as an analytical tool in the fields of business, science and engineering, and public policy. Decision trees are being used with increasing frequency in law to analyze the merits of a case and the positions of the parties in an existing dispute, or to develop legal strategies and projections for transactional events.

Computerized decision tree analysis can provide an objective and flexible tool for decision making in legal disputes and transactions

In legal disputes, opposing parties tend to view the strength of their positions based primarily on their interpretation of the facts and merits of the case, and on the knowledge, experience and counsel of their attorneys. Unfortunately, this can lead to numerous obstacles to settlement including: positional bias, reactive devaluation, posturing, linkage to other disputes, risk aversion, and even emotional issues.[1] Decision tree analysis can provide disputing parties with an objective, analytical tool to deconstruct a dispute into its principle components, and to test assumptions, perceptions and probabilities of outcomes underlying not only their position, but the position of their opponents.

In legal transactions, an evaluation of future scenarios is often invaluable in making a business decision. Counsel and their clients can use decision tree analysis to address issues of risk aversion, risk transfer, and strategic planning by constructing decision trees with multiple alternatives and evaluating the impacts of their probabilities of occurrence on the expected costs of the outcomes.

An overview of the basic structure of a decision tree, the concept of expected value, and the utility of sensitivity analyses is presented in the decision tree primer (**Figure 1**). There are three fundamental rules governing the effectiveness of decision analysis using decision trees: (1) All *options* available to the decision maker must be identified and be mutually exclusive, i.e., the decision maker can choose only one of the options; (2) All chance events or *outcomes* must be identified and be mutually exclusive, i.e., only one of the chance events or outcomes can occur, and (3) A decision tree must include all *pathways* (including all possible decisions and outcomes of chance events) that a decision maker might take through time.

Conceptually, the construction and analysis of decision trees is simple and straightforward. However, there are numerous inexpensive computer software programs, such as TreeAge™, Crystal Ball™, and PrecisionTree™, which facilitate more efficient analysis of decision trees, particularly where there are complex trees involved and /or where there is a desire to conduct iterative analyses to answer "what if" questions. **Figures 2 and 3** illustrate some examples of how decision tree modeling may be used.

As with any analytical tool, the value of the output is directly proportional to the quality of the input. Decision tree analysis, whether done by hand or by computer, should be conducted with realistic determinations of those quantities relevant to the situation being analyzed. In addition, the results of a decision tree analysis should not be used as a sole determinant in decision making.

Notes

[1]For an excellent and thorough discussion on obstacles to settlement, see David P. Hoffer, *Decision Analysis as a Mediator's Tool*, Harvard Negotiation Law Review, Vol.1:113, Spring 1996.

Recommended Reading:

Robert T. Clemen, *Making Hard Decisions: An Introduction to Decision Analysis*. 2nd Edition. (Duxbury Press, 1996).

James R. Evans and David L. Olson. *Introduction to Simulation and Risk Analysis*. Second Edition. (Prentice Hall, 2002).

URLs for the Software Cited:

Crystal Ball.: http://www.decisioneering.com/crystal_ball/

PrecisionTree: http://www.palisade.com/

TreeAge: http://www.treeage.com/

Information & Inquiry:

info@dcallcnpa.com

Figure 1
Decision Tree Primer

Decision Tree Structure & Terminology

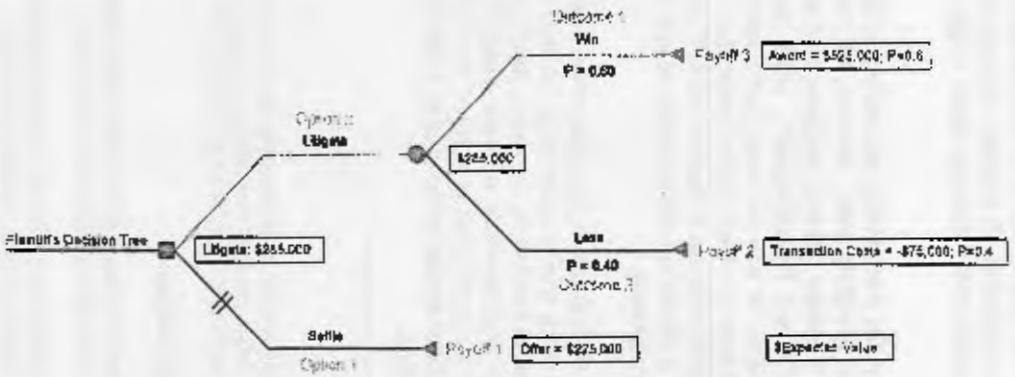


Figure 1a. A basic decision tree consists of a series of branches organized from left to right and connected together by one of three types of nodes. (1) a square (□) represents a decision node at which point a decision maker is faced with two or more options or choices. Branches emanating from a decision node represent the options or choices available to the decision maker. The decision maker can choose only one option; (2) a circle (○) represents a chance node over which the decision maker has no control. Branches emanating from a chance node represent the possible outcomes of the event. Each branch has an associated probability (P) of occurrence. The probabilities for all branches emanating from a chance node must sum to 1.0 (or 100%); (3) a triangle (◁) is sometimes used to represent a terminal node beyond which there are no further activities. The terminal node is also referred to as a consequence, or, when money is involved, a payoff, or net value. The probability of occurrence for an individual pathway of nodes and branches is the product of the probabilities along that pathway; the payoff value is the sum of the costs along that pathway.

Expected Value

The decision tree model facilitates the determination of the expected value (EV) of an event, the cornerstone of decision analysis. The EV represents a probabilistic determination of the outcome of many observations. In the plaintiff's decision tree, if litigation was carried out 100 times, the plaintiffs would win at trial 60 times and would receive an award of $525,000 for each win for a total gain of $31.5 million dollars. However, the plaintiffs would also lose 40 times and would pay transaction costs of $75,000 for each loss for a total loss of $3 million. The net for 100 trials would be $28.5 million, or, dividing by 100 trials, an average of $285,000. Thus the EV, or probability-weighted average, associated with the litigation option is $285,000.

The EV is calculated from right to left in a process often referred to as "folding back" or "rolling back". The EV for a terminal node is equal to its payoff. The EV for a chance node is the sum of the products of the probabilities and the payoffs of the branches emanating from the chance node. The EV for a decision node is equal to the value of its best option.

The expected value for each option in the plaintiff's decision tree in Figure 1a is determined as follows:

$EV_{Option\ 2}$ = (P(Win) x Award) + (P(Lose) x Transaction Costs)
= [0.60 x $525,000] + [0.40 x -$75,000]
= $285,000

$EV_{Option\ 1}$ = $225,000

Initial comparison of the EVs for Option 2 and Option 1 suggests that litigation of this case would result in an expected value $60,000 (~27%) higher than the settlement offer. However, if the award of $525,000 for winning at trial excluded the transaction costs of $75,000, the net award would be $450,000 and the expected value of the litigation option would be $240,000, only $15,000 (~7%) higher than the settlement offer option. Although this example is simplistic, it does illustrate the importance of defining realistic probabilities and quantities in decision tree modeling. Conducting sensitivity analyses on uncertain quantities can also provide useful information to the decision maker.

Decision tree calculations and sensitivity analyses alone may not be a sufficient basis for the plaintiffs to select a decision option and formulate a strategy. The degree of risk the plaintiffs are willing to assume should also be factored in. For example, plaintiffs who are risk-adverse may decided to settle for the lower amount simply to avoid the uncertainty of a trial. In this case, although the decision tree analysis suggested litigation as the preferred option, other factors might favor settlement over litigation.

Sensitivity Analysis

Probabilities assigned to chance events and quantities included in payoffs are rarely known with certainty and precision; they are usually best guesses or estimates. A sensitivity analysis provides a means of assessing how the results of a decision model are affected by variations in one or more of the uncertain quantities relevant to the decision. A sensitivity analysis can be performed on one, two or three variables simultaneously. However, a one-way sensitivity analysis is the most common.

Figure 1b shows a one-way sensitivity analysis for the plaintiff's decision tree in Figure 1a. This line graph contains one line for each decision option. The horizontal line represents the settlement offer (Option 1). It remains constant because the settlement offer of $225,000 is independent of the outcomes of any of the chance events in the plaintiff's decision tree. The sloping line represents the litigation scenario (Option 2). The expected value of the litigation option changes as the probability of a win at trial changes.

The point at which the two lines cross (P = 0.50; EV = $225,000) defines the threshold values. At this point, both decision options have the same expected value of $225,000. To the left of this point (for P < 0.50), the EV for the litigation option is always less than the EV for settlement. Accordingly, settlement would be the preferred strategy. To the right of this point (for P > 0.5), the EV for the litigation option is always greater than for settlement. This would suggest that the litigation option is preferable to settlement.

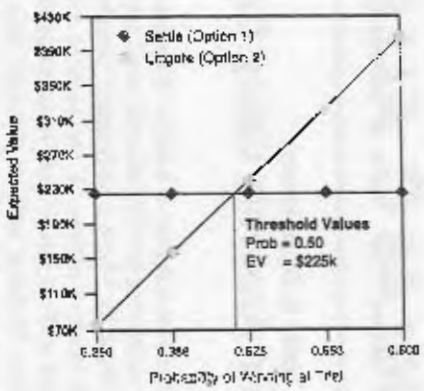
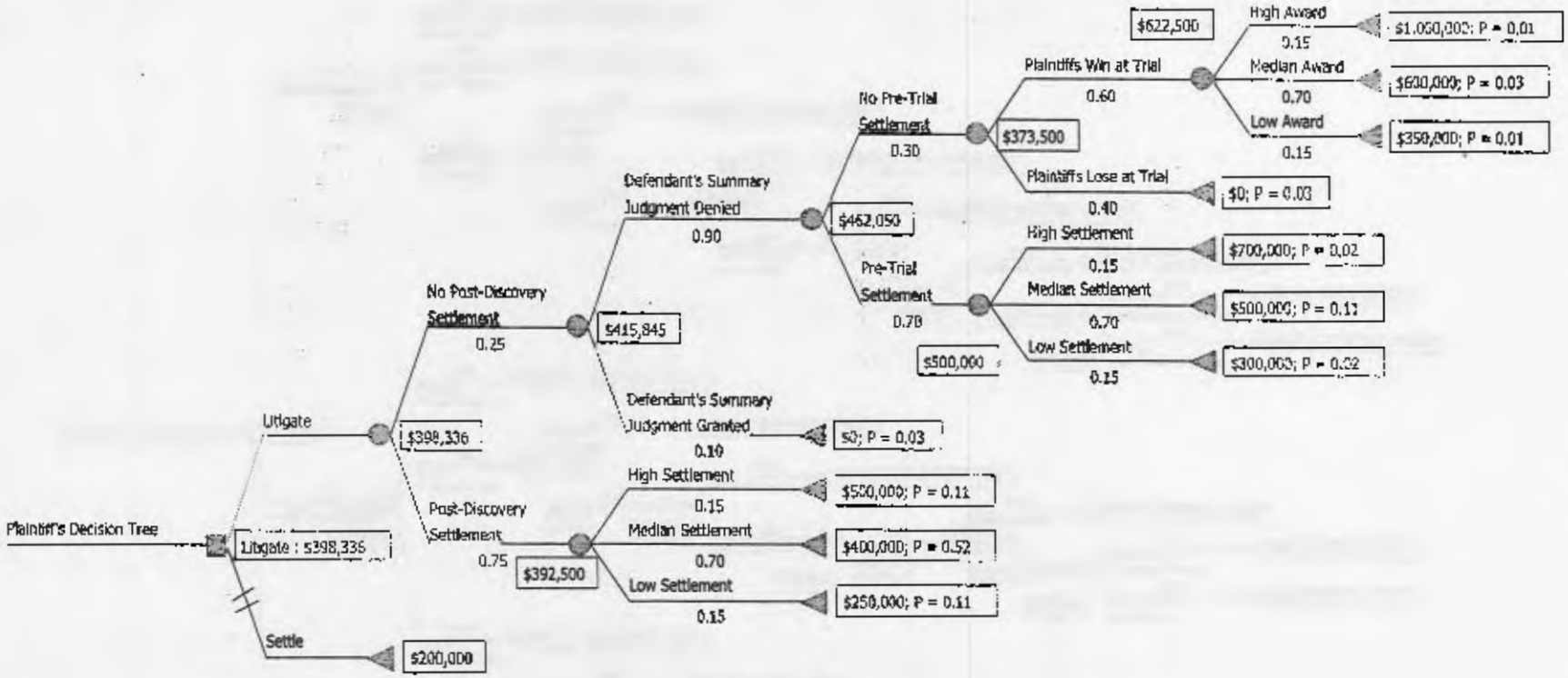


Figure 1b. One-way sensitivity analysis of Option 2.

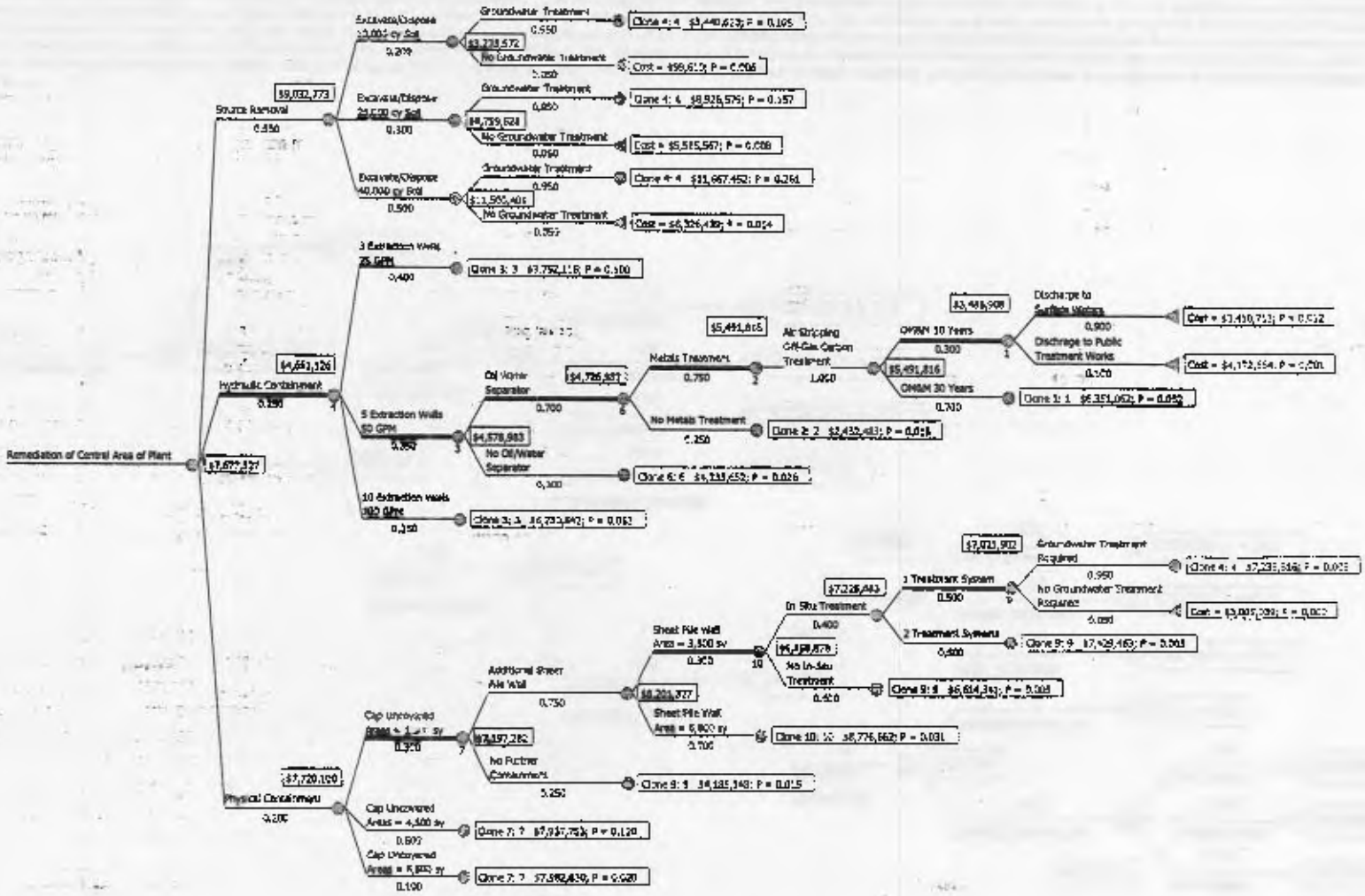
Figure 2

Plaintiff's Decision Tree for Dispute Settlement-Litigation

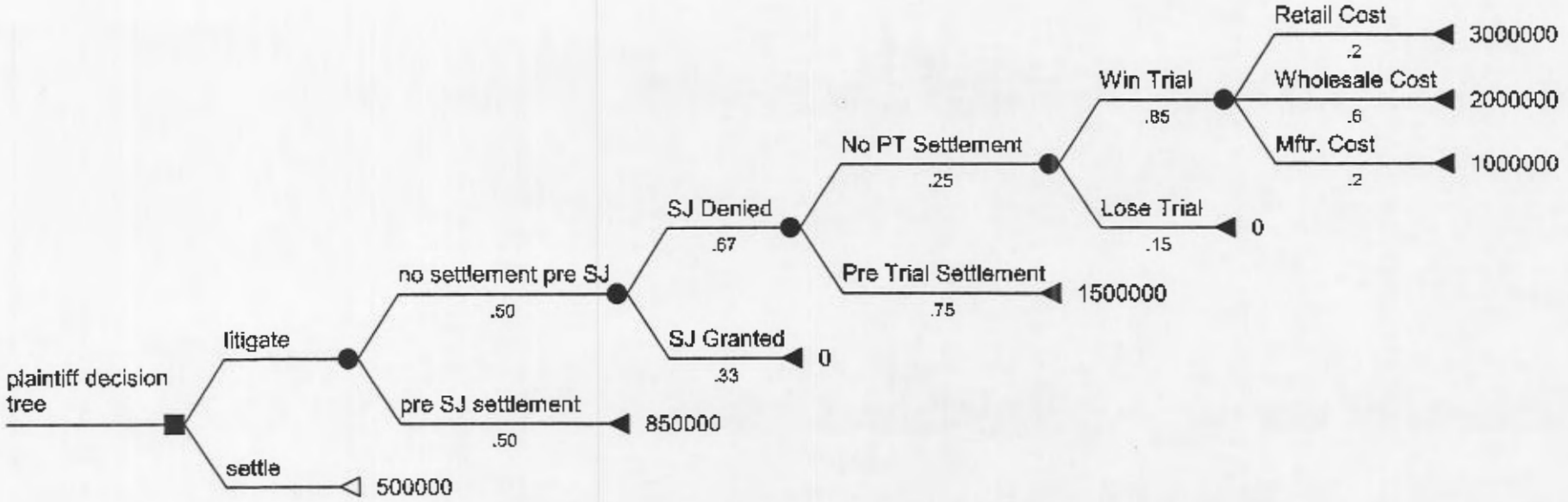


This generic decision tree illustrates how decision analysis could be used by plaintiff parties in deciding whether to litigate or settle a dispute. The tree incorporates post-discovery and pre-trial opportunities for settlement as well as the potential impact of a summary judgment motion. The probabilities and costs (i.e., the potential awards) assigned to the various outcomes in this tree represent the more typical situation in which the plaintiff's case tends to get stronger as the case evolves. Expected values assigned to the settlement and award sub trees of the litigation option increase as litigation proceeds to trial and the pressure on the defendants to settle increases. In this example, the $200,000 assigned to the Settle branch represents the best the plaintiffs could expect to receive at this point. This settlement value could either be in the form of a demand by the plaintiffs, an offer by the defendants, or the best the plaintiffs could expect after limited settlement negotiations. The probabilities and expected values assigned to the tree result in an expected value of $398,336 for the Litigate-Settle decision node. Excluding a consideration of transaction costs and the plaintiff's risk profile, the results of this decision analysis indicate litigation would be the preferred settlement strategy. It should be noted that there are situations in which a plaintiff's case gets worst as it evolves. This may result from a lack of facts obtained during discovery or changes in the law. In these situations, the plaintiff's strategy may be to avoid or minimize the risk of losing at trial. Accordingly, the probabilities and expected values assigned to this decision tree would be adjusted to reflect this situation. In any decision analysis, the selection of probabilities and expected values (and to a lesser extent the structure of the decision tree itself) needs to be realistic.

Figure 3
Future Cost Projections for Insurance Claim Valuation



Decision tree analysis was used to project future expected costs as part of an environmental insurance coverage claim prepared by an insured party and presented to its insurer. This moderately complex decision tree analyzes a series of potential alternatives or scenarios for remediating a portion of a plant site where there is contaminated soil and groundwater. There are a series of three possible remedial alternatives or outcomes: (1) excavate and dispose of contaminated soil (Source Removal), (2) extract and treat contaminated groundwater (Hydraulic Containment), and (3) cap contaminated soil areas (Physical Containment). Each of these alternatives has a probability of occurrence. Furthermore, each of the three alternatives consists of additional outcomes with their own associated probabilities of occurrence. The cost and probability for each remedial alternative or scenario is shown at the ends of the decision tree branches. Note that the outcomes of individual scenarios range from $99,610 to $11,667,452 with probabilities of occurrence of 0.6% and 26.1%, respectively. Given the entire range of possible alternatives, their associated costs, and their probabilities of occurrence, this model projected future expected costs of $7,677,327 to remediate the central area of the plant. Although the calculations shown in this decision tree can be performed using a hand-held calculator, a computerized analysis is much more efficient for complex trees such as this one.


plaintiff decision tree
litigate
settle
500000
no settlement pre SJ
.50
pre SJ settlement
.50
850000
SJ Denied
.67
SJ Granted
.33
0
No PT Settlement
.25
Pre Trial Settlement
.75
1500000
Win Trial
.85
Lose Trial
.15
0
Retail Cost
.2
3000000
Wholesale Cost
.6
2000000
Mftr. Cost
.2
1000000

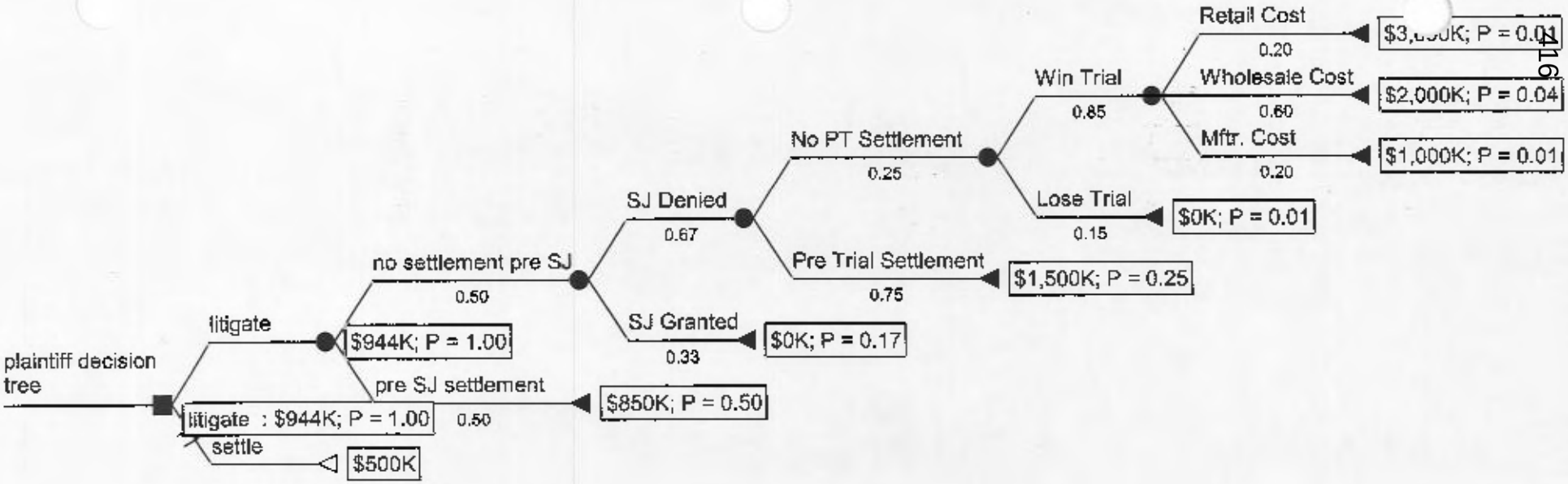

plaintiff decision tree
litigate
settle
$500K
litigate : $944K; P = 1.00
no settlement pre SJ
0.50
$944K; P = 1.00
pre SJ settlement
0.50
$850K; P = 0.50
SJ Denied
0.67
SJ Granted
0.33
$0K; P = 0.17
No PT Settlement
0.25
Pre Trial Settlement
0.75
$1,500K; P = 0.25
Win Trial
0.85
Lose Trial
0.15
$0K; P = 0.01
Retail Cost
0.20
Wholesale Cost
0.60
$2,000K; P = 0.04
Mftr. Cost
0.20
$1,000K; P = 0.01

FIGURE 1

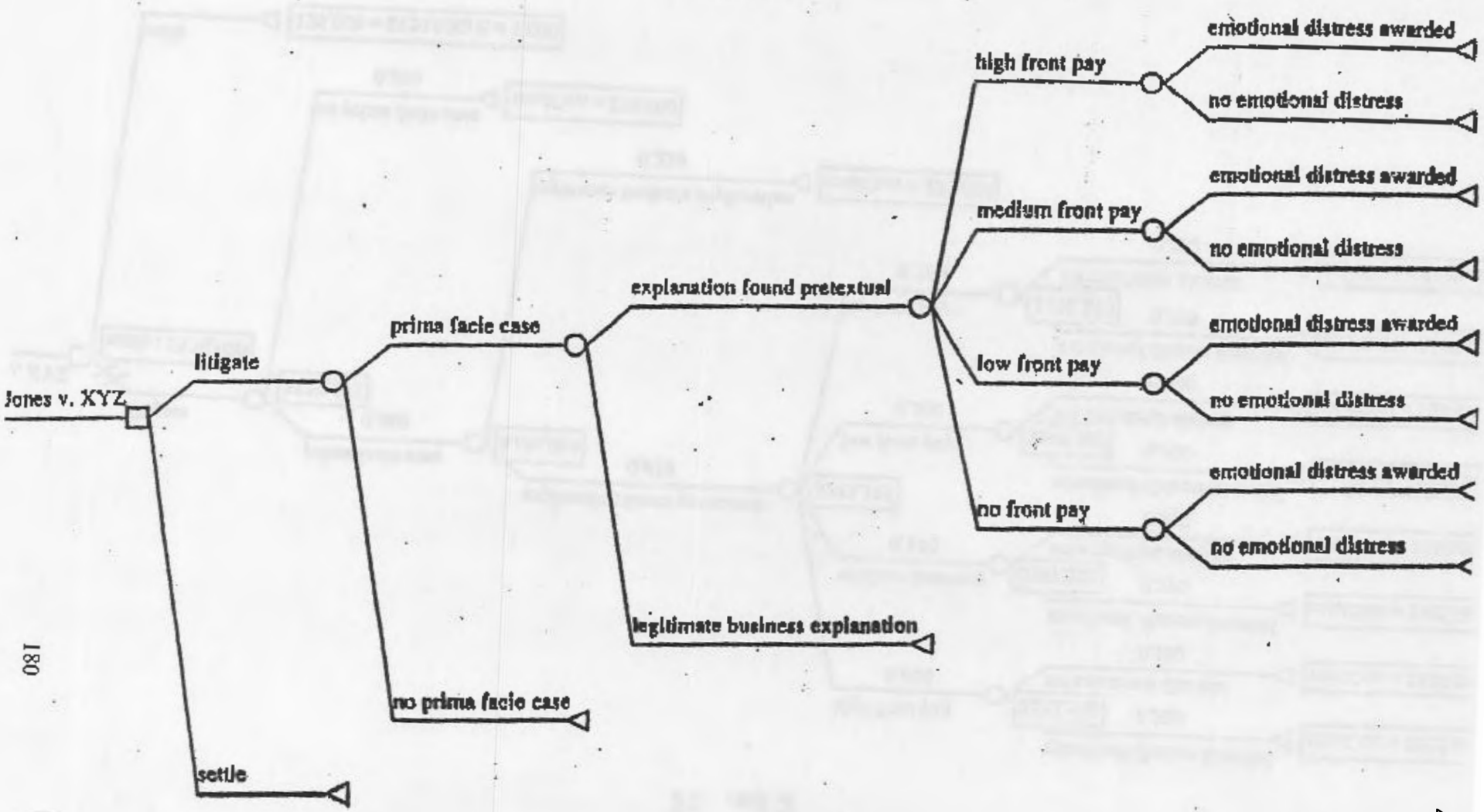
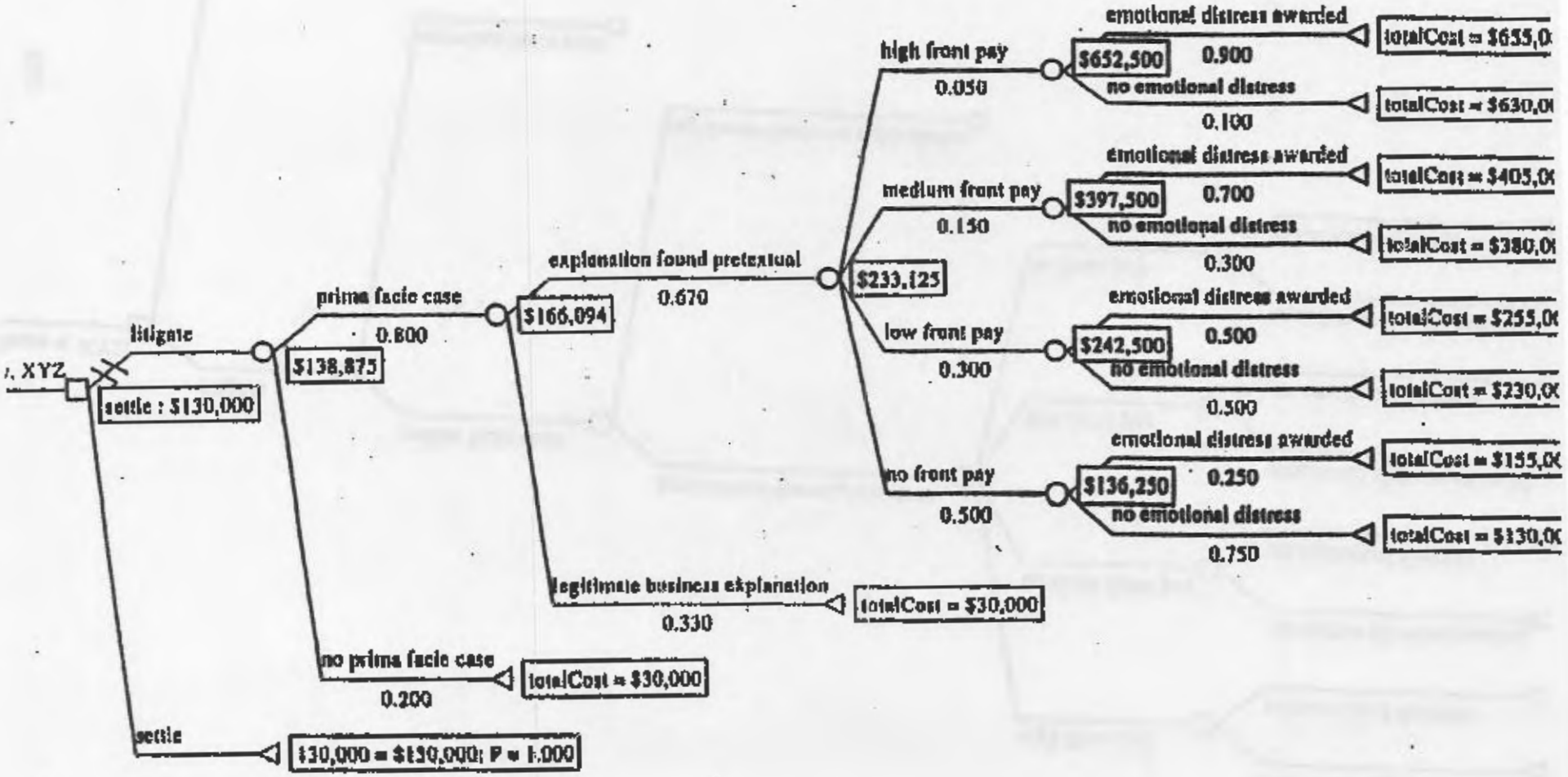

Jones v. XYZ
litigate
settle
prima facie case
no prima facie case
explanation found pretextual
legitimate business explanation
high front pay
emotional distress awarded
no emotional distress
medium front pay
emotional distress awarded
no emotional distress
low front pay
emotional distress awarded
no emotional distress
no front pay
emotional distress awarded
no emotional distress

FIGURE 2


emotional distress awarded
high front pay
$652,500
0.900
totalCost = $655,0
0.050
no emotional distress
totalCost = $630,0
0.100
emotional distress awarded
medium front pay
$397,500
0.700
totalCost = $405,0
0.150
no emotional distress
totalCost = $380,0
0.300
explanation found pretextual
$233,125
0.670
emotional distress awarded
prima facie case
$166,094
low front pay
$242,500
0.500
totalCost = $255,0
0.800
litigate
$138,875
0.300
no emotional distress
totalCost = $230,0
0.500
emotional distress awarded
no front pay
$136,250
0.250
totalCost = $155,0
, XYZ
settle : $130,000
0.500
no emotional distress
totalCost = $130,0
0.750
legitimate business explanation
totalCost = $30,000
0.330
no prima facie case
totalCost = $30,000
0.200
settle
$30,000 = $130,000; P = 1.000

The Value of Decision Analysis in Mediation Practice

Marjorie Corman Aaron

You are an experienced trial attorney who has recently gained an excellent reputation as a mediator of difficult cases. In the process of mediating a complex, high-stakes securities case, you have done everything possible to facilitate communication, provide an empathetic ear, and insure that the issues and interests of the parties are fully explored. The tension level and expressions of hostility between the parties have been significantly reduced over the course of the mediation. But very little progress has been made toward settlement.

The simple fact emerging from the joint mediation session and private caucuses is that the parties (together with their lawyers) have widely divergent views of the likely outcome of the case. Each side strongly believes it would prevail at trial. And, the defendants view the possible verdict range (in the unlikely event of a liability finding) as much lower than does the plaintiff, who anticipates a higher actual damage award, doubled or trebled as punitive damages. These views are held in good faith, and are based upon each party's and its lawyer's analysis of the factual and legal issues. You have "asked the difficult questions"; not a crack in the parties' armor has been acknowledged.

What's a mediator to do?

* * * *

When parties in a legal dispute are at a negotiation impasse caused by widely divergent assessments of the trial alternative, at least one of them is unrealistic. They cannot both be right. To break the impasse, the mediator

Marjorie Corman Aaron, Esq. is the executive director of the Program on Negotiation at Harvard Law School, 514 Pound Hall, Harvard Law School, Cambridge, Mass. 02138. She also specializes in the mediation of legal disputes and the design of curricula in negotiation and mediation practice.

must attempt to influence one or both parties' assessments, which should lead to movement in their settlement positions.[1] To do so, the mediator has three options:

1. Provide a "gestalt evaluation" — the mediator's overall sense of reasonable settlement value, without detailed feedback on each issue;

2. Provide detailed feedback on the strengths and weaknesses of the parties' positions on each issue, with or without relating it to a "gestalt" evaluation; or

3. Introduce a decision analytic approach to case evaluation, possibly using a computer software program to structure and perform the analysis.

As discussed later in this article, the first two options carry significant risks for the parties, the mediator, and the mediation process. Moreover, they often prove ineffective, particularly for resolving high-stakes, complex cases. The third option is both more powerful and less risky. A mediator using decision analysis to build and present a case evaluation is more likely to overcome impasse while avoiding damage to the mediation process.

Option 1 — The Mediator's "Gestalt" Evaluation

The mediator almost inevitably forms an opinion on the various disputed legal, factual, and technical issues through the various stages of a mediation process: in preparation, preliminary private meetings, and joint mediation sessions, while reviewing documents and listening to counsel, the parties, and key expert or fact witnesses. Some arguments ring true, others seem disingenuous. One side's expert may seem particularly impressive, another untrustworthy. The mediator will develop views on how the jury (or other decision makers) would react. Is a judge likely to grant summary judgment? Is critical evidence likely to be admitted? How will a jury understand the experts? How will it allocate liability? What will it find as a fair measure of damages?

From all of this input, the mediator begins to have a sense of the gestalt; what the case might be "worth," and what might be a reasonable settlement range. Two problems can result when the mediator presents his or her gestalt-sense as a case evaluation. First, the mediator's judgment might be sufficiently powerful but just plain wrong. In a highly complex, multi-issue case with a range of potential outcomes, the mediator's gestalt-sense may be far from the result his or her decision analysis would yield. It is necessary to disaggregate the elements of the case and the steps likely to occur in the litigation process in order to understand the value of the trial alternative and to find a reasonable settlement range.

More common, I suspect, is a second problem: The mediator's judgment might be correct but insufficiently powerful. Even if the mediator is a well-respected former judge, achieving a substantial shift in the parties' positions based on a gestalt-sense evaluation can be extremely difficult. As soon as the evaluation is delivered, the mediator's credibility is at risk to the extent that the parties or counsel view the evaluation as negative. They may discount the evaluation and then justify their reaction: "He is less familiar with this legal area than we thought. . . . hasn't really seen all of the witnesses. . . isn't familiar with all of the hundreds of exhibits" and so forth. The mediator sometimes undergoes an amazing metamorphosis from the "highly respected, indisputable neutral of unparalleled intellect" to "just another lawyer. . .and what does he know anyway?" Trial counsel, whose objectivity may be equally impaired by the advocate's role, often support the parties' unyielding belief in the strength of their case.[2]

Perhaps more damaging to the mediation process than loss of the mediator's credibility is the perception that the mediator is no longer neutral. Whenever a mediator provides an evaluation, he or she risks being viewed as favoring one side, and thus as an adversary by at least one party.[3] Providing a gestalt-sense evaluation can be particularly dangerous. In addition to the problem created by any evaluation's implicit rejection of at least one side's position, the gestalt evaluation can seem impenetrable and thus inseparable from the mediator.

Option 2 — The Mediator's Detailed, Issue-by-Issue Feedback

Why shouldn't the mediator simply give the parties and their counsel detailed "neutral feedback" on the strengths and weaknesses of each legal argument or on the weight of the evidence for each disputed factual issue?

Qualitative neutral feedback on disputed issues can be helpful. Unfortunately, it is often insufficient to move the parties across a significant negotiation gap. Absent an analytical structure for understanding a complex case, the parties have no mechanism with which to consider how the mediator's feedback on individual issues, if accepted, will affect their case's value. A company president may nod: "Yes, I can accept that this issue may be a bit more of a problem than I had thought, but I still want to get close to $x for my case."

In fact, when negative feedback is delivered on certain issues, the heart of the case often becomes a moving target. Party representatives and counsel intuitively or strategically begin to treat the case value as a constant, defensively shifting the relative weights of the issues. The strengths of the case will be used to justify the settlement position, and the weaknesses, if acknowledged, will be discounted as unimportant. The discussion becomes slippery and frustrating; the mediator's feedback never quite penetrates the parties' conception of reasonable settlement.

The apparent solution would be for the mediator also to provide an overall evaluation of what he or she considers to be a reasonable settlement, articulating the logical link between negative and positive feedback on particular issues and that evaluation. Presumably, the mediator has derived the evaluation from his or her views of the strengths and weaknesses of the parties' positions on factual and legal issues. If these views

are explained to the parties with some care, the evaluation may cause one or both parties to move significantly, overcoming the previous impasse.

Option 3 — A Decision Analytic Approach to Case Evaluation

It is true that a mediator's careful, thorough evaluation, persuasively and tactfully articulated, can be and often is the "but for" cause of settlement in a case. Mediators who provide such evaluations generally serve their clients well.

Why isn't that the end of the matter? Because, as noted earlier, in a reasonably complex case, the evaluation may be sufficiently powerful but insufficiently accurate. Human beings' cerebral software is limited. Given a sufficient number of interactive and independent variables, one's intuition about how various judgments of strength and weakness will play out may simply be wrong. If the parties will be persuaded by a mediator's evaluation, then the mediator should make every effort to insure that the evaluation is as accurate as possible.

Moreover, for the steamy mix of parties and lawyers and their emotional, personal, and professional dynamics and incentives commonly found in a mediation, using decision analysis can help overcome barriers to settlement. A mediator who presents an evaluation without considering the introduction of a decision analytic approach ignores a potentially invaluable device.

Why? How is decision analysis useful within a mediation process?

Integrity of the Mediator's Evaluation

Decision analysis permits confidence in the integrity of the mediator's evaluation. In a complex case, the mediator often faces a daunting, wide and tangled web of factual and legal issues when trying to arrive at an evaluation. The mediator may find it difficult or impossible to arrive at strong sense of overall case value.[1] Or, the mediator may have a fairly strong sense of the case value but be uncertain as to whether that sense is right or wrong.

Because intuition tends to be a poor predictor in complex cases, at a bare minimum, decision analysis can and should be introduced into the process by the mediator in formulating a case evaluation. The mediator might well make note of his or her gut sense, and then put it aside to work through a decision analysis. The gut sense evaluation and the decision analysis outcome can be compared. If they fall within a narrow range, the mediator can be confident in the integrity and power of both evaluations. If not, further thought, analysis, and recalibration should be undertaken before presenting any evaluation to the parties.

In some cases, the mediator may elect not to introduce decision analysis any further into the process — not to mention it to the parties or counsel. The mediator may sense that one or both will simply be unwilling or unable to understand and accept it as a basis for decision or discussion. Particularly where the mediator is a former judge or an experienced attorney playing a "senior statesman" role, the mediator's gestalt-sense — presented as an evaluation without reference to decision analysis — may be sufficiently powerful to cause significant movement in the parties' negotiating positions. In such cases, decision analysis will have played a quiet role in insuring the intellectual integrity of the evaluation, the mediation process, and its result.

A Neutral, Logical, and Shared Structure for Discussion

Once the parties have recognized that decision analysis is an inherently neutral and familiar logic, an evaluation built on that logic becomes extremely difficult to resist. The mediator's explicit introduction of a decision analytic approach provides a common structure for the parties to think about the case and possible settlement options.

The first challenge for the mediator is to help the parties understand that decision analysis simply reflects their own normal, rational thought processes and is, in fact, something they do in their everyday lives. This point can be illustrated with the simplest of examples: "Would you pay me 50 cents for a 50 percent chance of winning a dollar." Or, "If there is a 75 percent chance of rain, I should bother to bring that heavy umbrella." But, "If there is only a 50 percent chance of rain, I might not, depending upon how water resistant and how expensive my clothing is."[2]

Whether before or after the mediator has suggested using decision analysis to evaluate the case, neither counsel nor the parties can deny the importance of asking questions about what could possibly happen in the case before, during, and after trial. The mediator can walk the parties and counsel through a series of such questions which, in a typical case, might include the following:

> *Are there any motions to be ruled upon before trial? When?*
> *What are the possible outcomes of the summary judgment motion? Is partial summary judgment possible? Which issues are likely to survive?*
> *What could happen at trial? Is the admissibility of any evidence in doubt? How could that affect the trial outcome?*
> *Is contributory negligence a possibility here?*
> *What are the damages likely to be? Would different theories dictate different damages?*

Through step-by-step questioning and discussion with the parties and counsel, the mediator sets up a neutral framework for discussion and decision making. Once the parties have accepted decision analysis as familiar and irrefutably logical, any evaluation built on its structure has a greater likelihood of acceptance.

Reducing the Risks of Evaluation

An experienced mediator knows that providing an evaluation is a difficult and delicate task because it is inherently risky for the mediation process. An

mentioned earlier, the party receiving the more negative evaluation may thereafter view the mediator as an adversary and no longer neutral. This renders the mediator ineffective; everything he or she does becomes suspect.

When providing an evaluation appears necessary to overcome an impasse, mediators have, or should have, strategies to reduce its inherent risk.* For example, while a mediator is bound to provide a consistent evaluation to both sides, my advice is to deliver the evaluation in private caucuses, so that the parties need not suffer loss of face in front of the other side. The mediator should consciously endeavor to soften the emotional/ego impact of negative feedback and to distance himself or herself from the evaluation.

Decision analysis is a technique for shifting focus from the mediator to an easel or computer screen displaying probability estimates and values. When discussing the expected value outcome of a decision analysis, the mediator can quite sincerely say to a party for whom it is unfavorable: "I wish I had better news for you, it's just that the numbers came out this way" and so forth. The evaluation tends to be less closely identified with the mediator; its source seems as much the principles of mathematics or computer programming as the mediator's judgment.

Decision analysis may even allow the mediator to avoid providing his or her own evaluative feedback while influencing the parties to alter their own evaluations of the trial alternative. How? The mediator builds the structure of the decision tree from the parties' (and counsel's) articulation of what could possibly happen at various stages of discovery, pretrial motions, and during trial. In private caucuses, the mediator then asks each party to state which probabilities and values it would assign at various points along the decision tree structure. In some cases, at least one party's separate decision analysis yields an expected value outcome far different from its articulated settlement position.

When a party has accepted the logic of the method and has determined all of the input, it is hard pressed to reject the outcome. Even if the party is sorely disappointed and resists altering its settlement position, the mediator suffers no blame. The parties' perception of the mediator's neutrality remains intact.

More often, the parties' separate decision analysis outcomes fall close to their settlement positions, recreating some or all of the negotiation gap. This is natural: it confirms that their settlement positions reflect the parties' considered judgments, partisan perspectives, and natural biases. Nevertheless, the mediator will nearly always find some of the probabilities or values assigned by the parties to be reasonable, even where others indicate a lack of objectivity. In such cases, the mediator can then "piggyback" onto each party's analysis (in private caucus), providing his or her evaluation only for selected probabilities or values.

Consider, for example, a case in which the mediator agrees with the defense's estimate of a 60 percent chance of liability verdict, a 50 percent chance of some contributory negligence finding, and the actual damages range. Assume that the mediator differs greatly as to the contributory negligence percentage (by which damages would be reduced) and the probability of a punitive award. The mediator would perform the decision analysis using his or her evaluation only on the contributory negligence and punitive damages issues. If the mediator's reasoning on these issues is at least somewhat persuasive to the defense representative and counsel, it will be difficult for them to wholly reject the expected value outcome. After all, it was derived from their own evaluation on many of the probabilities and values, and only limited evaluative input from the mediator. It is easier for a party to acknowledge that its views might be "a little bit colored" by its position in the case than to admit to being "completely wrong." Where the mediator's evaluation rides "piggyback" on a party's evaluative input, its acceptance is less painful. Once again, the danger of the mediator being viewed as the adversary is greatly reduced.

The "Black Box" Quality of Decision Analysis

During the mediation, as the mediator builds the decision tree structure and presents a step-by-step evaluation that assigns probabilities or values to each issue on the tree, the outcome of the decision analysis is not yet apparent. This makes the parties less resistant to the mediator's reasoning on each issue. If the mediator's evaluation was persuasive when disaggregated into its component parts, it will be difficult to resist when reaggregated and "rolled-back" to the expected value outcome in a decision analysis.

The step-by-step process of building the tree and inserting probabilities and values also eliminates the particular credibility problem created when a mediator's evaluation falls toward the middle of the negotiation gap. Mediators often battle clients' suspicion that they will "split the baby" or seek a middle-ground compromise no matter what the merits of a case. Therefore, when a mediator presents an evaluation that puts case value at or close to the midpoint between the previously stated settlement positions, many parties and counsel may discount the mediator's sincerity and the credibility of the evaluation. However, for all but the most skeptical, where a mediator has committed to the decision analysis process, built the structure with the parties, and articulated and inserted the probabilities and values "before their very eyes," a midpoint outcome will not be suspect. The mediator thus retains credibility and the mediator's evaluation retains its power.

Transforming the Dispute

Decision analysis in general and on the computer in particular assists in the transformation of the dispute from a battle to a business problem. The

intellectual exercise of building a decision tree structure and mounting it on a large paper easel or blackboard (or, better yet, on a large computer screen) creates distance from the parties' and counsel's ego and personal investment in a case. To the parties, adopting a decision analytic approach feels neutral, rational, and intelligent. Allowing its outcome to influence one's settlement position becomes an acknowledgment of the power of mathematics and computer chips rather than a concession to the power of an opponent.

In many business disputes, it is most effective to use computer software to perform the decision analysis because many business people have confidence in the computer's ability to generate valuable data. Many MBAs were introduced to the use of decision analysis for business strategy choices in business school. Decision analysis on computer software for evaluating legal/business disputes applies a familiar method in a technology they trust. For other people, who view computers as alien and suspicious, using the software may be counterproductive. The wise mediator considers the appropriate level of technology for the particular audience and how best to introduce it within the process.

Avoiding Attribution of Fault

As decision analysis creates distance from the evaluation, it removes another common reason for a party's resistance to settlement — fear of personal attribution of fault. For example, assume that a company's general counsel authorized a company action which is cited as grounds for the legal complaint in a case. For the general counsel, a central participant in the mediation, the personal attribution of error creates understandable resistance to settlement. (Imagine that the general counsel sees himself or herself reporting the settlement to the CEO, who questions whether the company is paying such a high price to cover his or her blunders.) A sufficiently complex decision tree structure displayed on an easel or computer screen might graphically demonstrate the insignificance of the general counsel's original authorization as the issue of authorization is visually overwhelmed by a myriad of other variables and branches in the tree. This avoids the attribution of fault to the general counsel for the outcome of the analysis, and consequential injury to ego, personal or professional status.

The preferred scenario is that the expected value outcome of the analysis will not be overly sensitive to the general counsel's difficult issue. The mediator can then perform a decision analysis which adopts the general counsel's view on that issue, and nevertheless justifies significant movement toward settlement. Having seen that the outcome (and the wisdom of a larger payment in settlement) is attributable to a different and larger set of circumstances, the general counsel feels free to seek a business solution rather than personal vindication in the courtroom.

The Added Value of Computer Software

As the complexity of the mediated case increases, so does the value of decision analysis software. If a mediator provides a case evaluation using decision analysis and if it is likely that the parties will pay serious attention to it, all involved have an interest in the rigor of the analysis. Using the software prevents mathematical error; it insures that the probabilities total 100 percent where necessary, and so forth. In other words, using decision analysis software insures that the underlying structure of the tree is correct.

The software also adds value where "neatness counts." After a mediator's evaluation is presented and discussed in a mediation session, the mediation process sometimes adjourns for a period of time to allow the parties and counsel to discuss the mediator's evaluation with the appropriate committee or other internal authority or expert. While the mediator may articulate his or her evaluation in prose, it should also be communicated in decision tree format for all of the reasons that the easel or computer screen was important in the mediation session. Particularly when taken back to a business setting, the printout of a computer-generated analysis lends additional credibility.

The software also serves as a medium of dialogue between the mediator and a party or counsel. Its ability to perform formal or informal sensitivity analyses both quickly and easily allows joint, dispassionate examination of the effect of controversial evaluative judgments on the case's expected value. For example, in a case I mediated not long ago, I had not mentioned decision analysis when providing some gentle issue-by-issue feedback during an initial mediation session. The rather frail emotional state and limited mental capacity of the plaintiff made it unwise to suggest a decision analytic approach. I had found the case extremely difficult to evaluate, not because of complexity in the tree structure but rather because of the difficulty of assigning values and probabilities to the various issues. I played around with the software to work through my own decision analysis during a week's hiatus between mediation sessions. As I thought more about the case, I called the in-house attorney for the defense to discuss certain issues. During the course of that call, I mentioned that I had performed a decision analysis using *TreeAge*, a decision analysis software designed for litigation. He stated that he had done a decision analysis of the case as well, using a different software. We discussed the structure of our respective trees and the probabilities and values we had each assigned at various branches.

It happened that we disagreed somewhat on the probability assigned to one critical issue, where he had estimated that his client had a 75 percent chance of success. I agreed that his was the better side of that issue, but thought the probability estimate should be 65-70 percent. "Are you sure it's 75 percent? Couldn't it be 70 percent?" I asked. "Or 65 percent?" He thought 65 percent was too low, but agreed that he could not really

argue against 70 percent vs. 75 percent. In fact, the expected value outcome was extremely sensitive to that probability estimate. I suggested performing the analysis using a 70 percent probability with his damages estimates (which were lower than mine): the expected value outcome was nevertheless significantly higher than his previously stated settlement boundary. I then suggested running the analysis using his 75 percent probability and my damages estimates. Once again, the expected value outcome was significantly higher. The software became a language and a medium with which to push and probe at acknowledged "soft spots" in counsel's analysis. Yet, the probing felt neutral, it did not give rise to a defensive response. As a result, defense counsel was persuaded to put enough on the table to settle the case.

In a case of any complexity, the easel and the hand-held calculator are no substitute for a computer-generated decision analysis. Once the software tree has been built, the mediator can allow either or both parties to disagree with any piece of the evaluation, and demonstrate the result — informally testing the sensitivity of the expected value outcome to judgments on disputed issues. Or, you can explicitly explain and perform a sensitivity analysis, and discuss its implications for settlement. The expected value outcome's lack of sensitivity to a disputed issue helps quiet controversy on that issue; discussion or additional information-gathering can then be directed toward other issues. On the other hand, recognition of tremendous sensitivity to a particular issue tests the parties' confidence in their judgments on that issue.

The software's ability to display the distribution of possible outcomes predicted by a particular decision analysis can be used to test the parties' tolerance for risk. The possibility of a "zero verdict" or a "bankrupt-the-business" outcome may not seem real to the parties until the software demonstrates, in plotted graph or bar chart format, that 30 out of 70 possible outcomes fall within an intolerable range under the mediator's (and perhaps the parties') analysis. The points on the graph or the bar chart dimensions are hard to ignore.

When a mediated settlement cannot be reached, the other capabilities of the decision analysis software can lead the parties to other settlement methods. For example, in a complex, high stakes case I co-mediated, the parties reached impasse in the mediation despite the use of a decision analytic approach. They then agreed to settlement through a bracketed or "high-low" arbitration process, setting the award limits at points which eliminated the equivalent distribution of outcomes for each side as reflected in the mediators' decision analysis. Without the software's graphic demonstration of the distribution of outcomes predicted by the decision analysis, reaching agreement on such limits would have been difficult or impossible.

Conclusion

To be constructive and effective within the mediation process, a mediator's case evaluation must be carefully derived and reasoned, persuasively articulated, and tactfully delivered. A decision analytic approach allows the mediator to structure and present an intellectually rigorous evaluation while minimizing the risk of perceived loss of neutrality. This approach can enhance the mediator's ability to unlock or redirect participants' emotional and professional investment in litigation and to remove personal and organizational incentives for entrenchment in adversarial and costly disputes.

In a particularly complex case, using computer software for decision analysis offers added value by facilitating discussion of the evaluative analysis among additional decision makers who were not at the table. It provides a neutral language and method with which the mediator can probe and challenge the parties' stated positions and tolerance for risk. By helping people focus more clearly and dispassionately on the choices they face, a decision analytic approach and its presentation on computer software should enable them to achieve intelligent settlements.

NOTES

1. Of course, if circumstances allow, the mediator may be able to suggest creative options, moving the basis for settlement away from a rights-based analysis. This discussion assumes a case which lacks opportunities for creative options sufficient to resolve the dispute, at least at this juncture. In my experience, parties are often unwilling to consider creative options until after they have been persuaded that their trial alternative is less attractive than previously thought, and the legal rights/dollar based gap has narrowed.

2. This problem may not occur if the evaluation happens to fall close to the middle ground. In that case, however, the mediator may then be suspected of merely "dividing the difference" to achieve settlement, and his or her evaluation viewed as less credible.

3. Although a mediator is advised to employ techniques to distance himself or herself from the evaluation, including but not limited to framing the evaluation as "not the outcome I would choose, but based upon my experience, what I think a jury would do, [etc.]," this is extremely difficult to accomplish.

4. Generally, when attorneys speak of the value of a case, they are referring to the litigation alternative — to some sense of what will happen at trial, the likelihood of a liability finding, the magnitude of damages, and the attendant costs and risk. Undeniably, worth has an individual, personal aspect as well. Lawyers would recognize that it might be "worth it" to one client to settle the same case at a given price, but not worth it to another, depending on their tolerances for risk, current and future needs, level of comfort or discomfort with the trial process, etc. — factors one would put into a utility analysis.

5. A separate article could be written on tricks and techniques for a mediator introducing decision analysis to parties and counsel unfamiliar with the approach. Suffice it to say here that it should be introduced in simple, common sense terms.

6. Whether this is done in private caucuses or in joint session is a matter of mediator judgment and some considerable subtlety. Techniques and strategies mediators can use to mitigate the risks of providing an evaluation merits more complete discussion in a separate article. This discussion merely sets forth ways that decision analysis can be useful toward that end.

The Proper Use of Decision Analysis to Assist Litigation Strategy

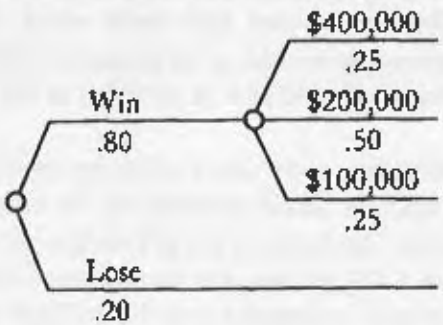
*By Marc B. Victor**

The 1980s have seen a rapidly growing interest among lawyers in the use of decision analysis to value litigation. When properly used, this technique imposes a discipline on counsel, forcing them to think as carefully and systematically as possible about the evidence and legal issues that are important to their case. It also provides counsel with the means to integrate their assessments of the numerous uncertainties in a logical, unambiguous fashion. Thus, counsel are more confident of their litigation strategy or settlement decisions.

Unfortunately, the last few years have also seen a number of articles that incompletely or incorrectly describe decision analysis.[1] This article attempts to correct some of the misconceptions they might have created.

THINKING CLEARLY ABOUT COMPLEX LITIGATION

The earlier articles have all trivialized the purpose of using decision analysis. They all illustrate the approach with an exceedingly simple example such as:[2]



*Mr. Victor is a member of the California bar and president of Litigation Risk Analysis, Inc. in Menlo Park, California.

1. Peterson, New Tools for Reducing Civil Litigation Expenses (1983); Bodily, *When Should You Go to Court?*, 59 Harv. Bus. Rev. 103 (May–June 1981); Greenberg, *The Lawyer's Use of Quantitative Analysis in Settlement Negotiations*, 38 Bus. Law. 1557 (1983); Nagel, *Applying Decision Science to the Practice of Law*, 30 Prac. Law. 13 (Apr. 15, 1984).

2. In all decision trees, the branches emanating from the circles ("nodes") represent the possible alternative outcomes to an uncertain event. In this example, whether the client wins or loses is uncertain, and the amount of any damage award is also uncertain. Counsel's opinion as to the likelihood of each uncertain event is indicated by the probability just under each branch.

They then go on to show how the settlement value can be determined by weighting each ultimate outcome by its probability of occurring:

20%	(= .80 × .25) ×	$400,000	=	$80,000
+40%	(= .80 × .50) ×	$200,000	= +	80,000
+20%	(= .80 × .25) ×	$100,000	= +	20,000
+20%	×	$ 0	= +	0
				$180,000 Settlement Value

Other numerical manipulations are then performed.

This focus on computations is misplaced. In a *good* decision analysis of a lawsuit, only a small fraction of the effort (perhaps ten percent) is spent in performing the necessary calculations, and only a part of the benefit of conducting the analysis is derived from the quantitative results. Most lawyers who are familiar with how to perform a good decision analysis will attest to the fact that its real benefit is in forcing—and assisting—an attorney to understand his or her case better, at a level of detail sufficient to produce valuable insights for planning pretrial discovery and selecting trial strategy. The only way for a reader to appreciate this, however, is by illustrating the approach with a *complex* lawsuit. Then, rather than beginning with a direct assessment of the probability of winning (as the simple examples of the earlier articles have all done), this article will use the full power of the decision analysis concepts to produce a better-reasoned, indirect assessment.[3]

In this lawsuit,[4] the plaintiff corporation, SmoothShave, Inc., has filed suit against the defendant for monopolizing the market for electric razors. The complaint alleges treble damages of $30 million. The defendant is wholly owned by a troubled Middle Eastern country, and, therefore, collection of any judgment is very uncertain. Plaintiff's lawyers have been asked to advise the company whether it is worth pursuing the case at an estimated additional cost of $1 million, and, if so, how the money could best be allocated to the various areas of pretrial discovery.

If counsel supervising the litigation were asked what the company's chances of winning were, their initial reaction would probably be: "It depends." A good decision tree is one that facilitates the lawyer's job of determining the probability of winning by capturing in a logical way the factors upon which winning depends. Some of these factors may correspond to ultimate legal questions that the jury will be called on to answer, such as, "Do you find that the defendant was pricing below cost?" Other factors will correspond to uncertainties whose resolution is believed likely to influence the jury's decisions on the ultimate

3. Other advantages of the approach are discussed below, but the reader should be aware of them as he or she reviews the example. They include the following: allowing the client to better understand the basis of counsel's recommendations, allowing counsel to negotiate fair settlements more easily, and allowing counsel to plan pretrial discovery more cost-effectively.

4. This case combines aspects of several analyses performed for different clients. It is similar to the analysis presented by the author at the 1982 Seventh Annual Fall Meeting of the Section of Litigation of the American Bar Association.

questions, for example, "Will we be able to find a memo purportedly written by the defendant's president urging the sales force to do 'whatever necessary' to make them Number One?"

As Figure 1 illustrates, a decision tree provides a very clear visual way of showing how a case can be won or lost through different combinations of results of influencing factors and ultimate issues. Trying to build such a picture ensures that counsel think carefully not only about the most important uncertainties in the case, but also about the interrelationships among all the important factors. The use of a decision tree also makes this important task easier because, in a complex case, keeping track of all the factors in one's head would quickly become impossible.

Now, rather than guessing the likelihood of winning *overall*, counsel for SmoothShave could use the logic of the decision tree to arrive at a more refined opinion:

> First, counsel should ask how likely the jury would be to find below-cost pricing assuming counsel found the president's memo and assuming the judge had given the jury the instruction counsel favored on how to determine "cost." Counsel might feel that, under these conditions, this issue is almost a sure winner and thus assign a 90% chance of getting the jury to believe the defendant was pricing below cost.
>
> Next, counsel should imagine that they found the document but the judge gave the cost definition instruction favored by the defendant. Under this scenario counsel would feel less hopeful about the jury's finding below-cost pricing but might still feel that the president's memo (combined with his surly personality on the witness stand) would sufficiently inflame the jury so as to yield a 60% chance of a favorable jury finding.
>
> In a similar fashion, counsel would assess the probabilities of good jury findings under the remaining two scenarios.

What counsel would have determined so far is that their chances on this jury question vary significantly depending on which combination of influencing factors exists.[5] Clearly, in order to arrive at the *overall* chances of prevailing, counsel would need to decide which of these combinations is most likely. This would allow counsel to conclude logically whether below-cost pricing is closer to a 90% winner (the top scenario) or only a 20% winner (the bottom scenario).

In expressing their judgments on the likelihood of finding the document and of getting the desired instruction, counsel would do well to first list all the reasons they could think of for getting *either* of the possible outcomes to each uncertainty. Listing the pros and cons makes a realistic assessment more likely. For example, they might develop the following list on the first influencing factor:

5. The preceding discussion should make it clear that Peterson (*supra* note 1, at 27) has seen too few *good* decision analyses.

DECISION TREE REPRESENTS LOGICAL ANALYSIS OF HOW CASE COULD BE WON OR LOST

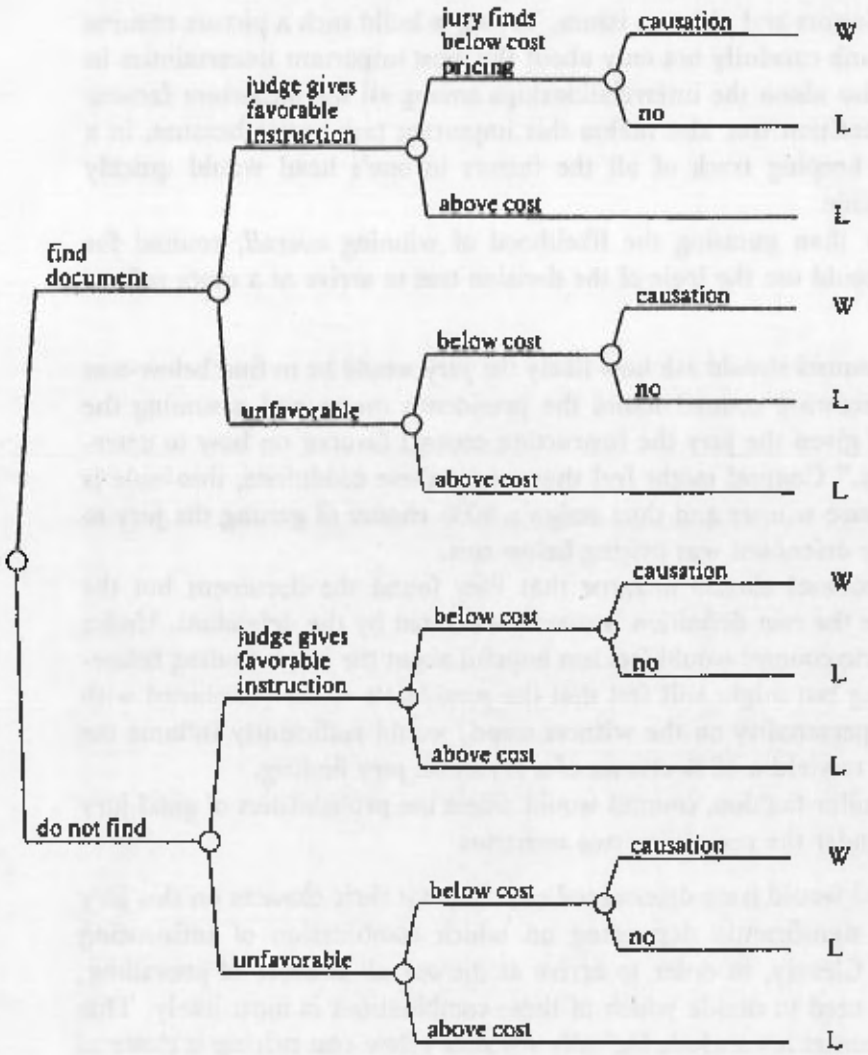


FIGURE 1

Find Document	Do Not Find Document
• President did not destroy his copy.	• Never existed! Salesman who "vaguely recalled it" is bitter over being fired.
• President scared of criminal sanctions.	• The only memos found are rather mild and innocent.

Balancing these possibilities, counsel might assign a 60% chance of finding the document. After similarly thinking about the second factor, counsel might assign an 80% chance of getting the favorable instruction. (See Figure 2.) Now counsel could easily determine the chance of the jury's finding below-cost pricing by giving the 90% first scenario a weight of .48 (= .6 X .8), the 60% second scenario a weight of .12 (= .6 X .2), the 50% third scenario a weight of .32 (= .4 X .8), and the 20% fourth scenario a weight of .08 (= .4 X .2). Thus the overall chance of below-cost pricing's being found by the jury is:

Scenario Weight		Scenario Probability		Overall Probability
(.48	×	90%)	=	43.2%
+(.12	×	60%)	=	+ 7.2%
+(.32	×	50%)	=	+16.0%
+(.08	×	20%)	=	+ 1.6%
				68.0%

Finally, in order to determine the chances of the jury's holding the defendant liable, counsel must also consider the likelihood that, having found below-cost pricing, the jury will also find that the defendant caused plaintiff's damages. Again, counsel should first develop a list of reasons why the jury would or would not find causation:

Jury Finds Causation	No Causation
• Mad at the defendant.	• Believes their expert.
• Likes our witnesses.	• Thinks we mismanaged the business.
• Impressed with our R&D expenditures—we should have been market leader.	

If counsel assessed causation at 90% in the top of the tree and 80% in the bottom, they could extend the previous calculations and arrive at approximately a 60% overall chance of winning.

In a similar fashion, counsel can think systematically about the uncertainties influencing the present value of any recovery (Figure 3), and arrive at a picture of the risks of litigation (Figure 4) that makes it easy for clients to determine their minimum settlement demand or maximum settlement offer.[6]

6. If a client is "risk neutral," then the settlement value can be obtained from Figure 3 by multiplying each of the present-value treble-damage outcomes by its probability of occurring,

USE OF PROBABILITIES SHARPENS THINKING AND ALLOWS LOGICAL CONCLUSIONS

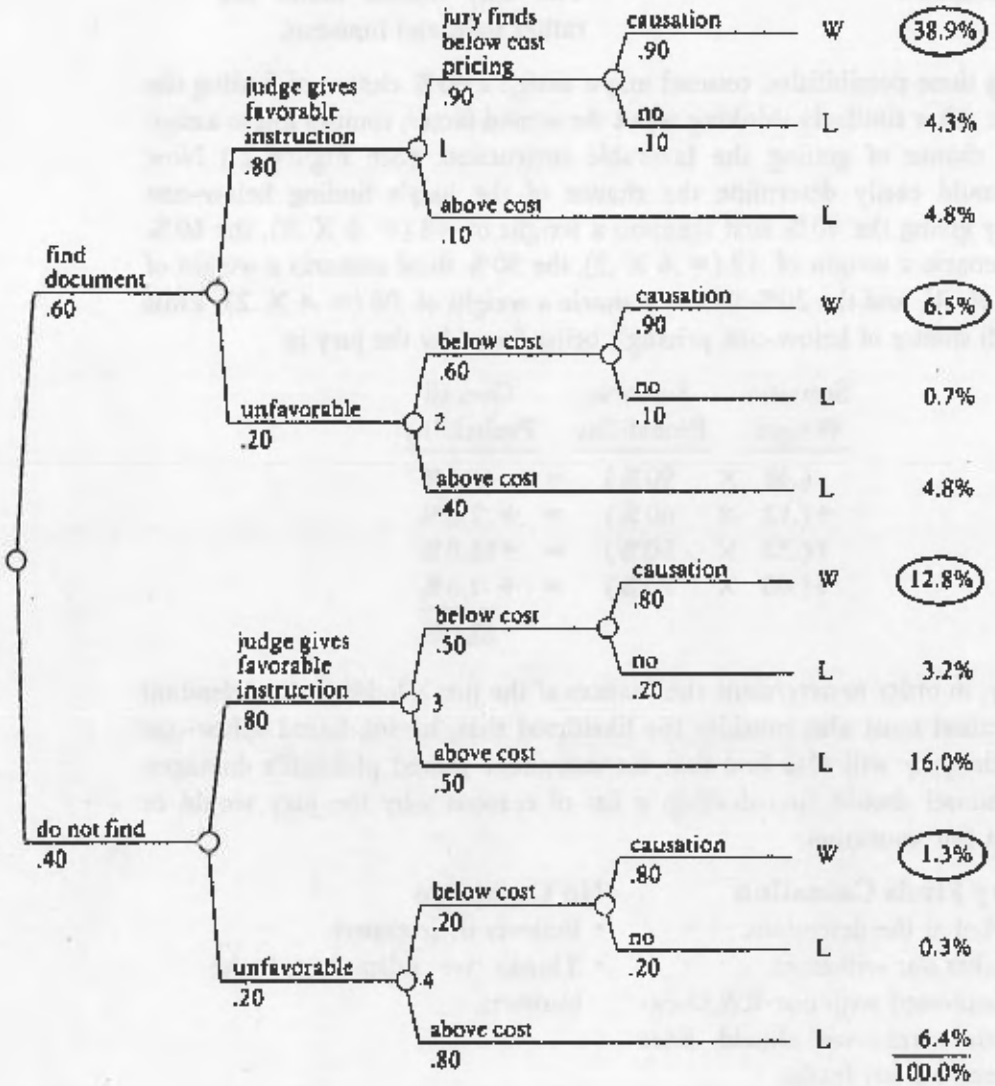


FIGURE 2

EACH SCENARIO CAN BE DESCRIBED BY (1) ITS PROBABILITY OF OCCURRING AND (2) THE PRESENT VALUE OF THE OUTCOME

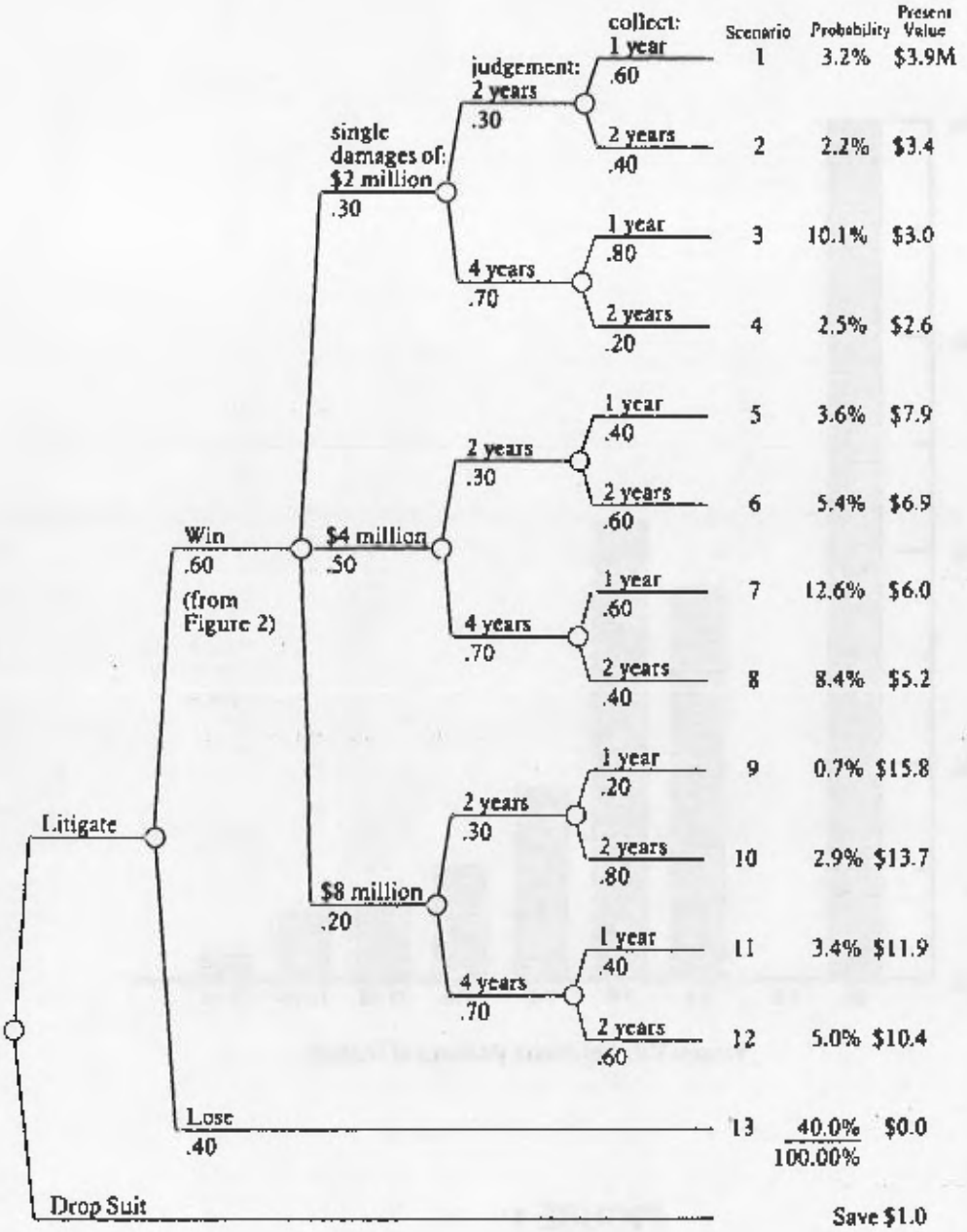


FIGURE 3

A COMPLETE, UNAMBIGUOUS DESCRIPTION OF THE RISKS OF LITIGATION CAN BE PRESENTED TO THE CLIENT

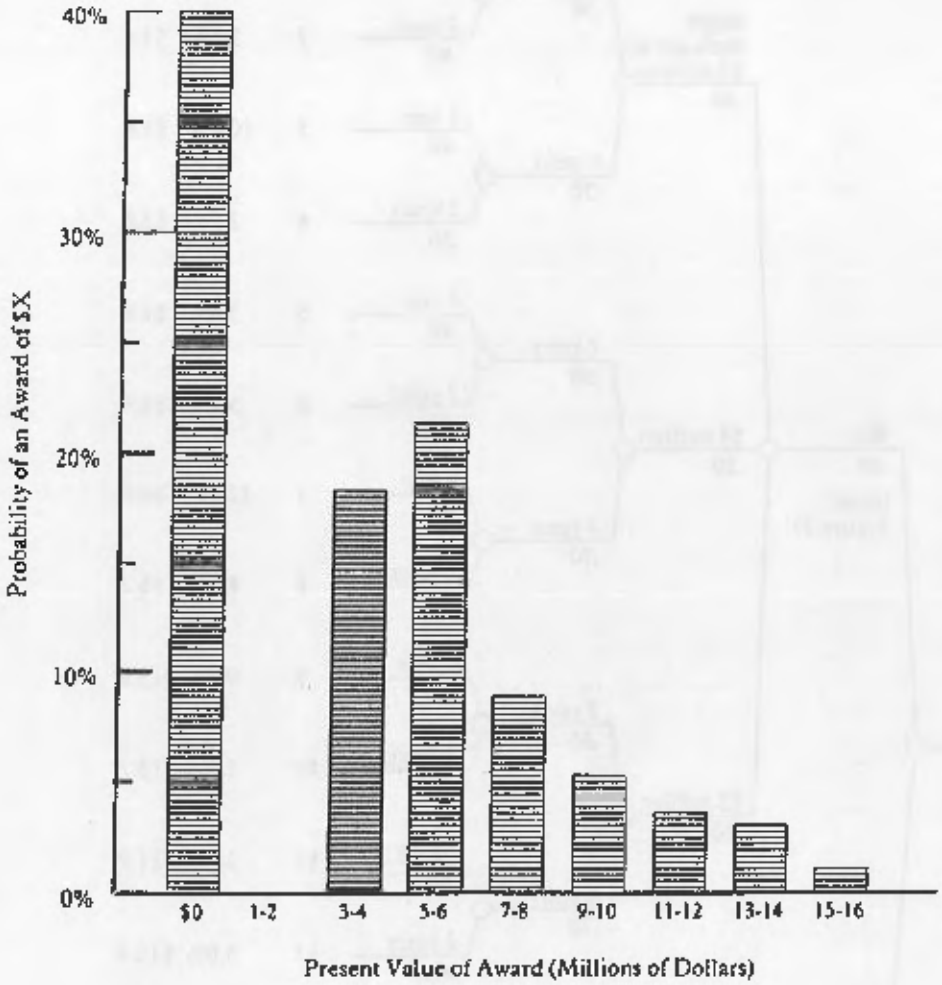


FIGURE 4

This process of disaggregation is fundamental to the way a lawyer naturally thinks and is easily mirrored by a good decision analysis. Also, looking at the decision tree reveals how much easier it is to keep track of all these factors using these techniques than to try to balance all the uncertainties of a lawsuit in one's head. As Harvard professor Howard Raiffa wrote in his famous book:

> The spirit of decision analysis is divide and conquer: Decompose a complex problem into simpler problems, get one's thinking straight in these simpler problems, paste these analyses together with a logical glue, and come out with a program for action for the complex problem. Experts are not asked complicated, fuzzy questions, but crystal clear, unambiguous, elemental . . . questions.[7]

WHAT ARE PROBABILITIES?

The second problem with some of the previous articles is their lack of understanding of probabilities. Probabilities are nothing more than the quantitative expression of a lawyer's professional best guess. Lawyers make best guesses all the time. In fact, that is one of the principal reasons they are retained in the first place—to counsel the client as to the value of a lawsuit. Few lawyers would stay in business if they refused to give opinions.

But what about the merits of quantitative as opposed to qualitative opinions? Qualitative expressions of uncertainty are very ambiguous and misleading. One lawyer may mean 40% when he says "good possibility," while another could mean 70%![8] How is a client or a colleague supposed to know what a lawyer means by such phrases as "Quite likely"; "Distinct possibility"; "Strong likelihood"; or "Not much chance." Especially dangerous are local sayings. For example, some Texas lawyers use the expression of probability: "That dog won't hunt." It seems to mean one has less than a 25% chance!

As soon as a client or colleague has to ask what a lawyer meant by what he just said, the lawyer might as well have used the less ambiguous language of probabilities in the first place.

Another reason for avoiding phrases such as "good possibility" is the difficulty of integrating one's numerous opinions. How good a job can a lawyer do

summing the results, and subtracting the remaining legal fees. In this case, this would produce $3,850,000 − 1,000,000 = $2,850,000. This value is technically known as the "expected value." For risk-averse litigants, a plaintiff's minimum settlement demand will usually be somewhat smaller and a defendant's maximum settlement offer will usually be somewhat higher than their expected values, as their risk aversion causes them to sacrifice some money in order to decrease their chances of ending up at the extreme worse position ("no liability found" for plaintiff, "maximum damage award" for defendant).

7. H. Raiffa, Decision Analysis: Introductory Lectures on Choices under Uncertainty 271 (1968).

8. This degree of discrepancy is not at all unusual. The author has asked well over 1,000 lawyers to attach probabilities to a variety of phrases commonly used to express uncertainty. Even "very likely" brings laughter: to many attorneys it means about 65%, while to many others it means 90%.

combining a "good possibility" with a "very likely" with a "not much chance"? How would he have figured his overall chances of winning the SmoothShave case if each of the uncertainties in Figure 1 had been only vaguely characterized?

Once one appreciates that probabilities are simply a less ambiguous way to express subjective judgments, one should realize how inappropriate it is to talk about a *range* of probabilities, as Greenberg did:

> [T]he lawyer might reckon his client's chances of winning on the question of liability to be between fifty and ninety percent. These minimum and maximum estimates [author's note: later referred to as "pessimistic" and "optimistic" estimates] could be used to create several decision trees in which various estimates of damages could be used to determine a range of expected values.[9]

At any one point in time, there is only one probability that best reflects a single attorney's judgment. This is true whether opinions are expressed qualitatively ("very likely") or quantitatively ("70%"). It is utter nonsense for a lawyer to have a range of probabilities on winning a lawsuit. Imagine telling a client that the overall chances of winning a lawsuit (all legal and factual uncertainties considered) are "about even" (50%), and then in the next breath saying "but this case is almost a sure winner" (90%)!

Besides sounding foolish on its face, there are other problems with Professor Greenberg's suggestion that counsel use a range of probabilities. Why would any client want anything other than the attorney's most realistic assessment? An "optimistic" assessment should be ignored because, by definition, it overstates the value of the case. If relied on, it has the obvious danger of driving a client to reject what is really a good settlement. A similar danger exists at the other end of the range. Labeling an assessment as "pessimistic" is a clear admission that one's case is really better. Decisions based on the pessimistic probability could easily cause a client to pay too much to settle a case.

COMPUTERS AS A SUBSTITUTE FOR HARD THINKING

The above discussion leads to the third criticism of some of the earlier papers. Not only is the notion of probability ranges wrong, it defeats one of the main purposes for performing a good decision tree analysis: to impose rigor on the attorney so that he or she will think as carefully as possible about a case and each of its underlying elements. Allowing for probability ranges will keep an attorney from sharpening his or her views. It will only promote fuzzy thinking.

9. Greenberg, *supra* note 1, at 1575 (footnote omitted). Peterson's criticism of the use of probabilities in decision analysis (*supra* note 1, at 27–28) is equally inappropriate for similar reasons.

The same criticism can be leveled against breakeven or "threshold" analysis, especially the two- and three-way versions suggested by Nagel.[10] Although computers allow all sorts of computations to be performed quickly, they should not become a substitute for thinking hard about complicated problems.

On the other hand, once all the major issues in a case have been tackled head on, a role for using computers (or calculators) to perform "sensitivity analyses" clearly exists: varying probabilities and recalculating the settlement ("expected") value can provide insights valuable for planning pretrial strategy.

For example, counsel for SmoothShave saw that if the probability of "finding the document" could be increased from 60% to 100%, the probability of winning the case would increase from 60% to just over 75%.[11] At the 60% chance of winning, the "expected value" of the case before costs was $3.85 million.[12] At the higher 75% chance of winning (corresponding to a 100% chance of finding the document), the probabilities of each of the thirteen scenarios of Figure 3 were recalculated, and the new expected value before costs was determined to be $4.85 million. This increase of $1 million in expected value gave counsel a rough idea of the most they should spend in searching for the alleged document.[13] They also determined, by performing similar recalculations, that if they had no chance of finding the document, their overall chance of winning the case would fall from 60% to about 35%, leading to a lower case value before costs of about $2.25 million. Figure 5 shows how the expected value of the case varies as the probability of finding the alleged document increases from zero to 100%. Similar graphs can be constructed for each of the uncertainties in the case to help counsel think of where to spend time and money pretrial.[14]

The reader should realize that this kind of pretrial planning is impossible with all the simple decision trees that merely begin with "win/lose."[15] This kind of planning can be performed only following the construction of a richer decision tree that includes both influencing factors and ultimate issues.

10. Nagel, *supra* note 1, at 17.

11. This new probability is obtained by recalculating the chances of following paths 1, 4, 7, and 10 in Figure 2, using a 100% probability of "finding the document."

12. *See supra* note 6.

13. When the amounts that could be won or lost are significant in relation to the company's financial position, a company will not be willing to "play the averages," and it will be necessary to incorporate the company's attitude toward risk taking in valuing the case. *See supra* note 6. Nonetheless, "expected values" can still be used to get a rough, quick idea of how sensitive the case value is to different underlying assumptions.

14. Sensitivity graphs also help to identify when differences of opinion among lawyers are important to resolve. Not every disagreement needs to be the subject of additional legal or other research. (For example, the company would probably proceed with this lawsuit even if one lawyer was at one end of the probability graph for the uncertainty in Figure 5 and another lawyer was at the opposite end. In either event, or anywhere in between, the value of the case justifies the $1 million investment.) But the more complex the case, the more difficult it is to separate those that are significant from those that are not. So, typically, they all get looked into, with some resulting waste of money.

15. *See supra* note 1.

NEW AREAS OF PRETRIAL ACTIVITY WILL OFTEN BE SUGGESTED BY SENSITIVITY ANALYSIS

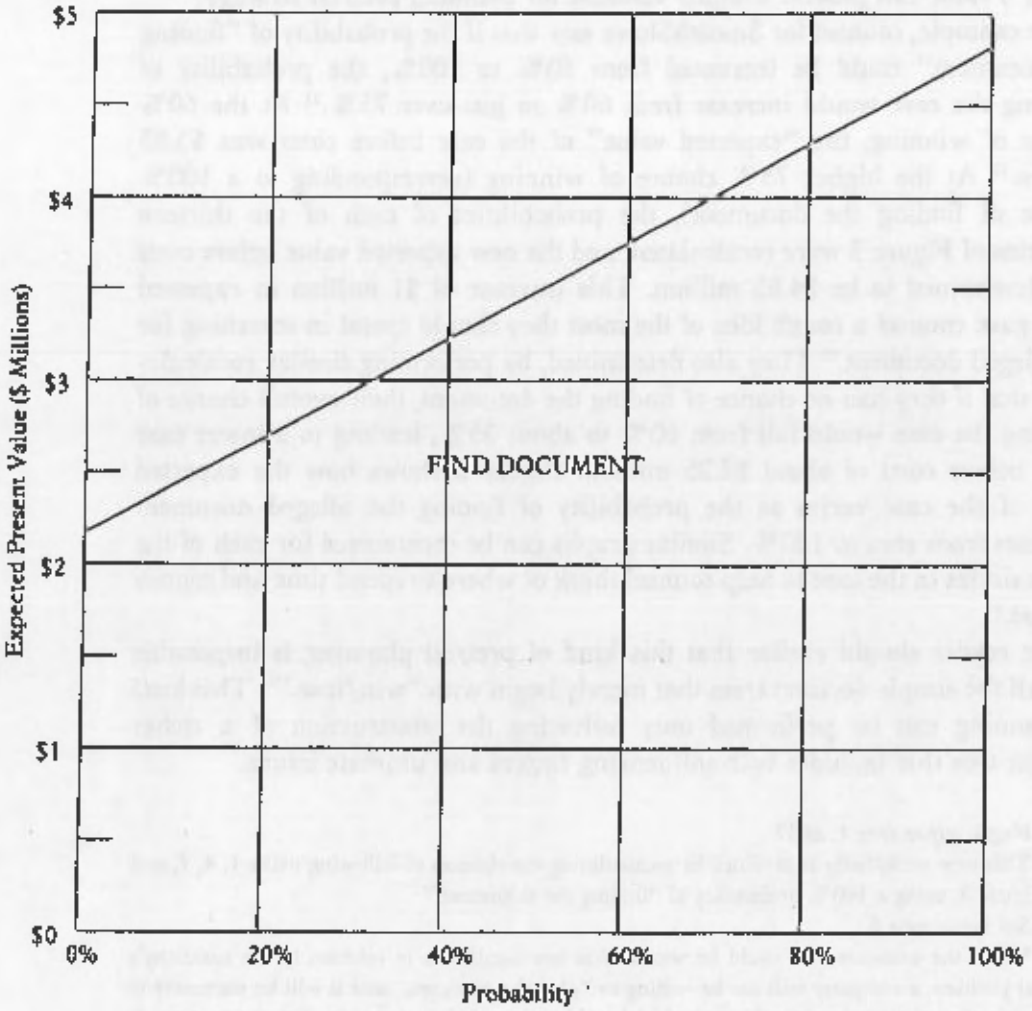


FIGURE 5

CONCLUSION

As with any analytical tool, a decision analysis poorly performed will invite—and deserve—criticism. But as this article hopefully demonstrates, when properly used, decision analysis can be a great supplement to the intelligent attorney.

DECISION ANALYSIS IN NEGOTIATION

JEFFREY M. SENGER*

Imagine a United States President facing a decision on whether to attempt a military mission to rescue Americans trapped in a hostile country. In a meeting in the White House Situation Room, top military advisers describe a possible plan. The President asks about the chances of success for the mission. The advisers respond that there are six crucial stages of the plan, and all have to go smoothly in order for the mission to work. They state that the overall chances for the plan are good because each individual stage has an eighty percent chance of success. What should the President do?

A field known as "decision analysis" can help answer this type of question and many others in a wide range of situations.[1] When parties understand what their chances of success are for each of several possible choices, they can make better decisions on how to proceed. The tools of decision analysis are particularly useful for negotiators. People who are negotiating need to be able to evaluate what is likely to happen to them if they accept a deal and what will occur if they do not.[2]

In the rescue example above, it is easy to see how a President might be tempted to authorize the plan. If the chances of success at each stage of a mission are eighty percent, it may seem that the chances of success for the overall mission would be reasonably good. However, decision analysis shows that the mission is much more likely to fail than succeed. The statistical method used to calculate the overall likelihood of success in this situation requires multiplying the chances of success of each individual stage. Thus the

---

* Senior Counsel, Office of Dispute Resolution, U.S. Department of Justice. A.B. Harvard College; J.D. Harvard Law School. This essay is based on materials developed by the author for training federal attorneys. The views set forth herein are those of the author and do not necessarily reflect the views of the U.S. Department of Justice or the U.S. Government. The author wishes to thank Janice Nadler and Jayne Seminare Docherty for their comments on this essay.

1. Readers desiring additional information on the topics covered in this essay can consult JEFFREY M. SENGER, FEDERAL DISPUTE RESOLUTION: USING ADR WITH THE UNITED STATES GOVERNMENT 80, 113-15 (2004); Marjorie Corman Aaron, *The Value of Decision Analysis in Mediation Practice*, 11 NEGOT. J. 123 (1995); David P. Hoffer, *Decision Analysis as a Mediator's Tool*, 1 HARV. NEGOT. L. REV. 113 (1996); Marc B. Victor, *The Proper Use of Decision Analysis to Assist Litigation Strategy*, 40 BUS. LAW. 617 (1985).

2. *See* ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991) (describing the importance of analyzing the best alternative to a negotiated agreement, known as "BATNA").

President should multiply 0.80 (the chance of succeeding in the first stage) by 0.80 (the chance of the second stage), then multiply this result by 0.80 for the third stage, and so on, all the way through the six stages of the mission. This total, 0.80 x 0.80 x 0.80 x 0.80 x 0.80 x 0.80, (or 0.80 to the sixth power), is 0.26. Thus, the overall chances of success for the mission are only approximately twenty-six percent, or slightly better than one in four.

I. EXAMPLES OF DECISION ANALYSIS

The mathematical processes used in risk analysis may be explained further with several examples. Imagine going to a local carnival and approaching a midway booth with a giant "Wheel of Chance." The wheel has many spaces on it, half colored blue and half yellow. The carnival operator tells you that if you spin and the wheel lands on a blue space, you will win $20.[3] If it lands on a yellow space, you win nothing. How much would you pay to play this game?

Many people can answer this question intuitively, without having to use a mathematical approach. However, following the math in this example can be helpful to understanding what happens in more complicated situations. Decision analysis principles state that the expected outcome of a situation like this is found by multiplying the probabilities of each possible outcome by the result of that outcome (called the payoff), and then summing these products. In the Wheel of Chance example, the probability of landing on blue is 0.50, and the payoff for landing on blue is $20. Multiplying these numbers yields $10. The probability of landing on yellow is 0.50, the payoff for this is $0, and multiplying these numbers yields $0. Adding these two results, $10 plus $0, gives the expected result of the game: $10.

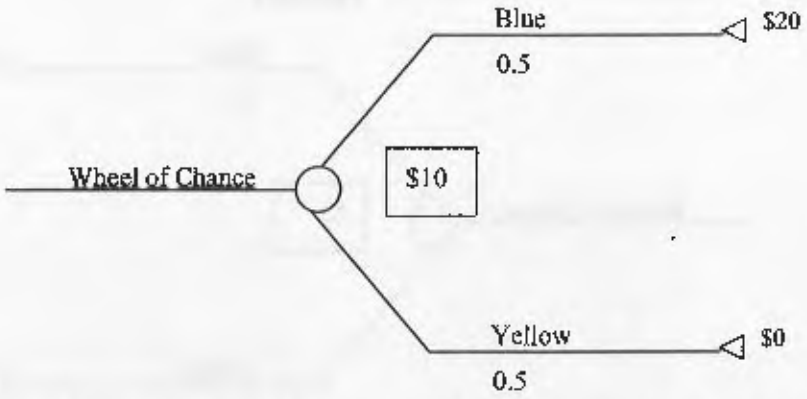
Figure 1 shows a graphical representation of this situation, which is a simple example of a "decision tree."[4] The trunk of the tree (entitled "Wheel of Chance") breaks off into two branches, representing the two possible outcomes of the game, blue or yellow. This juncture is marked with a circle (called a "chance node"), indicating that the results at this point cannot be controlled. The probabilities of each outcome (0.50) are written below each branch. Each branch ends in a triangle (called a "terminal node"), indicating that the game is over at that point, with payoffs of $20 for blue and $0 for yellow. A computer can be used to "roll back" the tree, which gives the expected value of the tree at the chance node. The box next to the chance

3. Assume for purposes of the example that the carnival operator has not rigged the wheel to give an unfair result.

4. Technically, this figure would be called a "chance tree" or an "event tree," as a decision tree would include another branch to indicate the option not to play the game at all.

node in Figure 1 shows the expected value of $10.

FIGURE 1



It is worth noting that $10 is not a possible outcome from playing a single game (which yields either $20 or $0). Instead, it is a mathematical construct providing a sense of what the game is worth, in a theoretical sense, to someone who plays it. One way of explaining this is that the expected value represents the average payoff for someone who played the game many times.

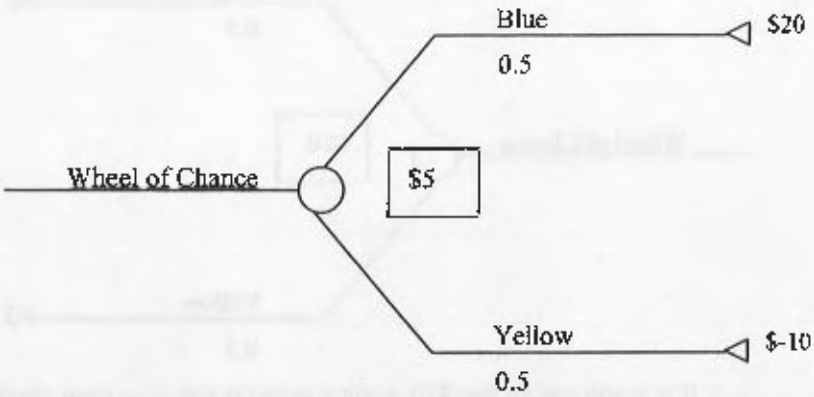
Different individuals will have different reactions to this information. People who do not enjoy playing games of chance may be willing to pay only $8 to play the Wheel of Chance (perhaps because they dislike risking money or because they would rather spend their time riding the roller coaster). On the other hand, carnival midways (not to mention Las Vegas casinos) exist because many people are willing to pay considerably more than $10 to play games such as this.[5]

For another example, imagine a slightly different Wheel of Chance. In this game, if the wheel lands on blue you will still win $20, but if it lands on yellow you must pay an additional $10. How much would you pay to play this game? The analytical approach is the same as in the first example: multiply the probabilities by the payoffs and add the results. The probability of landing on blue is 0.50, the payoff for landing on blue is $20, and multiplying these numbers yields $10. The probability of landing on yellow is 0.50, the payoff for this is -$10, and multiplying these numbers yields -$5. Adding these two results, $10 and -$5, gives the expected result of the game:

5. It is possible to use more advanced decision analysis tools to account for parties' risk preference. These tools can provide more specific information for parties who are inclined either in favor of or against taking risks.

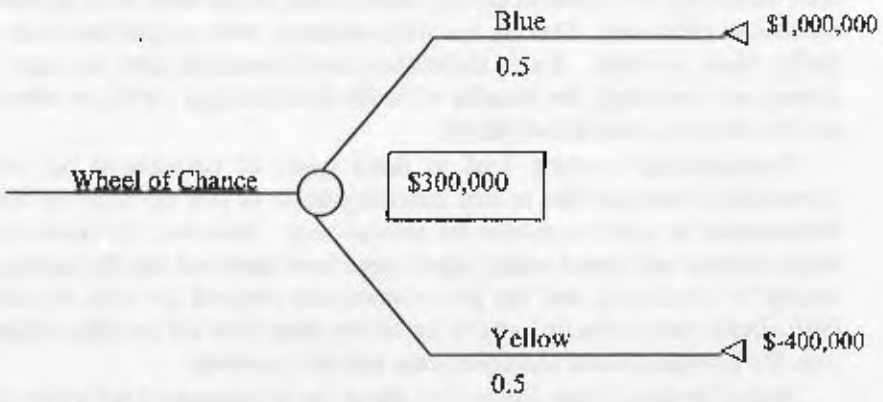
$5. This example is somewhat closer to the realities of litigation, where parties who fail to win lawsuits not only win nothing, but also must pay their attorneys. It is shown graphically in Figure 2.

FIGURE 2



Finally, imagine a high-stakes Wheel of Chance, where the carnival operator will give you $1 million if the wheel lands on blue, but you must pay $400,000 if it lands on yellow. What would you do in this situation? Mathematically, the probability of landing on blue is 0.50, the payoff for landing on blue is $1 million, and multiplying these yields $500,000. The probability of landing on yellow is 0.50, the payoff for this is -$400,000, and multiplying these numbers yields -$200,000. Adding these two results, $500,000 and -$200,000, gives the expected result of the game: $300,000. This is shown in Figure 3.

FIGURE 3



The high-stakes nature of this game introduces another factor into the analysis. Many people could not afford to take a chance of losing $400,000, even though the game as a whole has a highly favorable expected outcome. Similarly, some parties must settle a case in litigation, even when they expect to win, because they do not want to take the chance of losing. This provides another way for the rich to get richer—they can afford to take favorable risks that others must avoid.

II. DECISION ANALYSIS IN NON-LEGAL CONTEXTS

Decision analysis has wide application outside the legal arena, with interesting implications. In some cases, parties knowingly take significant risks because they determine these risks are necessary in order to achieve important goals. For example, planners know that building large public works projects involves substantial risks of bodily injury and even death for workers. With knowledge of the size and nature of the projects, it is even possible to make rough predictions of these events. More than ten people died when the subway system was constructed in Washington, D.C., a result that was reasonably foreseeable when the project began. Nonetheless, projects like this continue to be built because communities (and workers) decide to take risks.[6]

Decision analysis can yield unexpected results. One example is the decision of whether to shop at health food stores. It is possible that eating health food from these stores may result in a slightly longer expected lifespan

6. Some government positions include a specific salary component known as "danger pay" to compensate employees for additional risks they face on the job. *See, e.g.*, U.S. Department of State Standardized Regulations 650-57 (2001), *available at* http://www.state.gov/m/a/als/1767.

for consumers. On the other hand, because there are relatively fewer health food stores than conventional grocery stores, most people must drive a greater distance to get to one. Driving is a risky endeavor, with a significant risk of bodily injury or death. Some statisticians have speculated that the risks of driving may outweigh the benefits of health food (at least for those who do not live close to a health food store).

Environmental analysts look at these types of calculations as well. Communities have decided to send recycling trucks to pick up materials from homeowners in order to protect the environment. However, for rural areas where citizens are spread widely apart, some have theorized that the pollution created by the trucks, and the gas consumption required for them to make their rounds, may do more harm to the environment than the benefits realized from the newspapers and aluminum cans that are recovered.

Justice Stephen Breyer has written about the importance of analyzing risk carefully. He discussed a case over which he presided involving a ten-year effort to force cleanup of a toxic waste dump in New Hampshire:

> The site was mostly cleaned up. All but one of the private parties had settled. The remaining private party litigated the cost of cleaning up the last little bit, a cost of about $9.3 million to remove a small amount of . . . [pollutants] by incinerating the dirt. How much extra safety did this $9.3 million buy? The forty-thousand-page record of this ten-year effort indicated (and all the parties seemed to agree) that, without the extra expenditure, the waste dump was clean enough for children playing on the site to eat small amounts of dirt daily for 70 days each year without significant harm. Burning the soil would have made it clean enough for the children to eat small amounts daily for 245 days per year without significant harm. But there were no dirt-eating children playing in the area, for it was a swamp.[7]

Some may argue that $9.3 million is a small price to pay for protecting the environment, but Breyer responds to that argument as follows:

> The . . . reason that it matters whether the nation spends too much to buy a little extra safety is that the resources available to combat health risks are not limitless. . . . If we take the $9.3 million spent on the New Hampshire waste dump clean-up as an indicator of the general problem of high costs in trying for that "last 10 percent" ($9.3 million times 26,000 toxic waste dumps is $242 billion), we have an answer to

7. STEPHEN G. BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 11-12 (1993) (internal citations omitted).

the question, "Does it matter if we spend too much over-insuring our safety?" The money is not, or will not be, there to spend, at least not if we want to address more serious environmental or social problems—the need for better prenatal care, vaccinations, and cancer diagnosis, let alone daycare, housing, and education.[8]

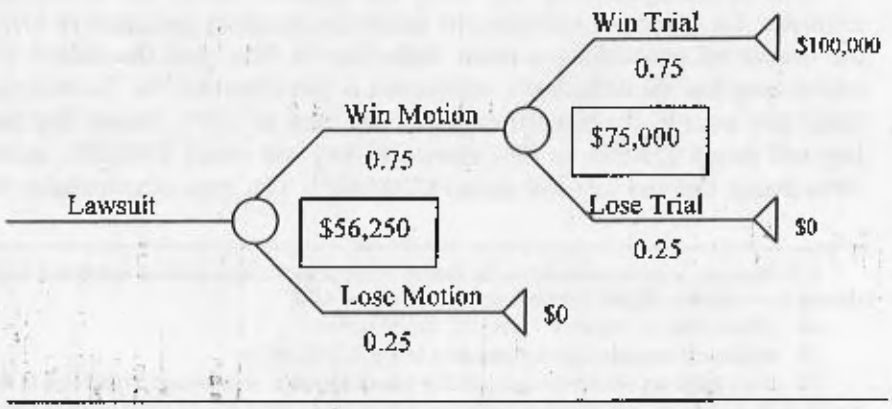
III. DECISION ANALYSIS IN LEGAL NEGOTIATION

Moving to the world of negotiation in litigation, imagine you are the plaintiff in a lawsuit where the defendant has filed a motion to dismiss the case. You believe you probably will win the motion, and you believe you probably will win the trial as well. The damage award from the trial would be $100,000. The defendant has offered to pay you $40,000 to settle the case. Should you accept the offer?

In order to answer this question, you need to provide a mathematical probability that represents the value of the word "probably." This requires making your best estimate of how likely you are to win the motion and the trial. Assume you decide your chances of winning in each instance are 75%. Would you accept the offer in these circumstances?

In this example, you must prevail in both the motion and the trial in order to win any money. Decision analysis under these circumstances involves multiplying the probability of winning the motion by the probability of winning the trial, 0.75 x 0.75, which is 0.5625. This result is then multiplied by the payoff that results ($100,000), which yields an expected value of $56,250. Under this scenario, the $40,000 offer is too low, and the plaintiff should continue with the lawsuit. This case is represented in Figure 4.

FIGURE 4



8. *Id.* at 18-19 (internal citations omitted).

It is worthwhile to examine the effect of attorney fees on this analysis. In the example above, the expected outcome of the case is $56,250. Thus, on average, the plaintiff can expect to receive $56,250 from litigation, and the defendant can expect to pay $56,250. However, assume that both sides would face attorney fees of $10,000 if they took the matter all the way through trial. In this case, the expected income from the lawsuit would be only $46,250 for the plaintiff ($56,250 reduced by $10,000 in fees), and the expected cost of the lawsuit would be $66,250 for the defendant ($56,250 in addition to $10,000 in fees).[9]

This difference in expected outcome creates opportunities for the parties to settle. Any settlement amount greater than $46,250 would represent an improvement for the plaintiff over litigation, and any settlement amount less than $66,250 is better for the defendant. The $20,000 range between these two numbers is a zone of potential agreement. In this case, it is in the economic best interest of both parties to settle somewhere in that range. Decision analysis can be a valuable tool in this regard to show both parties in a lawsuit how they benefit from reaching a settlement.

Decision analysis can be particularly powerful in complex cases. Consider the multiple stages of proof involved in a Title VII discrimination lawsuit. First, in order to survive a motion for summary judgment, the plaintiff must produce evidence sufficient to prevent the defendant from establishing that there is no genuine disputed issue of material fact.[10] At trial, the plaintiff then must establish a prima facie case indicating discrimination.[11] If that burden is met, the defendant must articulate a legitimate, non-discriminatory reason for its actions. In order to prevail, the plaintiff must then establish that this reason is pretextual.

In a hypothetical Title VII case, the plaintiff makes the following estimates: the chance of surviving the motion for summary judgment is 75%, the chance of establishing a prima facie case is 90%, and the chance of establishing that the defendant's explanation is pretextual is 67%. To analyze likely jury awards, the plaintiff estimates that there is a 10% chance that the jury will award $35,000, an 80% chance the jury will award $100,000, and a 10% chance that the jury will award $300,000.[12] This type of calculation is

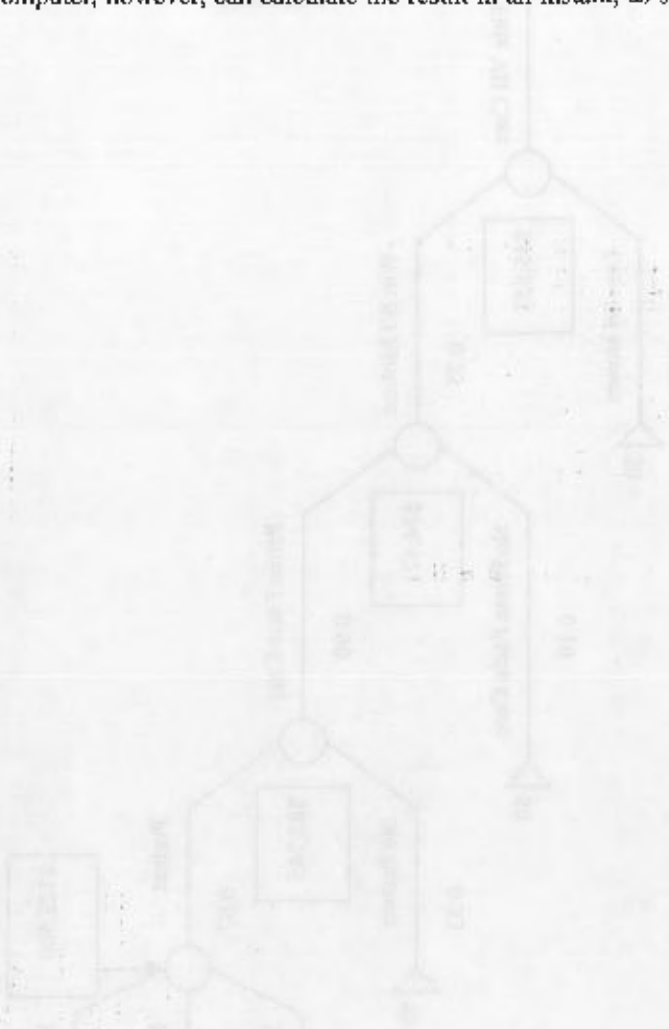
9. Technically, a dismissal based on the motion would probably require lower fees than a trial, altering these numbers slightly, but the general point remains valid.

10. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

11. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

12. Jury awards are often estimated with this type of approach, with normal juries being in the middle of the bell curve (and thus more likely) and with skeptical juries and runaway juries on either end (being less likely).

difficult to do by hand and almost impossible to do accurately by means of a hunch. A computer, however, can calculate the result in an instant, as shown in Figure 5.



Title VII Case
Win S/J Motion
0.75
$55,853
Lose S/J Motion
0.25
$0
Prima Facie Case
0.90
$74,471
No Prima Facie Case
0.10
$0
Pretext
0.67
$82,745
No Pretext
0.33
$123,500
Runaway Jury
0.10
$300,000
Normal Jury
0.80
$100,000
Skeptical Jury
0.10
$35,000

FIGURE 5

This analysis shows that the expected value of the case at the beginning of litigation is $55,853. It also shows the value of the case as litigation proceeds. The second chance node (immediately after the summary judgment stage) has a value of $74,471, indicating that if the plaintiff wins the summary judgment motion, the case rises in worth by almost $20,000. At the final stage (when the jury is deliberating), the case is worth $123,500.

IV. ADVANTAGES AND DISADVANTAGES OF DECISION ANALYSIS

Decision analysis is not a perfect tool. The probabilities that parties place on the likelihood of various events are not magically accurate. The final result of an analysis is only as reliable as the data that parties use to create it, and the data are usually uncertain and subjective. Indeed, the figure that results from a decision analysis can appear artificially precise. Parties must recognize that it represents only an estimate based on the information available at the time.[13]

Nonetheless, decision anaylsis can be a valuable tool to enable parties to make more accurate predictions in negotiation. Assessing the future outcomes is uncertain and subjective no matter what method is used. Predictions based on hunches or intuition are no more accurate than those based on decision analysis, and they may be less so. The advantage of decision analysis is that it allows parties to combine several individual hunches in a rigorous, mathematical manner. As Professor Howard Raiffa wrote, "The spirit of decision analysis is divide and conquer: Decompose a complex problem into simpler problems, get one's thinking straight in these simpler problems, paste these analyses together with a logical glue, and come out with a program for action for the complex problem."[14]

Decision analysis can also help parties overcome the human tendency to be overconfident.[15] The example at the start of this essay shows how it is natural to underestimate the chances for failure in a situation. Looking at the results of a decision analysis can help bring parties back down to earth. As another example of this, the author of this essay is a college football fan who begins every season with great expectations for his team. One reason for

---

13. Parties can perform more complicated calculations, known as "sensitivity analyses," to examine the consequences that result when probability estimates are varied to account for different possible scenarios.

14. HOWARD RAIFFA, DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICES UNDER UNCERTAINTY 271 (1968).

15. Robert N. Mnookin & Lee Ross, *Introduction* to BARRIERS TO CONFLICT RESOLUTION 17-18 (Kenneth J. Arrow et al. eds., 1995).

these expectations is that the probability is high that the team (the Nebraska Cornhuskers) will win each of its individual games. Statistics professor (and Nebraska fan) Brad Carlin examined this phenomenon by calculating the odds of the team winning each of its games. The calculations were done by examining the Sagarin computer rankings of each team, accounting for home field advantage (typically three or four points), creating an expected margin of victory, and determining the likelihood of winning based on all of these factors. The probabilities of victory seem quite high, as in the following example from a recent season:

Opponent	Likelihood of Victory
Arizona State	92%
Troy State	98%
Utah State	99%
Penn State	74%
Iowa State	83%
McNeese State	99%
Missouri	95%
Oklahoma State	89%
Texas A & M	70%
Texas	73%
Kansas	97%
Kansas State	57%
Colorado	83%

These numbers appear to represent overwhelming odds in favor of victory. Indeed, the team is favored to win every single game, many by more than 90%. However, decision analysis shows that that the likelihood of going undefeated for an entire season is very slim.[16] Using these numbers, the chance of an undefeated regular season is only 11%, or about one in nine. Considering the Big XII championship game and the national championship bowl contest, the odds of winning every game drop to only 3%.

Ultimately, negotiators should use decision analysis as a tool. It can be valuable for parties to use their intuition to make their best estimate of the overall value of a case before beginning any statistical analysis. Once the analysis is complete, parties can then compare their initial estimate with the result generated by the computer. When the results are comparable, parties

16. Fans may also remember that the team lost seven of these games that year (2002).

can have more confidence in their position. If they are significantly different, parties should figure out why. In this way, decision analysis can enable parties to examine their assumptions rigorously and determine the best possible strategy for their negotiations.

Decision Analysis as a Mediator's Tool†

David P. Hoffer

I. Introduction

Mediators are continuously searching for new tools and techniques to help overcome the barriers to settlement that render direct negotiations between disputing parties futile. One such technique, decision analysis,[1] is rapidly becoming popular with mediators and parties for its usefulness in breaking difficult impasses.[2]

Although decision analysis is an extremely valuable addition to a mediator's toolbox, it must be used with forethought and a clear understanding of what problems it is best suited to solve. Part II of this Note explains how decision analysis is used in litigation generally; Part III describes how decision analysis is used by mediators. Part IV presents a summary of the obstacles to the use of decision analysis in mediation. Finally, Part V ties together these ideas and proposes a normative framework for the effective use of decision analysis in mediation.

II. Decision Analysis in Litigation[3]

Decision analysis has been traditionally used by businesspeople to model complex decisions involving multiple uncertainties. More

† Awarded First Prize — Student Articles, CPR Institute for Dispute Resolution, New York, New York (1996).

1. The term "decision analysis" was originally used to refer specifically to the analysis of decision trees. In recent years, the term has been used more broadly to describe any of a number of techniques for thinking systematically about decisions. In this paper, the term refers to the traditional use of decision trees.

2. For an excellent discussion of where decision analysis fits in the spectrum of available methods for conducting evaluative mediation, see Marjorie C. Aaron, *The Value of Decision Analysis in Mediation Practice*, Nov. J. 123–33 (April 1996).

3. For a brief tutorial on using decision trees to model decisions, see Appendix A, *infra*.

recently, it has gained acclaim in the legal community as a methodology for making decisions in complex litigation.[4] Litigators facing increasing delays and costs have intensified their efforts to reach fair settlements early in the litigation process, when each side's evaluation of its case is still being formed. They have increasingly used decision analysis as a means of structuring the issues in the case, communicating about the dispute (both among co-counsel and between lawyer and client), determining settlement value, and allocating resources before trial.[5]

Decision analysis helps disputing parties to value their litigation alternatives, or BATNAs (*Best Alternative To Negotiated Agreement*).[6] A typical decision tree used in litigation has two branches: "litigate" and "settle." The "settle" branch may reflect the other side's most recent offer, or it may reflect the lawyer's estimate of what the adverse party might accept in settlement. The "litigate" branch is often an extended "chance tree" the branches of which represent the different events that may transpire during litigation. Sometimes, it is useful merely to model the litigation alternative, without reference to a received or anticipated settlement offer. The result is a chance tree, like that emanating from the "litigate" node in a conventional litigate/settle decision tree, whose expected value is the expected value (or cost) of litigation.

Figure 1 presents a sample tree illustrating a corporation's decision regarding an hypothetical employment dispute.[7] Assume that a

4. *See, e.g.*, Marc B. Victor, *The Proper Use of Decision Analysis to Assist Litigation Strategy*, 40 BUS. LAWYER 937 *passim* (1985) (responding to critical misconceptions of the use of decision analysis and suggesting that it can be a useful analytical tool to value complex litigation).

5. For example, a litigator can use sensitivity analysis to explore the question: "Shall I incur $30,000 in legal fees for my client in order to narrow down my estimate of the probability of winning summary judgment in this case?" If the analysis indicates that a change in the probability of winning summary judgment will yield a change in the expected value of litigation of only $30,000, then the lawyer might choose to expend resources elsewhere. Applications such as this one, in which one party can use decision analysis to make partisan strategy decisions in the course of litigation, are beyond the scope of this paper. For an incisive summary of such partisan applications of decision analysis to litigation, see Morris Raker, *Software to Model the Uncertainties in Litigation*, *in* WINNING WITH COMPUTERS: TRIAL PRACTICE IN THE TWENTY-FIRST CENTURY, PART II 175 (John C. Tredennick, Jr. ed., 1993). For an explanation of the use of sensitivity analysis, see *infra* note 13 and accompanying text.

6. *See* ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 97–106 (2d ed. 1991).

7. All diagrams in this paper were produced using Decision Analysis by TreeAge (DATA), a decision analysis software package available for Windows and Macintosh from TreeAge Software, Inc. of Williamstown, Massachusetts. Computer software can render the use of decision analysis much less daunting, because it provides an easy mechanism to draw, modify, and analyze the tree in a graphical and intuitive fashion.

former employee, Ms. Jones, has sued the XYZ Company alleging discrimination, and she seeks back pay, emotional distress damag and "front pay" (compensation for lost future earnings). If settlem negotiations fail, XYZ is shielded from liability by the legal hurd that Jones must surmount. First, she must establish a prima fa case of sex discrimination as defined in the applicable statute. S ond, once XYZ Company offers a "legitimate business justificati for the dismissal, Jones must prove that the justification is a pret for discrimination.[8] Satisfying this burden establishes XYZ's liabil and entitles Jones to back pay; Jones must then prove the amount emotional distress damages and front pay to which she is entitle

Each terminal node reflects one possible outcome. For examp the fourth terminal node from the top reflects the outcome in whi liability is found (and back pay is awarded), medium front pay awarded, and emotional distress damages are not awarded.

The costs and probabilities associated with each event are mi ing from this diagram. While lawyers often have an empirical bas for estimating costs, estimates of probabilities and damage awar can be more elusive. The decision analyst must rely on his profe sional judgment to develop reasonable approximations based on th circumstances, the applicable law, the litigation forum, the skill opposing counsel, the astuteness of the judge, and so forth.[9] For pu poses of this example, if we make some reasonable assumptions, th tree would look like Figure 2.[10]

8. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 799–803 (1973).

9. The reader who is skeptical of the utility of rough estimates must remembe that probability and damage figures are implicitly estimated, roughly and in the ag gregate, every time a lawyer makes a decision about whether or not to settle a case fo a given dollar amount. Estimating them individually and with precision spreads th uncertainty across all of the issues in the case and enables more focused analysis o the uncertainties most crucial to the decision. Fortunately, once the model is devel oped, computer software can facilitate the process of honing these numbers usin techniques such as sensitivity analysis.

10. Assumptions used in formulating this tree are as follows: the probability o establishing a prima facie case and pretext are 80% and 67%, respectively; back pay (if awarded) would be $100,000; the likelihoods of high, medium, low, or no front pay are 5%, 15%, 30%, and 50%, respectively; front pay may be $100,000, $250,000, or $500,000; the probability of an emotional distress damages award is 90%, 70%, 50%, and 30%, respectively, corresponding to the likelihood of front pay (in recognition that the more a jury is willing to award in front pay, the more likely it is to award emotional distress damages); emotional distress damages (if awarded) can be proven to be $35,000; Ms. Jones has offered to settle the case for $130,000; and rejection of the offer and proceeding to trial would incur an additional $30,000 in legal fees.

FIGURE 1

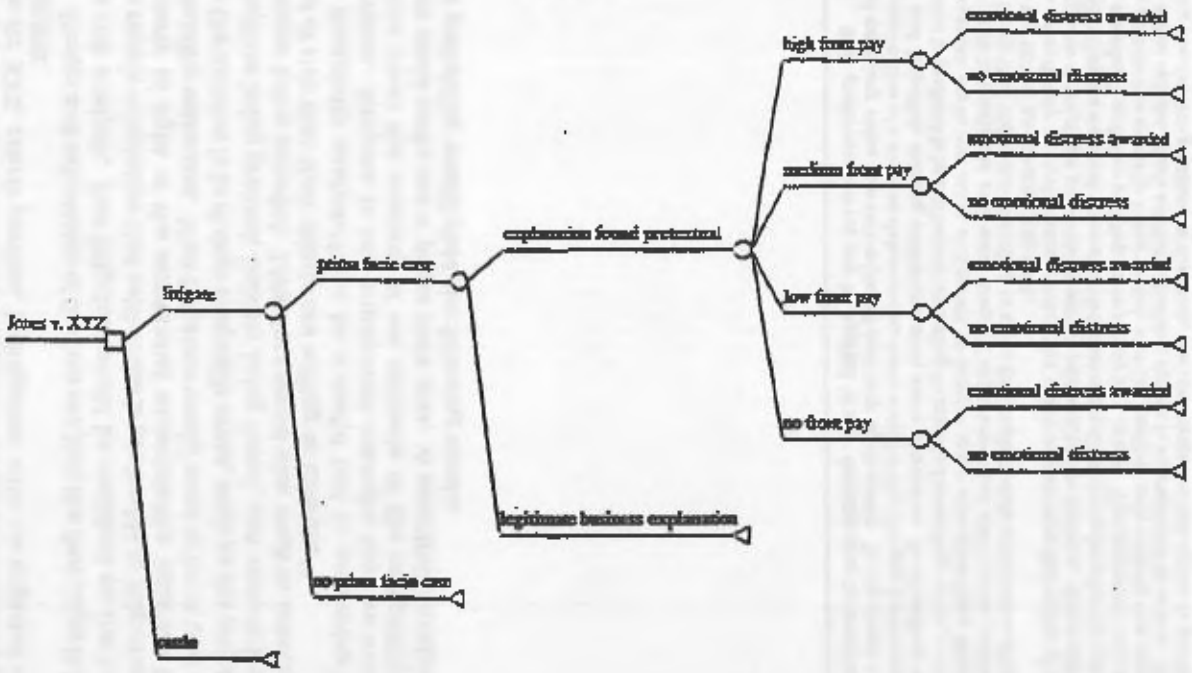
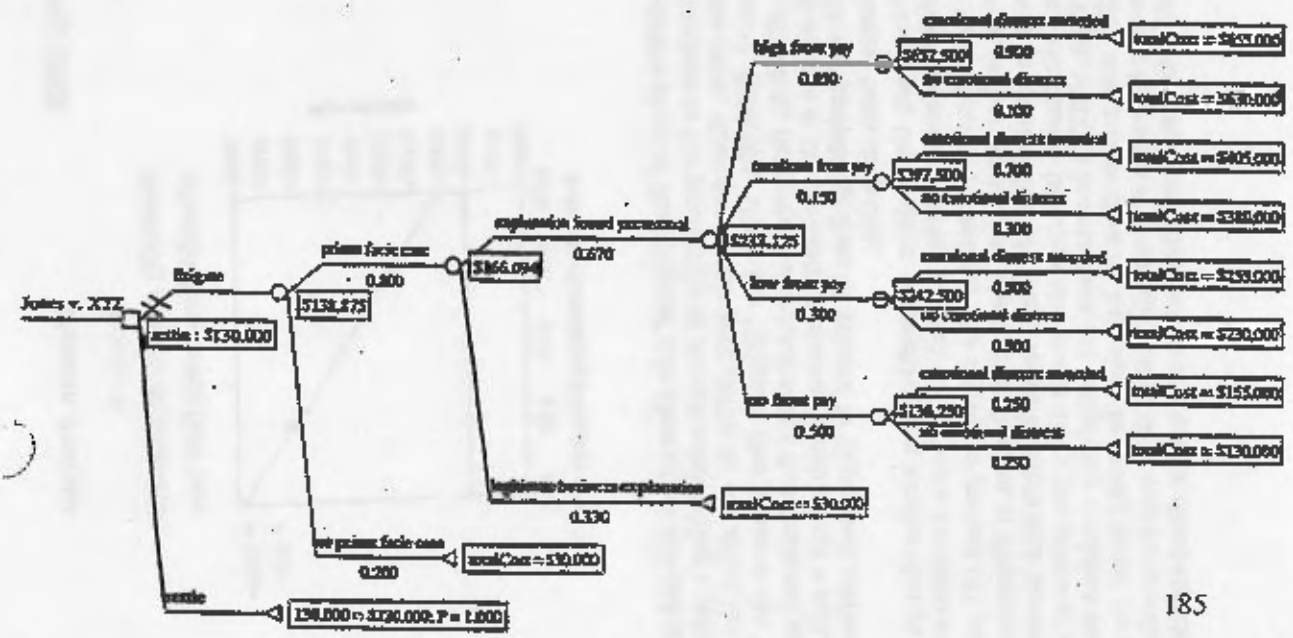


FIGURE 2



In this case, a settlement of $130,000 would be financially preferable for XYZ, *ceteris paribus*, to litigation with an expected cost of $138,875.

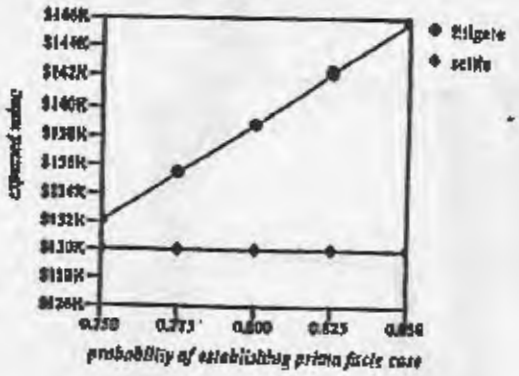
Design and calculation of the tree are just the first steps in litigation risk analysis. Few litigators would be confident on the basis of this simple calculation that settlement is preferable to litigation, particularly in light of the substantial uncertainties inherent in the probability estimates. Most litigators would want to know how sensitive the decision is to change in specific areas, such as the probability of motions being granted, liability being found, and various levels of damages being awarded. Litigators would also want to consider the level of risk that their clients are willing to tolerate.[11]

Sensitivity analysis[12] can be a useful tool in answering these questions. Suppose, in our employment example, that we were uncertain about the accuracy of our estimate of the probability that Jones could make out a prima facie case. A sensitivity analysis on that probability would yield the following result:

11. Risk preference curves can be applied to any decision tree to translate expected monetary value into risk-adjusted certainty equivalents. In the *Jones v. XYZ* case, application of a concave risk-aversion curve would widen the gap between settlement and litigation, making settlement even more attractive. In situations where litigation is preferable to settlement according to expected monetary value, a concave risk-aversion curve can cause settlement to become more attractive than litigation. This result is consistent with most lawyers' experience that risk-averse parties are more likely than risk-neutral parties to enter into unfavorable settlements simply to avoid the risk of an adverse judgment.

12. Sensitivity analysis demonstrates the effect on the expected value of available options of varying a particular quantity relevant to the decision. It is performed by calculating the expected value of each option using different values for the quantity being examined, and then plotting those values on a graph. The horizontal axis of the graph reflects the quantity being varied, and the vertical axis reflects the expected value of the options. Each available decision option is represented by a line. By examining the relative positions of the lines, one can discern which option is preferable at any given value of the quantity at issue.

FIGURE 3
Sensitivity analysis on probability of establishing prima facie case



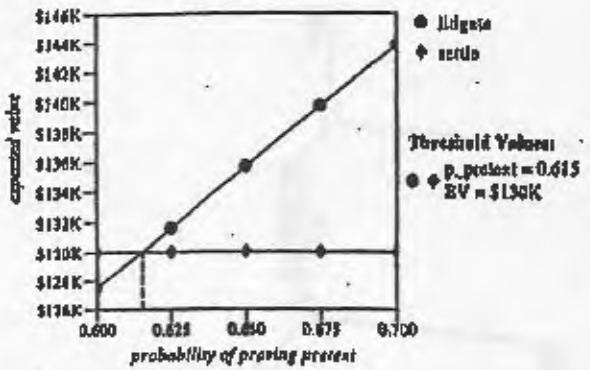
The positive slope of the "litigate" line shows that the cost of litigation increases as the probability of Jones's establishing a prima facie case increases. Changes in this probability do not affect the cost of settlement, $130,000. Since the "litigate" line is above the "settle" line at all points, the graph indicates that the decision is not sensitive to a 5% change in the probability of Jones's making out a prima facie case. At any probability from 75 percent to 85 percent, settlement is still cheaper than litigation.

By contrast, the decision is sensitive to a similar change in the probability of Jones's proving pretext, as Figure 4 demonstrates.

At the estimated probability of a finding of pretext (67 percent), settlement is less costly than the expected value of litigation; however, once the probability of pretext drops beneath 61.5 percent, the litigation alternative becomes less costly than the proposed settlement. Thus, if XYZ's lawyer were not completely confident that the probability was greater than 61.5 percent, he would invest resources in narrowing the range of probability that Jones would prove that the justification for the termination was a pretext for discrimination.

FIGURE 4

Sensitivity analysis on probability of proving pretext



III. DECISION ANALYSIS IN MEDIATION[13]

A mediator is usually called in to facilitate the settlement of a dispute in which direct negotiations have been derailed by one or more "barriers to settlement."[14] Mediators can overcome some barriers to settlement more easily than others. For example, when mediators facilitate communication between parties and defuse emotional obstacles, they help to correct informational imbalances. Mediators are less effective at facilitating the resolution of issues of principle, since the party seeking vindication often cannot achieve that goal in a private forum. Also, mediators may have less success

13. The use of decision analysis does not depend on the school of mediation theory to which the mediator subscribes. Broadly speaking, there are two poles — purely facilitative and purely evaluative — on the spectrum of mediation styles. The primary difference between points along this spectrum is the degree to which the mediator offers his own opinions with respect to the relative merits of the parties' underlying cases. While a decision tree can be used as a vehicle for communicating and justifying a case evaluation, it can also be used as a purely facilitative tool. Thus, non-evaluative mediators need not shy away from decision analysis for fear of losing their "neutrality."

14. The most frequently encountered barriers to settlement are: different predictions about trial outcomes, asymmetric information, emotional issues, different views of the facts, constituencies, agency problems, poor communication, cognitive devaluation, linkage to other disputes, unfavorable combinations of risk and loss aversion, strategic behavior and posturing, and issues of principle. *See generally* Robert H. Mnookin & Lee [illegible], *Introduction to* BARRIERS TO CONFLICT RESOLUTION 3 (Kenneth Arrow et al. e[illegible]95) (analyzing some of the most common barriers to settlement).

in harmonizing different predictions about trial outcomes, because the trial preparation process encourages parties to focus on the strengths rather than the weaknesses of their respective cases.[15]

A mediator can utilize decision analysis to help parties overcome barriers to settlement, by working with both sides to develop a joint model.[16] This technique usually entails designing a chance tree that represents the litigation alternative for both sides, such as that in Figure 5.

15. The mediator can also assist each party privately in formulating a decision tree which models that party's litigate/settle decision. Such "partisan" decision trees typically follow the model in Figure 1; the mediator can serve as a neutral sounding board and evaluator in assigning values to the branches of the tree. The mediator may elect to introduce the concept of decision analysis in separate private sessions with each party, building a simplified structure and eliciting probability estimates with respect to liability and levels of damage awards. The mediator can use the forum of a private session to question the lawyers on their respective probability estimates, noting the weaknesses in their respective cases and shaping a tree that is realistic.

Even when a mediator helps both sides to develop their respective trees, there may be substantial structural and numerical differences. One party may face decisions (such as whether to file particular motions or perform additional research) that the other party may not face or even know about. The mediator's ability to advise each party confidentially on the development of its tree is valuable in helping that party to assess its litigation alternative thoroughly. Such structural discrepancies, however, can impede the mediator's ability to build a "joint" [illegible] applicable to both parties.

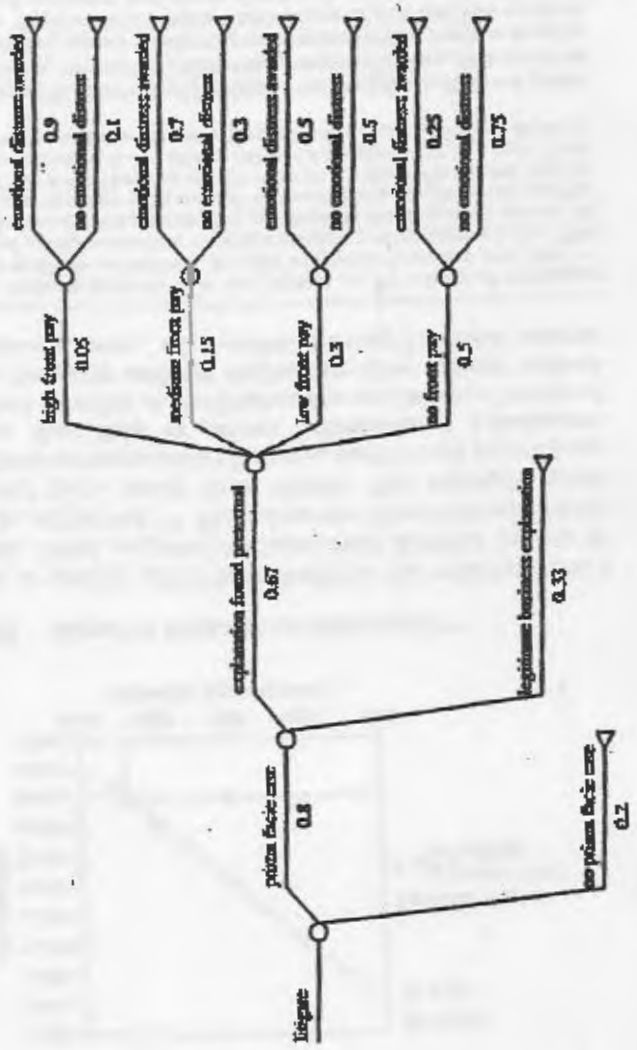


FIGURE 5

The parties can then focus their debate on specific aspects of the jo decision tree, which can lead to a more efficient, product negotiation.[16]

A. *Surmounting Common Barriers to Negotiation*

The most common barriers to settlement are described belo along with an explanation of how decision analysis can help the me ator to surmount them.

1. *Different Predictions About Trial Outcomes*

When parties' lawyers reach different conclusions about the leg merits of their clients' cases, their disparate valuations of the ca can impede settlement. Many contrasting predictions can be trans lated into differing probability estimates at specific points in a dec sion tree: the probability of winning a motion, a specific factu finding, or a certain level of damage award. This "translation" ca narrow the focus of discussions, forcing counsel to refine their argu ments and justifications to make a credible case in the course of th mediation. Experimentation with a decision tree can also influenc the parties' actual perceptions of the overall value of the case.

2. *Asymmetric Information*

When one party is acting on information to which the other party is not privy, settlement may be more difficult. If one party possesses a piece of evidence of which the other party is unaware, their respec tive valuations of the case will be different, and unassisted settle ment may be impossible.[17]

By serving as a repository for information about the issues and uncertainties in the case, a decision tree can facilitate sharing of in formation that otherwise might have remained private. Through a

16. This benefit is most manifest when there are multiple legal questions in the case, because the analysis can reveal which issues are most crucial to reaching agree ment. A dispute driven by a simple "yes/no" question is less amenable to settlement through modeling, because there is less to "narrow down" in the process.

17. Information asymmetries may also hasten settlement, as when A possesses harmful information about its own case and agrees to settle at a figure more favorable to B than A would have accepted in the absence of the evidence. *See* George A. Akerlof, *The Market for Lemons: Qualitative Uncertainty and the Market Mechanism*, 84 Q.J. ECON 488, 495 (1970); Lucian A. Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404, 405 (1984); Robert B. Wilson, *Strategic and Informational Barriers to Negotiation*, in BARRIERS TO CONFLICT RESOLUTION, *supra* note 14, at 113.

decision tree, each party will learn more about the assumptions underlying the opposition's case, as the lawyers explain the basis for probability and value estimates. This process enables each party's counsel to consider all of the issues influencing the other side's valuation, and it also provides a valuable opportunity for each party to see the case from the other's perspective. Ultimately, it may help the parties to reach convergent expectations about the value of the case.

3. *Emotional Issues*

Parties (and their lawyers) can become emotionally involved in their case, which can impair rational decision-making about settlement. By providing a logical valuation tool that effectively transforms the dispute into a business problem, the mediator can use decision analysis to move beyond emotional issues and toward a rational resolution of the dispute. Emotions are less likely to be triggered by a debate over a specific probability than by a general debate about the merits of the case. Decision analysis can thus help to "separate the people from the problem."[18]

4. *Different Views of the Facts*

Parties will value litigation differently when their perceptions of the relevant facts differ. When parties predict different litigation outcomes, settlement is more difficult.[19] Decision analysis can differentiate between those factual disputes whose resolution is essential to a settlement and those whose resolution is not. Sensitivity analysis can help parties identify, and focus their attention on, those factual disputes that have the greatest impact on the settlement value of the case.

5. *Constituencies*

When lawyers (or other agents) represent diverse constituencies whose approval is necessary for settlement, the bargaining process may be difficult.[20] This phenomenon may be seen as a "two-level game" in which the agents are negotiating both with each other and

18. *See* Fisher et al., *supra* note 6, at 17–39 (exhorting parties to distinguish between tensions in their relationship and substantive disputes, and to address these as types of conflict separately).

19. *See* Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: User-Friendly Guide to Selecting an ADR Procedure*, 10 Neg. J. 49, 59 (1994).

20. *See id.* at 57.

with their respective clients or constituencies.[21] In such situations the parties may design a decision tree to explain the reason for entering into an agreement. After a tentative settlement has been reached, a negotiator can present the decision tree to his constituency and explain why a settlement is rational in light of the risks modeled by the decision tree. Such a tangible demonstration can be very effective in securing a group's support for an agreement that might otherwise seem unwarranted.

6. *Agency Problems*

The negotiation process is complicated when the lawyer takes into account his own interests. When the lawyer's incentives differ from those of the client, as is often the case with both hourly fee arrangements and certain contingent fee arrangements, these differences in interests can block agreement.[22]

Decision analysis diminishes the lawyer's ability to persuade the client to act counter to his self-interest by highlighting the client's true goals. The process of designing the decision tree forces the client and the lawyer to formulate an objective jointly (usually the maximization of net income or minimization of total cost). Faced with a decision tree that demonstrates clearly which course of action is best suited to achieve the client's goals, the lawyer will be less able to manipulate the process to serve his own ends.

7. *Poor Communication*

Poor communication between parties or between lawyers — resulting from hostile relations or poor communication skills — can prevent crucial information from being shared by all stakeholders.[23] Decision analysis can make communication more productive by narrowing the issues, sharpening the arguments, and improving understanding. Parties will gain a better sense of the issues on which they

21. *See generally* Lawrence Susskind & Jeffrey Cruikshank, Breaking the Impasse: Consensual Approaches to Resolving Public Disputes (1987) (providing a guide to strategies for resolving public disputes consensually); Robert D. Wilson, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, in Double-Edged Diplomacy: International Bargaining and Domestic Politics (Peter B. Evans et al. eds., 1993) (exploring the effect of domestic constituencies on the dynamics of international negotiations).

22. *See* Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 Ohio St. J. Disp. Resol. 235, 242–43 (1993); Bruce L. Hay, Optimal Contingent Fees in a World of Settlement (October 1993) (unpublished manuscript, on file with the Program in Law and Economics, Harvard Law School).

23. *See* Sander & Goldberg, *supra* note 19, at 54–56.

disagree. Some issues will turn out to be sources of little disagreement; others will be revealed through sensitivity analysis to have little impact on the total case value. This educational process allows the parties and the mediator to focus their efforts on the key areas of dispute. Furthermore, reduction of the litigation to a decision-analytic model helps lawyers and mediators transform an abstract, heated debate about the overall merits of a case into a concrete, detached discussion about the probabilities and costs associated with specific events.

8. *Reactive Devaluation*

This psychological mechanism, in which the recipient of an offer concludes that "it must not be good enough for us if they're willing to offer it," can prevent workable solutions from being ratified.[24] Decision analysis can minimize reactive devaluation by creating acceptable settlement figures through the application of a rational framework, rather than by a traditional exchange of offers and counteroffers. A party is less likely to devalue the other's offer if it understands the offer's genesis.

9. *Linkage to Other Disputes*

When the resolution of the instant dispute depends on the disposition of another conflict, settlement may be hindered unless the linked dispute can be addressed in a settlement package.[25] To the extent that a decision tree model can be broadened to address the possible results of collateral disputes, the parties can use it to determine a reasonable settlement value for multiple disputes that exist between the parties. The parties can expand the tree to account for the options and uncertainties associated with the collateral disputes and then use the aggregate model to determine an appropriate "package" settlement value.

10. *Unfavorable Combinations of Risk and Loss Aversion*

Risk aversion explains a party's willingness to forego a chance to win a large gain in order to be guaranteed a smaller one.[26] Conversely, loss aversion explains a party's inclination to risk a large loss

24. *See* Mnookin, *supra* note 22, at 246–47; Mnookin & Ross, *supra* note 14, at 15.

25. *See* Sander & Goldberg, *supra* note 19, at 57–58.

26. *But see id.* at 59 (describing the "jackpot syndrome" in which a plaintiff is driven to trial by the prospect of a huge payoff).

in order to avoid having to make a smaller, certain payment.[27] plaintiff is risk averse and defendant is not loss averse, the case mu settle more easily because each party wants to avoid the risk of bei defeated; however, settlement will be unlikely if a loss averse defen ant is willing to risk a costly judgment rather than pay out a certa sum in settlement.

While negotiation often masks differences in risk and loss ave sion (since neither party wants the other to know when it is bluffing decision analysis can illuminate differences in risk preferences in constructive way. Each party can use the decision tree to test its ow and its opponent's risk preferences. The ability of decision analysi software to develop and apply risk-preference curves can accour more precisely for risk.

11. *Strategic Behavior and Posturing*

Uncooperative behavior is central to many lawyers' strategies indeed, it may be perceived as poor lawyering to forego such behavior In an effort to shift the bargaining range in his favor (or to avoi letting the range shift in the adverse party's favor), a lawyer may exaggerate the merits of his case to create the appearance that there is no zone of potential agreement. These persuasive arguments may commit the lawyer to a recalcitrant posture, which may be hard t abandon in settlement discussions.[28]

By encouraging parties to work together on a joint solution, a mediator can use decision analysis to minimize posturing and other strategic behavior. Some posturing will necessarily take place as the details of the tree are developed, but it is likely to be more focused and less obstructive than "grandstanding" about the value of the case.

12. *Issues of Principle*

When an issue of law, precedent, public policy, or personal pride is at stake, parties will often resist settlement because the privacy of the process does not allow this interest to be vindicated in a public forum.[29] While it is difficult to put a monetary value on issues of

27. *See* Mnookin, *supra* note 22, at 242–46; Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, in BARRIERS TO CONFLICT RESOLUTION, *supra* note 14, at 54–59.

28. *See* Mnookin, *supra* note 22, at 239–42.

29. *See* Sander & Goldberg, *supra* note 19, at 57.

principle, a mediator can use a decision tree to highlight and challenge parties' implicit valuation of the principles at hand. For example, suppose that the XYZ Company refuses to settle for more than $50,000, preferring to go to court as a matter of principle. The mediator can ask the defendant whether he is willing to sacrifice over $66,000 (the difference between the acceptable settlement figure and the expected cost of litigation) to establish the principle that one should not settle baseless claims. If the principle is so important to the defendant that he answers in the affirmative, the parties can save time and money by terminating the mediation and the settlement negotiations. On the other hand, if the defendant determines that the value of the principle is not as great as the exposure to liability modeled by the decision tree, he will decide to relax the artificial $50,000 settlement cap in the name of rational decision-making.

B. *Collateral Effects*

In addition to resolving some of the above barriers to settlement, the use of decision analysis by a mediator can benefit the parties through several collateral effects.

1. *Setting Client Expectations*

The translation of focused discussions into hard numbers serves as a valuable tool through which lawyers can communicate with their clients about case valuation and settlement decisions. The average layperson is ill-equipped to decipher legal argument and strategy for purposes of decision-making. If he has an effective lawyer who argues persuasively, the layperson may find it difficult to see weaknesses in his own case. Much as a mini-trial affords decision-makers the opportunity to hear opposing counsel's arguments directly,[30] decision analysis affords the opportunity to demonstrate the expected bottom-line impact of those arguments on the range of potential litigated outcomes.

2. *Enhancing Cooperation*

When both parties and the mediator understand the grounds for the parties' differing valuations of the case, the mediator can help the parties to treat the dispute as a joint problem. The decision tree can divert the lawyers' energies away from battling one another and toward finding creative ways to exploit their different perceptions in a

30. *See* Eric P. Green et al., *Settling Large Case Litigation: An Alternate Approach*, 11 Loy. L.A. L. Rev. 493, 509 (1978).

settlement agreement. This shift in focus can also defuse the emotional barriers to settlement by fostering an atmosphere in which specific disagreements on points of law are addressed in technical rather than rhetorical debate.

3. *Legitimacy*

The use of a recognized methodology to model litigation risk, combined with the use of a computer and specialized software, adds legitimacy to the mediation process. This legitimacy is helpful both in motivating the attorneys to settle and in persuading clients that there is a rational and articulable basis for agreeing to a particular settlement.

C. *Implications*

Once decision analysis has been utilized, the dispute resolution process can take any of several turns. The case may settle immediately. The parties may reach agreement on subsidiary issues and use the momentum from a partial settlement to propel them toward a more complete one. The parties may identify a limited number of issues on which they fundamentally disagree, submit those issues to binding arbitration, and design a settlement package whose terms depend, in whole or in part, on the arbitration result. The parties may fail to reach any agreement; however, they will walk away with a more complete understanding of the weaknesses and risks associated with their respective cases, which may lead to a future settlement.

IV. Obstacles to Use of Decision Analysis in Mediation

Parties or their lawyers may resist using decision analysis because of unfamiliarity with either the underlying concepts or their application. These obstacles to the use of decision analysis are encountered frequently and can resurface in different ways as the tree is created and analyzed. Thus, if decision analysis is to be employed successfully, mediators should be aware of the various obstacles to the use of decision analysis, as well as available techniques for overcoming them.[31]

31. These obstacles include discomfort with mathematics, discomfort with computers, unwillingness to cede control to a model, unwillingness to share probability estimates with the mediator, failure to achieve buy-in, and reluctance to anchor expectations at an as-yet-undetermined figure.

A. *Overcoming Common Obstacles*

1. *Discomfort With Mathematics*

Many lawyers are uncomfortable with the mathematical concepts that underlie decision analysis. A lawyer may be reluctant to engage in decision analysis out of fear that (1) his lack of familiarity with the techniques for assigning probabilities and analyzing results will put him at a competitive disadvantage, or (2) he will be embarrassed in front of his client or opposing counsel. To induce the lawyer to engage in the conceptual process of designing the tree, the mediator can start with its structure while omitting probabilities and payoffs. The lawyer who has helped to create the tree will be more willing to make the leap to mathematics when the time comes. At that point, the mediator can teach the basic principles of decision analysis using simple examples and apply the mathematical principles to the case only when they are understood by all.

2. *Discomfort With Computers*

Complex decision analysis is simply impractical without the use of a computer. Software exists to model complex decision trees easily and powerfully,[52] and it also allows real-time testing of different values and estimates in the course of mediation. To the extent that a lawyer is uncomfortable with computers, he may be resistant to their use in the mediation. Mediators can avoid this barrier by starting with pen and paper to model the tree in its early stages, and moving to the computer only when the lawyer realizes the tedium of drawing diagrams by hand.

3. *Unwillingness to Cede "Control" to a Model*

Even the most mathematically-inclined, computer-literate lawyer may be reluctant to engage in decision analysis because it may appear to wrest control of the settlement away from him in a way that simple mediation does not. When a model is designed to represent the litigation, the mediator's ability to manipulate it and achieve different results may seem to appropriate from the lawyer a crucial element of his role: the ability to persuade others to adopt his view of a case's value. The prospect of allowing opinions to be swayed through the click of a button may be quite frightening.

52. *See supra* note 7.

To counteract this reaction, a mediator can reframe the activity in terms of simply thinking through the parties' decisions. By emphasizing that no irrevocable commitments are made by engaging in the analysis and that the effort is merely an attempt to assess the value of the case in a structured fashion, the mediator can defuse some of the lawyer's anxiety about losing control of the process.

4. *Unwillingness to Share Probability Estimates With Mediator; Resistance to Changing Perceptions*

Lawyers often posture with the mediator and try to convince him that their cases are stronger than they really are, particularly in evaluative mediation. To the extent that strategic advantage may be gained by convincing the mediator of the merits of one's case, each lawyer may be unwilling to share his real probability estimates with the mediator, or to change his beliefs about the merits on the other side. A lawyer who knows that his chances of winning a motion for summary judgment are infinitesimal is unlikely to say so to the mediator; he is even less likely to admit his poor position to his opponent. These problems inhere in any mediation, and techniques used by the mediator (such as reality testing and exploration of contingent settlements) to address them in other circumstances are equally applicable here.

5. *Failure to Achieve Buy-in*

As with settlement agreements in general, lawyers and their clients will be more reluctant to accept decision-analytic models if they do not help to forge them. At the same time, a mediator will get bogged down in details if he seeks to mediate the addition of each branch and probability. The mediator can circumvent this conundrum by mediating the design of the tree's structure without allowing the entry of any probabilities or other numbers. Once the parties have developed a mutually acceptable structure, they will often feel enough ownership of the model to surmount the buy-in problem.

6. *Reluctance to Anchor Expectations at an As-yet-undetermined Figure*

Lawyers may refuse to use decision analysis for fear of anchoring. Once the model is developed, the party whose position is closer to the model's result may anchor his bargaining position to the model

and resist further concessions.[33] Because neither party knows in advance whether the model will favor its position, both parties may decide that it is safer to avoid the risk of an unfavorable anchor.

This obstacle to the use of decision analysis may be the most difficult to overcome, partly because parties will rarely state the objection explicitly. The mediator can surmount this obstacle by reemphasizing that the numbers reflect merely a preliminary attempt at an accurate model and represent only points in a range of reasonable figures. By explaining the use of sensitivity analysis early in the process, the mediator can reinforce the idea that precision is rather unimportant with respect to certain numbers, and that parties should thus reserve judgment on the importance of accuracy until after initial analyses have been performed.

V. Conclusion

Whether or not to employ decision analysis is, like many decisions faced by a mediator, a strategic decision. Just as mediation is not appropriate to all disputes, decision analysis is not appropriate to all mediations; unfortunately, there is no concrete set of rules that can be applied to determine whether a particular mediation would benefit from using the methodology.

In some instances, characteristics of the dispute itself will drive a mediator's election to use decision analysis. For example, a mediator might be more likely to do so if a major barrier to settlement is different predictions of trial outcome than if issues of principle, pride, or precedent dominate. A mediator should contemplate which barriers to settlement are hindering resolution of the dispute and consider whether, under the circumstances, decision analysis would aid in overcoming them.

In other instances, characteristics of the individuals involved might lead a mediator to draw conclusions about the suitability of decision analysis for the mediation of their dispute. For example, if the parties and lawyers demonstrate a complete lack of familiarity with mathematical concepts and computers, the effort required by the mediator to overcome their hostility and teach them the necessary fundamentals may not be worth the potential benefits. A mediator should thus consider the qualities of the individuals involved and formulate a strategy appropriate to them.

33. See Kahneman & Tversky, *supra* note 27, at 67–69 (describing the influence of "reference [illegible] on settlement values).

A key predictor of the success of the technique is the mediator himself. He must be credible to both parties and experienced in both traditional mediation and litigation risk analysis. Unless the parties have faith in the mediator's judgment and ability to guide them in the right direction, the process is likely to fail. Thus, a mediator should familiarize himself in advance with the concepts of decision analysis, the techniques for exploiting it maximally in mediation, and the software necessary to do so efficiently.

Decision analysis is certainly not a panacea for all mediators' woes. Mediators must be aware of the strengths and limitations of decision analysis, as well as the obstacles to its use, before deciding whether and how to use it. Decision analysis has the potential to facilitate the resolution of particularly intractable disputes. A mediator who adds it to his toolbox should find the payoff handsome.

Appendix A: Fundamentals of Decision Analysis

A decision tree is a graphical representation of a complex decision. Developed in the 1960's for use in business education, decision trees are flexible enough to be used for many types of decisions. Professionals in the fields of business, economics, medicine, public policy, engineering, and law all use decision trees when multiple uncertainties complicate the decision process.

A. *Structure*

Decision trees are organized chronologically, from left to right. They contain "nodes" of three different types: decision, chance, and terminal. A decision node (represented by a square) denotes a point at which the decision-maker must choose between two or more options. A chance node (represented by a circle) denotes a point where the decision-maker has no control over the outcome; each event following a chance node has a probability associated with it that reflects how likely it is to occur. Terminal nodes (represented by triangles) denote final outcomes, after which no events relevant to the decision are considered.

The following simple decision tree represents a situation in which a personal injury plaintiff must decide whether to proceed to trial with a chance of recovering $1,000 or settle for $500. (See Fig. A.) Assume that you represent the plaintiff in this lawsuit.

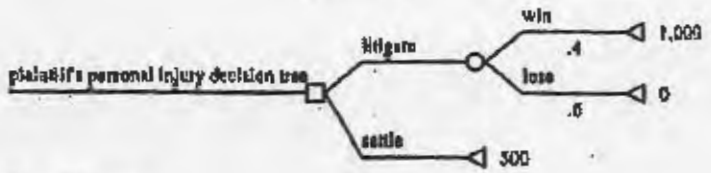
Figure A

The plaintiff faces two choices — litigate or settle — which are represented by branches emanating from the decision node at the left. If the plaintiff settles, the inquiry is complete: he gets $500 and the dispute ends. If he chooses to litigate, there are two possible outcomes: win (a terminal node with a payoff of $1,000) and lose (a terminal node with a payoff of zero). For purposes of this example, all of the uncertainties associated with litigation (other than liability), as well as costs, are ignored.

To make this decision intelligently, the plaintiff must assess how likely he is to win if litigation is pursued. A $500 settlement offer may seem inadequate if the plaintiff has an excellent chance of winning $1,000; however, the offer may be very attractive if a success outcome is less certain. In order to be more precise, we must assign probabilities to the uncertain events modeled by the tree. In the simple case, we must assess the likelihood that the plaintiff will win at trial.

Assume that, in your professional judgment, your client has a 40% (.4) chance of winning at trial. This probability would be displayed beneath the node labeled "win." Accordingly, a probability of 60% (.6) would be displayed beneath the node labeled "lose." (See Fig. B.)

Figure B

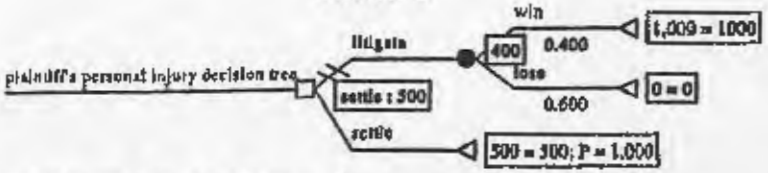


B. *Calculation*

Settlement is apparently preferable to litigation in this case because the probability of winning is not high enough to risk the gamble of trial. This evaluation is based on a concept called expected value or expected monetary value. The expected value of a node is defined as the sum of the products of the probabilities and payoffs of its branches. In other words, the expected value of a course of action is the average value of taking that course of action many times. If one were to try cases identical to this case one hundred times, about forty would result in a victory while sixty would result in a loss. The average recovery would be 40 victories at $1,000 per victory, or $40,000, plus 60 losses at $0 per loss, divided by 100 cases tried, for an average recovery of $400.[84] Thus, the expected value associated with the "litigate" node is $400. (See Fig. C.)

84. The same result can be reached by (1) multiplying the probability of victory, 0.4, by the payoff associated with one victory; (2) multiplying the probability of defeat, 0.6, by the payoff associated with one defeat; and (3) adding the two together, for an expected value of $400 + $0 = $400.

FIGURE C

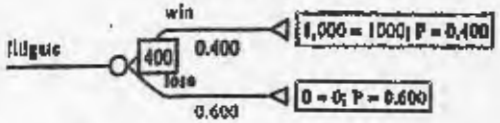


C. *Different Kinds of Trees*

A distinction must be drawn between decision trees and chance trees. A decision tree is a tree whose first node (the "root" node) is a decision node; thus, it models a situation in which the events being modeled are triggered by an initial decision to be made by the decision-maker. A chance tree (or "event tree") is a tree whose root is a chance node; in other words, no decision is required. It is used to model events over which the decision-maker has no control, and its value represents the value of being faced with the modeled set of uncertainties.

Chance trees are often embedded in decision trees. For example, one can examine the chance tree that represents the litigation alternative in the example above. Its expected value, $400, represents the expected value of litigation. (See Fig. D.)

FIGURE D



D. *More Complex Trees*

The concept of expected value is at the core of all decision analysis. In more complex trees, the expected value is calculated in stages. In the example below, a motion for summary judgment is interposed between the decision to litigate and the outcome of the trial. (See Fig. E.)

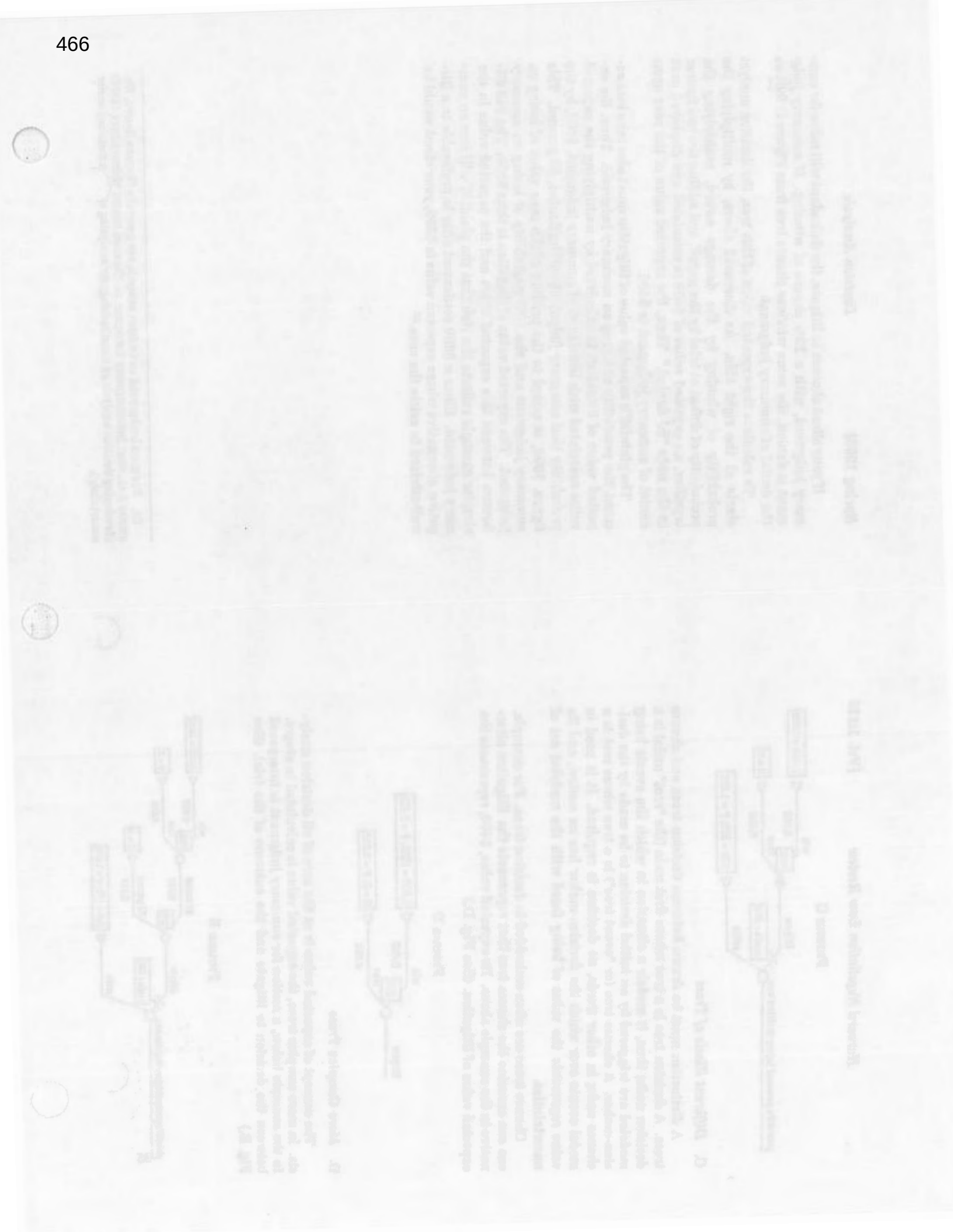
FIGURE E

If your client chooses to litigate, the defendant will move for summary judgment, with a 10% chance of winning. If summary judgment is denied, the same win/lose chance tree from Figure D follows the denial of summary judgment.

To calculate the expected value of this tree, the decision analyst starts at the right side. As discussed above, by multiplying the probability of winning by the damage award, multiplying the probability of defeat at trial by the payoff, and adding the two figures together, an expected value of $400 is calculated and displayed next to the node "SJ denied." Thus, the expected value of the case upon denial of summary judgment is $400.

The plaintiff's expected value of litigation must also take into account the possibility of losing on summary judgment. Thus, the expected value of litigation is calculated by multiplying the expected value associated with the denial of summary judgment, $400, by the probability that summary judgment will be denied, 90 percent. This figure, $360, is added to the product of the zero value of losing on summary judgment and the 10% probability of losing on summary judgment. The expected value of litigation is thus $360. The $40 difference between this expected value and the expected value in the simpler example reflects the risk that the plaintiff will lose on summary judgment. Since a $500 settlement offer is preferable to a litigation alternative whose expected value is $360, your client would be well-advised to settle the case.[35]

35. For more background on decision analysis, see generally HOWARD RAIFFA, DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICES UNDER UNCERTAINTY (1968) (developing decision analysis as a methodology for analyzing c[illegible]x decisions under uncertainty).



Tao of Mediation

The Technique of No Technique: A Paean to the *Tao te Ching* and Penultimate Word on Breaking Impasse

By: Simeon H. Baum**

Mediators and ADR aficionados love to discuss impasse. Transformative mediators remind us that fostering party empowerment and recognition – not settlement or problem solving – should be the mediator's driving purpose.[1] Still, we confess that for many of us impasse remains a bugaboo. Those of us who seek to maintain and generate "constructive" discussion, and even problem solving, in a mediation aptly value the treasure trove of techniques and suggestions that can be found in a book like this one.

While recognizing the value of these suggested "how to"s, a compendium of impasse breakers for mediation is well served by a final corrective: the technique of no technique. About a dozen years ago, this author moderated a program on *Impasse Breaking* hosted by the New York County Lawyers Association. That night, four excellent, experienced mediators presented one technique a piece.

Professor Lela Love suggested that when the parties are snagged on one issue, the mediator can change the agenda. The parties can "pin" the frustrating issue for the time being, lifting a phrase from the entertainment industry, and shift to another potentially more workable issue. With a history of success behind them, they can later return to the troubling issue if, in fact, it has not dissolved or morphed into a more easily resolvable form.

Margaret Shaw, suggested applying standards coupled with a transaction cost analysis. In her example, drawn from the employment context, one could derive a back pay number from considering the standard that would be applied by a court, and then compare it to the cost of litigation (which might be even greater).

Hon. Kathy Roberts, suggested use of the "mediator's proposal." While Steve Hochman develops this concept in his article within this compendium, Judge Roberts differed from Steve's approach by selecting "doability" as the standard for her proposal – is it likely to settle the case? – rather than fairness or predicted case outcome. This proposal generated very interesting debate with Professor Love on whether use of a mediator's proposal distorts the mediation process. There were multiple concerns. First, Professor Love questioned whether it is even the mediator's role to provide evaluative feedback or direction to the degree reflected in the mediator's proposal. Moreover, where parties have been encouraged to be candid, exposing case weaknesses and settlement thoughts in caucus, there is a question of whether they might regret that candor if it were now factored into an endgame solution. Conversely, if parties anticipate that there will be a "mediator's proposal," there might be excessive emphasis on spinning the mediator – whether it is with their thoughts on what might settle the case (in the doability

[1] *See, e.g.*, Robert A. Baruch Bush and Joseph P. Folger, The Promise of Mediation – Responding to Conflict Through Empowerment and Recognition (Josey Bass, 1994), which sets out this transformative manifesto.

model) or their thoughts on legal risks (in a case outcome or fairness model). Over time, its use could stifle candor and creativity. Overall, there is a risk that mediation would shift from a party-centric to a mediator-centric one. Rather than fostering party empowerment and recognition, or joint, mutual gains problem solving, using the mediator's proposal as the cherry on top of the ice cream Sunday threatens to convert that open, fluid, meaningful, and enriching process into an alter ego of Court or settlement conferences, where the mediator and not the parties is the star of the show.

Roger Deitz, suggested use of a "ball and chain." He advises parties at the commencement of the mediation that there might come a time when they wish to leave the mediation. He extracts, *ab initio*, a commitment from each party that if that time arises, he or she will stay if so requested by the mediator. Considering that one of the most valuable services rendered by the mediator is keeping people at the table, this is a valuable thought indeed.

At some point that evening, I had the opportunity to suggest the approach I raise here, terming it the "technique of no technique." The core point was the observation that the greatest value a mediator brings to the table is not a set of skills or a bag of tricks. Rather, it is the character[2] of the mediator, and particularly the ability to communicate and engender trust. Cultivation of trust goes beyond the vital trust in the mediator to encouraging the development of trust among the participants. Essential to this is the mediator's presence. This is a quality of open awareness that is expressed in all conceivable ways. It is not simply what the mediator says or does. It includes posture, bearing, tone of voice, eye contact, and the power of omission. It involves a sensitive awareness, deep listening, flexibility, and a genuine quality of connectedness or relatedness. The mediator models a mode of being with the parties that implicitly communicates a message. The silent message is: we are all decent, capable people of good will who are all in this world together, and can work through this problem together. Underpinning this message is the sense that there is a force in and embracing us that will work it out, if we persist and let it happen.

Now, this might sound a bit vague, or even otherworldly. But the power of attitude cannot be overrated. This intuition finds support in recent studies by Margaret Shaw and Steven Goldberg. Both in a study they did in 2007 polling users of mediators with no judicial background and in a more recent study with Jeane M. Brett, including user of former judge mediators, they received responses from hundreds of lawyers on what made the mediator effective in moving a matter to resolution. The researchers grouped answers into three broad categories: (1) confidence-building skills (the ability to gain the trust and confidence of the parties), (2) evaluative skills (the ability to encourage agreement by evaluating a party's likelihood of achieving its goals in court or arbitration), and (3) process skills (skills by which a mediator seeks to encourage agreement, not including evaluative skills). By far, the greatest source of success of was confidence building skills, with 60% of the responses identifying this quality. This was

[2] In addition to "character" we could add orientation, attitude, and engagement – the atmosphere created by the living, engaged, alert, flexible, caring, attentive, responsive and "space creating" presence of the mediator.

followed by process skills (35%) including patience and perseverance, with evaluative skills being the least significant (33%).[3]

A core takeaway from the Shaw, Goldberg studies is that trust and confidence is key to success in mediation. The highlighted attributes of what build trust and confidence relate to character and attitude: "Friendly, empathetic, likeable, relates to all, respectful, conveys sense of caring, wants to find solutions"; "High integrity, honest, neutral, trustworthy, respects/guards confidences, nonjudgmental, credible, professional." There are many traits and acts that can be identified. Yet, central to all, I would submit, is the fundamental attitude – call it the mediator spirit – described above, before our mention of this study. The point of using this type of term is to emphasize that there is something whole, something integrative, something at the heart of the mediator that cannot be divided, manipulated, juggled and parsed – a gestalt, to borrow from Fritz Perls – that is essential to the mediator's power. That power, of course is the special power that comes precisely from powerlessness. In place of judicial or other form of authority, might or coercive force, is the quality of the mediator that fills this void. That is a power of trust. Trusting and trustworthiness, cultivating trust in others. An attitude that values freedom and recognizes that the parties themselves are the valued decision makers. It is a letting go that brings with it the embrace of the whole.

[3] Stephen B. Goldberg and Margaret L. Shaw, *The Secrets of Successful and Unsuccessful Mediators Continued: Studies Two and Three*, 23 Negotiation Journal 4, pages 393-418 (October 2007). Following are details from this study. First, under secrets of success, the top Confidence Building Attributes were:
#1 Friendly, empathetic, likeable, relates to all, respectful, conveys sense of caring, wants to find solutions (60%);
#2 High integrity, honest, neutral, trustworthy, respects/guards confidences, nonjudgmental, credible, professional (53%); and
#3 Smart, quick study, educates self on dispute, prepared, knows contract/law (47%).
Next, the top Process Skills were:
#4 Patient, persistent, never quits (35%);
#6 Asks good questions, listens carefully to response (28%); and
#7 Diplomatic, makes both sides feel as if they are winning, softens the blows of bad news, makes suggestions tactfully (21%).
Finally the top Evaluative Skills were:
#5 useful reality testing and outcome evaluation – candid (33%).

Put in negative terms, the following were the top reasons for a mediator's being counterproductive or unsatisfactory: These, not surprisingly, correspond to the above reasons for mediator success:
First - Lack of Confidence Building Skills
#1 Lack of integrity, not neutral, disclosed confidential information, failed accurately to convey position, inconsistent evaluations, interested in settlement at all costs, too quick to reach conclusions (48%);
#3 Self absorbed, self-important, not empathic, not respectful, did not care, not interested, did not listen (20%);
4 Did not understand issues/applicable law, not well prepared (16%);
Next - Lack of Process Skills:
#2 Not firm/forceful, just went through the motions, just delivered messages (24%);
#5 Lack of patience/persistence, quit too easily (11%); and
#6 Not flexible in approach, has his/her approach and would not vary to fit situation (7%)
others.
Finally - Lack of Evaluation Skills:
#6 Faulty/no evaluation (7%)

The aspect of the mediator highlighted here affects atmospherics. It does not have to be showy (hopefully it is not!). But it makes a major difference in keeping people in the room. It supports communication and creativity. It communicates positive regard for the participants, reinforcing their willingness to continue with what can be a difficult discussion.

A central point of the "technique of no technique" is not that the various approaches and methods are not valuable. They certainly are. Still, there is something perhaps more essential. There is a time honored term drawn from China, *wu wei*, which can be translated as "non-doing." This loaded term can be found in the 2,500 year old classic, the *Tao te Ching*. If there is any text which could serve as the mediator's bible, my vote would be for this one. Attributed to Lao Tsu, there are hundreds of English language translations of this seminal text in the Taoist tradition.[4] Discussing the meaning and philosophy of the *Tao te Ching* and its application to mediation is a major topic that could support a book, and is beyond the scope of this addendum. Moreover, there is certainly no intent here to persuade readers that one must adhere to a particular religious or cultural tradition in order to be an effective mediator. But, in *wu wei*, the Taoists supply us with a very useful and suggestive concept.[5] One insight of *wu wei*, is that

[4] Two lovely translations of the Tao te Ching are: Stephen Mitchell, Tao te Ching (Harper & Row 1988)(with broad poetic license) and Wing-Tsit Chan, The Way of Lao Tsu (Tao-te ching) (Prentice Hall; First edition. Fifth printing. edition (January 11, 1963)).

[5] At least ten of the 81 chapters (or quatrains) of the Tao te Ching specifically recommend or observe the benefits of *wu wei*. *See*, W.T. Chan, The Way of Lao Tsu (Tao-te Ching), chapters 2, 3, 10, 37, 38, 43, 48, 57, 63 and 64. For example, in Chapter 2, after describing how opposite concepts, like good and evil, depend on one another for meaning:

> Therefore the sage manages affairs *without action* And spreads doctrines without words.
>
> All things arise, and he does not turn away from them. He produces them but does not take possession of them.
> He acts but does not rely on his own ability. He accomplishes his task but does not claim credit for it. It is precisely because he does not claim credit that his accomplishment remains with him.

In Chapter 3, after describing dangers of competition that arise from valuing superlatives, and the benefit of simplicity:

> By acting *without action*, all things will be in order.

In Chapter 10, after lauding unity of spirit, childlike weakness, simplicity and receptive passivity:

> Can you understand all and penetrate all *without taking any action*?
> To produce things and to rear them, To produce, but not to take possession of them, To act, but not to rely on one's own ability, To lead them, but not to master them - This is called profound and secret virtue.

Chapter 37:

> Tao invariably *takes no action*, and yet there is nothing left undone.
> If kings and barons can keep it, all things will transform spontaneously.

(*Tao* is the great Way of ultimate reality.)

Chapter 38, after praising unselfconscious, superior virtue, sets out a hierarchy of virtue in descending order:

> The man of superior virtue *takes no action*, but has no ulterior motive to do so. The man of inferior virtue takes action, and has an ulterior motive to do so.
> The man of superior humanity takes action, but has no ulterior motive to do so. The man of superior righteousness takes action, and has an ulterior motive to do so. The man of superior propriety takes action, And when people do not respond to it, he will stretch his arms and force it on them.

The top value is universal purposelessness that is in conformity with the Way things are; pure neutrality.

Chapter 43:

> The softest things in the world overcome the hardest things in the world. Non-being penetrates that in which there is no space. Through this I know the advantage of *taking no action*.
> Few in the world can understand the teaching without words and the advantage of *taking no action.*

Chapter 48, after describing a movement from mental complexity to integral simplicity:

> *No action is undertaken,* And yet nothing is left undone. An empire is often brought to order by having no activity.
> If one (likes to) undertake activity, he is not qualified to govern the empire.

In Chapter 57, after decrying governmental interference, overregulation, draconian laws, overemphasis on cunning and skill, and obfuscating complexification:

> Therefore the sage says: *I take no action* and the people of themselves are transformed. I love tranquillity and the people of themselves become correct.
> *I engage in no activity* and the people of themselves become prosperous. I have no desires and the people of themselves become simple.

Chapter 63, explaining some benefits, and the operation, of non-action:

> *Act without action*. Do without ado. Taste without tasting.
> Whether it is big or small, many or few, repay hatred with virtue.
> Prepare for the difficult while it is still easy. Deal with the big while it is still small.
> Difficult undertakings have always started with what is easy. And great undertakings have always started with what is small.
> Therefore the sage never strives for the great, And thereby the great is achieved.
> He who makes rash promises surely lacks faith. He who takes things too easily will surely encounter much difficulty.
> For this reason even the sage regards things as difficult. And therefore he encounters no difficulty.

Similarly observing that a "stitch in time saves nine," Chapter 64 elaborates:

> What remains still is easy to hold. What is not yet manifest is easy to plan for. What is brittle is easy to crack. What is minute is easy to scatter.
> Deal with things before they appear. Put things in order before disorder arises.
> A tree as big as a man's embrace grows from a tiny shoot. A tower of nine stories begins with a heap of earth. The journey of a thousand li starts from where one stands.

sometimes one makes greater progress by not interfering with the activities of others. Rather, letting a course of events develop on its own, as it were, with patience, confidence, and open, accepting attention, can permit the being or event to develop as it should. *Wu wei* suggests stepping out of the way, rather than directing, controlling and manipulating events. To draw on an overused term, it suggests a holistic approach, where the mediator recognizes that larger forces are at play and permits, encourages or assists in their constructive movement.

There are many practical applications of "not doing" with which we are all familiar. We all know that sometimes it makes sense to hold one's tongue. We all have experienced moments when, by letting someone struggle with a problem, we permit them to arrive at a solution which our intermeddling might have blocked. Our silence can permit a truthful expression or insight from developing in a dialogue that our speech might have stifled. Tact is based on non-doing.

In negotiation, the negotiators have an inner drive towards resolution. They want a solution that will meet their needs. They have their own fears and concerns about legal outcomes. Moreover, extrinsic forces and circumstances support resolution. Costs continue to mount. All the forces of the business, legal, and broader community continue to operate and impinge on the players. Time ticks away. These things are already operating without our encouragement. Non-doing simply helps them find a way of expression, of recognition, and then of choices to take action to dissipate concerns and satisfy needs, to limit risks and reduce costs which no rational or even emotional actor genuinely wants to incur.

The preceding examples are just a fraction of the meanings which can be drawn from *wu wei*. A classic image from the *Tao te Ching* is water. It moves without effort or conscious force, finding the low places, from shape of terrain and force of gravity. The mediator's presence can similarly have influence, without any particular effort on the mediator's part. A handshake, a smile, a nod. We can point to these things and note what a difference they might make in reducing the interpersonal temperature in a room. Yet often, like leaves falling in autumn, they are simply a natural consequence of the mediator's overall character and nature – a character that is supported by disciplined self consciousness.

Continuing with the Taoist theme, while we are at it, we can take another example from *tai chi*, a martial art, itself, imbued with the philosophy found in the Tao te Ching. We have seen tai chi players in the park, with flowing, continuous, graceful movements. One component of that martial arts practice is "push hands." Push hands involves two players standing facing each other. As party A places his hands on the other's arm, party B senses the force. As party A presses, party B shifts direction and recedes, so that at no time does he confront or oppose party A's force. Party B, in turn shifts to press party A, who likewise shifts direction and recedes. The main objective in the execution of the four simple push hands moves of "ward off, rollback, press and push" is for the players to

> He who takes action fails. He who grasps things loses them. For this reason *the sage takes no action* and therefore does not fail. He grasps nothing and therefore does not lose anything;

maintain contact throughout, forming a harmonious whole, with no more than 4 ounces of pressure building up at any time. While this practice can be used as a model of non-confrontation, the most significant point to be derived here is of continuous relatedness or connection.

Like a push hands player, the mediator preserves a gentle connection with all participants through the mediator's presence and broad, affirming awareness. The importance of this presence to preserving continuity of constructive dialogue cannot be underestimated. Just as, when things get knotty in push hands, the skilled player neither breaks away nor erupts with force, but maintains sensitivity and lets the form work itself out, so too, the mediator neither breaks off the session, nor necessarily rushes to caucus, nor desperately argues the parties into doing something. Most effective is gently remaining present, perhaps just waiting, listening deeply, and sensing what is happening, what perhaps is driving this interaction, while also seeing the broader context.[6]

In one employment mediation, conducted a decade ago, an attorney complained that "the mediator did nothing; we settled it ourselves." Assuming the mediator was there throughout and supported continuing talks, staying out of the parties' way, this, too, is non-doing. It is well beyond the role of simple message bearer. One quotation from Stephen Mitchell's translation of the Tao te Ching is apt here:

> When the Master governs, the people
> are hardly aware that he exists.
> Next best is a leader who is loved.
> Next, one who is feared.
> The worst is one who is despised.
>
> If you don't trust the people,
> you make them untrustworthy.
>
> The Master doesn't talk, he acts.
> When his work is done,
> the people say, "Amazing:
> we did it, all by ourselves!"[7]

[6] With apologies to transformatives who assert that a mediator should maintain a microfocus – not seeking the "big picture – this statement is made with a recognition that both ends of the microscope and telescope may revealing an opening to something that can move people from the snag of apparent impasse. But living with the impasse is the heart of non doing. To quote mediator Barry Berkman (of the Himmelstein Friedman school), it is the "paradoxical nature of change" that change can develop when we recognize and accept the reality of a given situation – even of one that seems undesirable.

[7] S. Mitchell, Tao te Ching, Ch. 17. Here is Wing Tsit Chan's translation:

> The best (rulers) are those whose existence is (merely) known by the people. The next best are those who are loved and praised. The next are those who are feared. And the next are those who are despised.
>
> It is only when one does not have enough faith in others that others will have no faith in him. (The great rulers) value their words highly. They accomplish their task; they complete their work. Nevertheless their people say that they simply follow Nature.

Recently, Gerald Lepp, ADR Administrator for the mediation panel of the United States District Court for the Eastern District of New York, held an "ADR Cross Cultural Workshop" structured and facilitated by Hal Abramson of Touro Law School, with Dina Jansenson and Jeremy Lack as panelists. Professor Abramson presented a number of scenarios depicting cross cultural misunderstandings and elicited suggestions from the audience/participants on how to correct them. At the end of this section, Dina Jansenson wisely observed that most of the time in mediation, the mediator will, appropriately, do nothing more than be aware of the dynamic.

There is much to be said for recognizing that often, less is more. We do not have to fix everything. Beyond this, silence itself is a tremendous force. As noted above, refraining from filling the void is often the greatest wisdom. It leaves space for meaning, creativity, and a host of valuable and significant expressions to emerge.

Professor Len Riskin made a spash in the mediation field in the mid 1990s with his seminal article, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*.[8] "Riskin's Grid," which created a typology of mediators ranging from evaluative and directive to facilitative, and from narrowly to broadly focused ones, fostered great debate on whether it was within the mediator's purview to conduct evaluations or direct parties at all.[9] Since 2002, Riskin has embarked upon another groundbreaking path within the legal and ADR field: promoting mindfulness mediation.[10] Drawing on Buddhist Vipasana teachings, Riskin observes that disciplined practice of awareness of one's breathing, and of one's physical, emotional and mental states, can increase relaxation, calm, alertness, and sensitivity to others. He suggests that this can enhance the humane practice of the law and of dispute resolution.

Interestingly, I remember twenty years ago reading about a Zen master who mediated a deadly dispute between warlords in medieval Japan. He remained calm, gave recognition to each party, identified interests, promoted a resolution that permitted the saving of face, and was detached from identifying with one side or the other. While, unfortunately, I have not been able to recover this reference, I recall that it struck me at the time as not insignificant that the practice of meditation supported this function.

Wing-Tsit Chan, The Way of Lao Tsu (Tao-te ching), Ch. 17. Although both versions of Chapter 17 speak of the ruler's acting, it is noteworthy that this is seen as others doing it themselves or the ruler's just following Nature. *Cf.* citations in footnote 4, *supra*.

[8] 1 Harv. Negot. L. Rev. 7 (1996).

[9] *See, e.g.*, Lela Love and Kim Kovach, *"Evaluative" Mediation Is an Oxymoron*, 14 Alternatives To High Cost Litig. 31 (1996); Lela Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 Fla. St. U. L. Rev. 937 (1997). Riskin's 1997 poetic rejoinder can be found online at: http://www.law.fsu.edu/journals/lawreview/downloads/244/riskin.pdf.

[10] *See, e.g.*, Leonard I. Riskin, *The Contemplative Lawyer: On the Potential Benefits of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 Harvard Negotiation Law Review 1 (2002); Leonard. I. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 Journal of Legal Education 79 (2004); Leonard. I. Riskin, *Knowing Yourself: Mindfulness*, The Negotiator's Fieldbook – The Desk Reference for the Experienced Negotiator (A.K. Schneider, C Honeyman, Ed.) (ABA Section of Dispute Resolution 2006).

Profound awareness of self enhances calm and deep awareness of others. That, in turn, supports connection and presence.

The "technique of no technique" includes the suggestion that mediators not be stuck on any one technique or approach. In the ABA Dispute Resolution's "Negotiator's Fieldbook," Peter S. Adler exhorts negotiators not get boxed into a single type defined by two pairs of opposites – moral or pragmatic, competitive or cooperative – but rather, remain flexible: the Protean negotiator. The same recommendation applies to mediators facing impasse. Definitely, we should peruse our bag of tricks. But, whatever our preferred strategy, style, or approach, we might be alert to the possibility that it makes sense, under the circumstances to break the rules. Even the attentive, trust generating, integral, flexible, supportive mediator – who modulates presence and relatedness -- ought to be ready, at times to try one of the approaches recommended in this compendium - except for Steve Hochman's.[11]

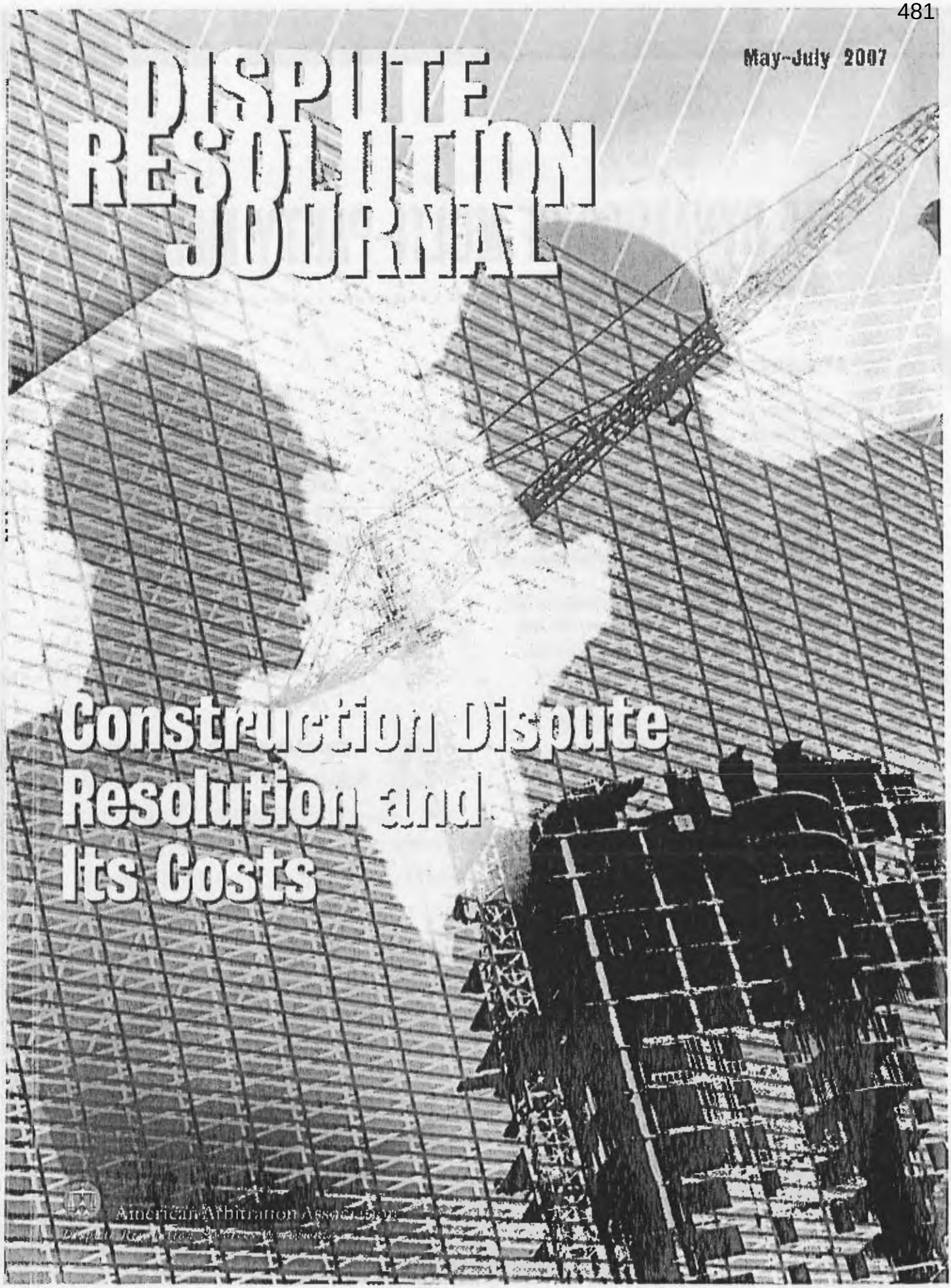
***Simeon H. Baum, President of Resolve Mediation Services, Inc. (www.mediators.com), was the first Chair of NYSBA's Dispute Resolution Section. Mr. Baum has mediated over 900 disputes, including the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site and Trump's $ 1 billion suit over the West Side Hudson River development. He was selected for New York Magazine's 2005 - 2011 "Best Lawyers" and "New York Super Lawyers" listings for ADR, and Best Lawyers' "Lawyer of the Year" for ADR in New York for 2011. He teaches Negotiation Theory & Skills at Benjamin N. Cardozo School of Law and is a frequent speaker and trainer on ADR.*

[11] For over a decade, Stephen Hochman and Simeon Baum have jointly presented multi-day trainings for mediators on various Commercial Division panels of the Supreme Court of the State of New York.

Multi-Party Mediation; Impasse Breakers

May-July 2007

DISPUTE RESOLUTION JOURNAL



Construction Dispute Resolution and Its Costs

American Arbitration Association

THE DYNAMICS OF MULTI-PARTY MEDIATION

BY ALBERT BATES, JR., AND L. TYRONE HOLT

Albert Bates Jr. is a partner in the Trial Practice Group of Duane Morris, LLP, focusing on construction litigation and domestic and international arbitration. An arbitrator or mediator, Mr. Bates serves on the AAA's Construction Arbitrator Master Panel and represents the ABA Construction Litigation Committee on the AAA's National Construction Dispute Resolution Committee.

L. Tyrone Holt is the managing principal of The Holt Group LLC, in Denver, Colorado. Mr. Holt provides professional construction arbitration and mediation services throughout the United States through his company, Western Neutral Services, LLC. He is a Fellow of the College of Commercial Arbitrators and a Life Fellow of the American Bar Foundation. He currently serves on the governing committee of the ABA Forum on the Construction Industry. He is a co-editor and a chapter author of the book, Design Professional and Construction Manager Liability. He also serves on the AAA's National Construction Arbitrator Master Panel.

Mediating the large, complex construction dispute from the vantage point of counsel and the mediator. Special attention is paid to organizing and dealing with negotiating groups.

At the American Arbitration Association's (AAA) recent Construction Mediation Conference in Miami, entitled "What You Can't Not Know," we facilitated a discussion of the complexity of mediating large, complex construction disputes, focusing particularly on the dynamics associated with multi-party mediation. Mr. Holt focused on the role of the mediator, while Mr. Bates focused on the role of lead outside counsel. The purpose of this article is to share the highlights of the Miami discussion.

Hypothetical Problem

Complex construction projects involve many stakeholders. The fact pattern that we used at the conference involved a public-private partnership as the owner of a project that involved a multi-modal (train/bus/light rail) transportation station, a 400-room luxury hotel and a three-story parking garage. The owner retained an architect, who in turn retained a number of consultants, many of whom retained subconsultants. The owner also engaged a construction manager with full-time site supervision responsibilities. The project was bid on a "design, negotiate and build" basis, funded in large part through the issuance of municipal bonds. The construction contract was awarded to a general contractor, who retained a number of subcontractors to perform significant portions of the work. Materials were purchased from a number of vendors and suppliers by the contractor and subcontractors. Each of the participants had various types and amounts of insurance coverage.

A general consensus must be reached among the negotiating teams before a facilitated resolution of the dispute can be achieved.

The general contractor asserted claims against the owner for significant delay and disruption, as well as labor and equipment inefficiency claims. These claims implicated the owner, architect, various consultants and the construction manager. The subcontractors had similar delay and insufficiency claims against the general contractor. The owner asserted claims for liquidated damages on certain phases of the work, alleged various deficiencies in the work, and was pushing the general contractor to develop a recovery schedule. The owner was also preparing an error and omission claim against the architect and derivatively some of the architect's consultants, as well as a claim against the construction manager for scheduling and supervision deficiencies. The architect and several of its consultants had significant unpaid invoices and they were developing a claim for additional services as a result of acts and omissions by the owner, the construction manager and the general contractor.

Identifying the Negotiating Groups

This fact pattern is not atypical and it illustrates the complexity of the issues before a mediator on a large, complex construction project. The first challenge for the mediator is determining the relationships between the various parties to the dispute and the issues on which certain parties may be aligned. In Miami, we called this determining the number of "packs" (i.e., negotiating teams) participating in the mediation process. A general consensus must be reached among the negotiating teams before a facilitated resolution of the dispute can be achieved by the various stakeholders and their teams. Consequently, identifying these teams is an important task for the successful mediator.

It is obvious that the claimant and respondent have divergent interests and views on the merits of the underlying controversy. They often disagree about facts, the causes of delay and disruption, the completeness and accuracy of the drawings, the amount of damages actually resulting from the alleged causes, and a myriad of other issues. Other than an overriding goal of "minimizing exposure" or "maximizing recovery," the stakeholders on each side of the table may have disparate interests, which could be economic or non-economic in nature. However, the interests among the stakeholders on the "owner's side of the table" or the "contractor's side of the table" may also be quite divergent.

Further, the members of each negotiation team often have divergent interests. To take a simple example, the goals and objectives of the attorney, the architect of record and the architect's insurer may differ significantly. The dynamics may be more difficult when the owner is a public-private partnership or a joint venture or other consortium created for the project. The same is true if the contractor is an entity created for the project. The dynamics may also be difficult on publicly bid projects, particularly in states that require public bidding of multiple-prime contracts.

Initial Considerations

In spite of their divergent interests, the stakeholders must open up the lines of communication and strive to reach consensus on important process issues. Initially, they must agree on a mediator and explore the nature and extent of information to be exchanged in advance of the mediation. If the process is to be successful, all stakeholders must be fully engaged in the mediation process. Other important initial considerations that must be addressed include:

- Who comprises the negotiating team for each entity? Who should participate in the mediation? To what extent should experts be involved in the negotiating team? Who within the company must attend the mediation for it to be successful?

- How should the negotiating team approach the mediation session? What role will each participant play? Who will be the spokesperson? To what extent should the business principals directly interface with each other prior to or during the mediation?
- How many negotiating teams are there? Should everyone on the owner's side of the table meet collectively to prepare for the mediation, or will the owner, design professionals and construction manager approach the mediation independently? Is there a "joint defense agreement"? How does the presence or absence of such an agreement affect the interests of the parties at the mediation?
- Have the insurers made coverage determinations? How do the coverage issues, if any, affect the mediation process? Is there a dispute between the insured and the insurer that is relevant to the mediation?
- How can the carriers be forced to become engaged in the process?

There could be other special considerations in a public project and in one that is publicly bid.

Mediator Selection Process

As Mr. Holt said in Miami, the first objective in mediator selection is "Do No Wrong." In other words, selecting the right mediator is important, but retaining the wrong one can be fatal to an early and cost effective resolution of the disputes. Factors to be considered in the mediator selection process include the mediator's qualifications and experience, specifically:

- How many times has the mediator been involved with this type of dispute, either as a mediator, as counsel for a party to mediation or in some other capacity? There are lots of construction mediators in the United States, but only a small subset of those mediators have the experience and skill set to handle large, complex, multi-party construction matters.
- Is public-sector mediation experience important? What about specialized construction knowledge or specialized insurance claims experience?
- A large percentage of construction mediators are attorneys. Is the likelihood of success in resolving this dispute maximized by selecting an attorney, or is this a matter best addressed by an industry professional?
- Is the mediator's mediation philosophy important? What style would maximize the likelihood of resolving the dispute?

The consensus at the Miami conference was that technical expertise and prior experience with large, complex construction projects is essential. To be successful, the mediator must structure the mediation conference to facilitate the meaningful exchange of information among the parties. Each stakeholder must buy into the process, and must be prepared, motivated and ready to address the matters in dispute. Achieving these preliminary objectives requires a skilled and knowledgeable mediator.

Preparation for the Mediation Conference

The initial contact between the mediator and the parties is very important to the success of the process. The process begins with the initial contact. The mediator needs to lead the discussion to maximize the utility of the mediation process and to begin to understand the obstacles that may present impediments to resolving the dispute. In doing so, the mediator needs to recognize the divergent personalities within each negotiating team. Most teams contain both "stabilizers"—members who are committed to the mediation process and want to achieve a negotiated resolution—and "destabilizers"—members who want to fight to the end and attempt to present roadblocks to a negotiated resolution.

An important early goal of the mediator is to identify the leader within each negotiating team. (That leader may or may not be the ultimate decision maker.) Another early goal is to identify any "destabilizers" and take affirmative steps to minimize their disruptive impact. This can be a difficult to achieve, particularly if the destabilizer is the decision maker, or if there are several destabilizers on each side of the table.

Some of the issues to be discussed between the mediator and the parties in advance of the mediation conference, including the following:

- What submissions will be necessary?
- Will all submissions be exchanged or would only provided to the mediator?
- Who will attend the mediation conference? Will experts attend? If so, what is their role?
- Who *must* attend? What level of authority must be in the room before proceeding to mediation?
- What will be required of the insurers? What level of insurance authority must be in the room before proceeding to mediation? Is telephone availability acceptable under any circumstances?
- What work needs to be completed by the participants for the mediation conference to be meaningful?
- Should "small group" and "negotiation group" *ex parte* calls be conducted in advance of the mediation?

From the perspective of the mediator, these issues are best addressed in a pre-mediation conference or conference call. In Miami, Mr. Holt, commenting from the perspective of the mediator, made the following points with respect to planning for the mediation:

1. In large and complex cases, you must hold a pre-mediation conference call; thereafter, act on what you learn.

2. Appreciate before the mediation conference that you have a large and/or complex dispute, and prepare, plan and structure the mediation accordingly.

3. Set the property expectations for the parties, beginning with the initial conference call.

4. Make sure that there is "grist for the mill."

All of the key participants must be presents for a large, complex mediation. The scheduling and structure of the mediation conference *must* address and include all necessary parties, insurance representatives, consultants or experts as appropriate to the case and consistent with the wishes of the parties and their counsel.

It is also important that the mediator address any fundamental problems or issues in advance of the mediation conference. Fundamental issues include the following:

- the need for public-sector approval and ratification. These issues need to be addressed in advance of the mediation.
- the need to have insurance representatives physically present.
- the presence of key decision-makers at the mediation.
- the status of the expert and damage reports. If these have not yet been exchanged, the mediator needs to address how can this information can be effectively communicated among the parties to allow meaningful dialogue during the mediation.

If left unaddressed, such issues can create irreconcilable conflict that creates a barrier to early, cost effective resolution of the case.

Counsel's Perspective

In Miami, Mr. Bates offered comments from the perspective of outside counsel on preparation for the mediation conference. He described his role in the following terms:

> As outside counsel, I view my role as leading the consensus-building process on behalf of my client, trying to draw out and fully understand the views of the members of my negotiating team, including my client, and to aligning divergent interests that may exist. From a broader perspective, I try to understand where the money is and the extent to which the responsibility for the losses follows the ability to pay.

In general, Mr. Bates's approach to the mediation process contains four basic themes:

1. Needs v. Wants: Participants often come to the mediation process telling their counsel, "This is what I want." The lead counsel must open the lines of communication to understand what each of the participants "need," not what each wants.

Needs include the financial ability to meaningfully contribute to the solution. Needs must be the focus of the dynamic within the negotiating team. Clients who use binding dispute resolution processes, such as litigation or arbitration, are motivated by the desire to get what they want. In mediation, no one gets everything he wants. Clients choose mediation to have the dispute quickly and efficiently resolved, eliminate business risk and minimize disruptive effect on business operations on financial terms that are acceptable.

2. Objective Case Assessment: An objective case assessment is a critical element of preparing for the mediation process. Clients want and need an objective assessment of the reasonable range of outcomes from a litigation or arbitration process. Clients must understand the risks to their business if a negotiated solution is not achieved in mediation. These risks include, but are not limited to, the following:

- an adverse ruling in litigation or arbitration,
- the legal and expert costs associated with adversary proceedings,
- transaction costs (filing fees, arbitrator compensation),
- the cost of personnel used in the adversary proceeding,
- the effect that litigation can have on reputation, and
- lost opportunity costs while being involved in an adversary proceeding.

It is often useful to develop a potential exposure range. Mr. Bates says the illustration of a statistical bell-shaped curve is useful. The curve will demonstrate the reasonable range of likely financial outcomes. The parties must deduct from any recovery the costs of achieving those outcomes.

Once there is some agreement within a negotiating team on the reasonable range of net recovery, it becomes significantly easier to obtain consensus within the negotiating team.

3. Identify Impediments to Resolution: It is important to understand the impediments to resolution. They include:

- vast differences of opinion as to the reason-

ably range of outcomes,
- differences in the party's aversion to risk,
- "destabilizers" or other personality conflicts
- disproportionate case knowledge or information,
- the absence of an important participant,
- a dispositive legal issue,
- a dispositive technical or engineering issue,
- financial constraints with one or more participants, and
- insurance coverage issues.

Counsel needs to assess these issues and take steps to reduce or minimize the disruptive effect on the mediation process. This often includes meeting with the stakeholders in advance of the mediation and opening lines of communication with the mediator.

4. Prepare the Client for the Process: Even sophisticated clients sometimes have a misconception of the mediation process. They need to be reminded that the process is often slow and tedious. The client may not see the mediator for several hours. Clients may be offended by remarks made in the parties' opening statements. Nevertheless, if the process is to be successful, the client needs to be committed to it, allow it the time necessary to work, and remain positive and proactive. Counsel may need to remind the client to help the mediator find a solution. Mediation is an unpredictable process. Sometimes, one or more parties may need to vent. However, counsel must remain focused on the client's objectives and assist the client in managing its emotions.

The Mediation Conference

At the Miami Conference, Mr. Holt outlined the initial considerations for the mediation conference, including logistics and presentations.

Logistics involve when, where, and how long the mediation will be. (He stresses the need to make sure that enough time is committed.) Also involved are the availability of support facilities, personnel and equipment, and the commitment of people not to run out "early to catch a plane."

As to presentations, the question is will there be any or might they be divisive? If there will be presentations, who will make them and how long will they be? The mediator needs to get everyone's input on these issues.

While the specifics of the mediation conference varies in every mediation, the process can generally be broken down into the beginning, the middle and the end.

Mr. Holt described the beginning as the "engagement" process. Each team member must become engaged in the mediation for the process to be successful. This may involve venting and drawing out the feelings and thoughts of each member of the team. The listening skills of the mediator are of critical important at this stage.

The middle game inherently involves challenges to the positions articulated by the parties. The style of the mediator varies greatly, as do the mediation philosophies of different mediators. Some mediators are evaluative, while others are facilitative. Some are aggressive while others gently challenge a party's stated position. The mediator's goal is to have each party fully appreciate and evaluate the risks of not resolving the matter through mediation. A good mediator has many tools at his disposal to challenge the parties.

The mediation then moves to the "end game," the meaningful engagement between the various negotiating teams. Mr. Holt offered the following comments from the perspective of the mediator on the "end game."
- Do not be too quick to declare impasse.
- Do not confuse bluffing and negotiating tactics with true impasse.
- Let the parties decide what they need to proceed further with the process.
- Additional sessions are not uncommon in early and/or complicated, multi-party mediations.
- Everything is subject to mediation, including the terms and conditions of the next session.
- In order for complicated deals to survive, some form of settlement memorandum must be documented and signed before mediation conference ends.
- Partial or "half a loaf" settlements can sometimes facilitate or encourage complete resolutions.
- Do not let the progress that has been achieved get lost.

Conclusion

Successfully mediating a large, complex construction case requires a commitment from each participant in the process. Open communication and understanding the needs of each person involved in the process is critical to achieving a negotiated solution. Counsel and the mediator each have very difficult jobs in finding commonality within the negotiating teams, building consensus within the teams, and fully engaging all necessary stakeholders. Effective mediation, particularly with the myriad of participants in large construction projects, takes hard work by all involved. The mediation process is highly successful because it meets the needs of the parties to achieve an acceptable resolution of difficult issues while minimizing the cost, time and disruptive effect of resolving the underlying dispute. ■

Sausage Making Laid Bare – The Consensus Based Risk Allocation Model and other Impasse-Breakers and Approaches to Multiparty Naysayers (when each one points the finger at the other as the more culpable party).

By: Simeon H. Baum**

One of a mediator's great joys, challenges and justifications can be found in the multi-party matter. Multi-party conflicts or disputes arise in every conceivable dimension of society. Take for example a school board's decision in renewing a teachers' union contract. Each Board member can have diverse views and interests; within the union there might be different views, interest groups and political factions; school administrators bear different views and interests; and the public itself – parents, students, and taxpayers affected by the decision – consists of multiple and divergent stakeholders. Zoning Board decisions; end of life decisions involving large families (perhaps with second marriages); plant closings; any union negotiation; environmental resource use decisions – all involve multiple parties. Indeed, moving from business into municipal, state, national or international arenas, the set of multiparty disputes casts a wide net.

The broad array of multiparty disputes produces a wide range of issues, a host of which fall outside the focus of this paper but bear mention. These include the problem of convening itself. Identifying interest groups, selecting their representatives in what would otherwise be an impossibly unwieldy discussion, and managing intraparty communication are just a few of the threshold challenges in mediating these matters. As environmental mediators know all too well, it can even be a challenge to find a common legal framework that creates a shared sense of risk. Upstream users of water in Vermont affecting the availability or condition of water in downstream states might eventually have an impact on the environment and users of natural resources as far south as the Chesapeake Bay. Local authorities in the downstream states might have no authority to regulate upstate users. EPA regulators have, at times, convened sessions of stakeholders for "reg/neg," or negotiated rulemaking to address these problems.[1]

Several years ago, CPR's annual meeting featured an exercise in facilitated multi-party negotiation, drawing on the hypothetical of rebuilding the World Trade Center. It was an excellent display of the unique features of multiparty negotiations and the ways in

[1] These observations were raised by David Batson of the EPA and others at an all-day conference entitled "Changing Times, Changing Legal Practice: Effective Legal Strategies to Resolve New Environmental Disputes," held at The University Club in New York City (One West 54th St) on November 17, 2009. The Conference was presented by Pace Law School's Kheel Center on the Resolution of Environmental Interest Disputes, included Lowenstein Sandler PC, Leyland Alliance and Wilson Elser Moskowitz Edelman & Dicker LLP as co-sponsors, and had a good number of participating sponsors, including the Federal Bar Association's Alternative Dispute Resolution Section; Federal Bar Association's Environment, Energy, and Natural Resources Section; American Bar Association Section of Environment, Energy, and Resources; Environmental Law Institute; New York City Bar Environmental Law Committee; nPace Law School Center for Environmental Legal Studies; and the New York State Bar Association's Dispute Resolution Section.

which they benefit from a neutral facilitator.[2] In that post 9/11 scenario, five divergent groups struggle to arrive at a mutually acceptable solution to questions of how the WTC site will be used (memorial or commercial), who will pay for the rebuilding, and who will get credit for posterity. This negotiation is held in the shadow of media coverage. Three of the five stakeholders (victims' families, State, and City, as well as insurers and developer) involve numerous members. In view of the pressure applied by constituents "outside the room" it was important to be able to structure a constructive discussion in which all could strive for consensus.

This WTC scenario underscores the value a neutral party might bring. The neutral can help develop a good structure for talks, identify interests and issues, help in setting and revising the agenda, conduct caucuses, deal with the formation of independent cabals, assist in brainstorming, help with reality testing, and maintain constructive focus as the terms of this multi-factorial deal are hammered out. One enhanced challenge for the mediator in this type of negotiation is working the balance between remaining a background player – a facilitator – drawing out the parties' interests and thoughts for resolution – while exerting sufficient influence to maintain a structured and progressive discussion. There is a tangible risk that relations and communications will fray where each group excessively asserts its own interest and stalls consensus seeking talks by filibustering, table pounding, or withdrawal. The mediator brings value here by developing a transparent process while preserving the ability to caucus, and fundamentally, by keeping people at the table. With all of this activity, the artful mediator is challenged to keep the "less is more" philosophy of neutral intervention close at hand.

Shifting from the host of public and community disputes and deal-making, we now turn to the realm of civil litigation. Perhaps first in mind for litigators is the multi-defendant case, *e.g.*, construction cases, or third party liability matters, where multiple defendants and third or fourth party defendants have been added to the fracas. Often insurers are involved here. Similarly, there is the class action, or its variant, the multi-plaintiff case. Beyond these, legion are the areas where multiple parties and interest groups are involved in litigation.

---

[2] "Rebuilding the World Trade Center Site – An Exercise in Multi-Party Negotiation" presented by Professor Lawrence Susskind of the Harvard Law School Program on Negotiation, draws on taped segments of a 90 minute exercise used by participants in the January 2007 Annual meeting of CPR (now the International Institute for Conflict Prevention and Resolution).. Each of the multiple groups consists of six participants, representing (1) the families of those who died as a result of the collapse of the World Trade Center buildings on September 11, 2001; (2) the State/Port Authority, representing the Owner of that land; (3) the City of New York: (4) the Silverstein group, which had a longterm lease for the site and was responsible for rental payments and rebuilding; (5) the insurer for the collapsed buildings; and (6) a facilitator charged with fostering a constructive negotiation. The tape and associated materials can be purchased at: http://www.pon.org/catalog/product_info.php?products_id=417. This author was part of a CPR working group that developed the initial problem, under the guidance of Peter Phillips of CPR. The raw material for that program was reworked and refined by Professor Susskind and his students prior to the January 2007 CPR Annual Meeting. An obvious takeaway from this roleplay is that – with divergent interest groups under public scrutiny, the tendency to form caucuses among fewer than all participants, and the need for consensus – the participants benefitted greatly from having a facilitator manage the discussion.

The Consensus Based Risk Allocation Model

Civil litigators are all too familiar with one phenomenon in the multi-defendant case – mutual finger pointing. When asked who bears responsibility for a particular occurrence or loss, defendants have a tendency to direct attention away from themselves and seek to shift the burden of payment onto one or more of the other defendants. In construction related cases, or the third party insurance world in general, this is a frequent occurrence. Often, counsel or claims adjusters will enter a negotiation with a predetermined percentage which they believe their company should bear relative to the other defendants. Moreover, they have set views on the percentage responsibility the other parties should bear as well – particularly party X, whom they deem to be the chief target, or party Y, who was in a position similar to their own. This scenario can generate feelings among professionals not unlike sibling rivalry.

Over the course of several mediations in which this common phenomenon arose, I developed and refined an approach that has proven to be consistently effective in extricating multiple defendants from the quagmire of mutual finger pointing. This approach can be termed a *consensus based risk allocation model*. It can be seen as an effort to garner information from the parties themselves and to have the solution to their imbroglio emerge from their own thought processes, rather than have it independently developed and pronounced by the mediator. Because it involves an amalgamation of their collective thoughts, it is seen as consensus based. It is termed a "risk allocation" model because it involves the thought processes of all defendants (including counsel and insurance representatives) in assessing how risk of loss at trial should be assessed and allocated among all of the defendants.

Before describing this process, one social psychological phenomenon bears noting. Defendants can get hung up on relative percentages, and on looking over their shoulders at what the other defendants are contributing. Dealing with hard dollars can help disengage defendants from this inter-party struggle. The consensus based risk allocation model is designed to shift parties' focus from percentages to hard dollars and to focus each defendant on its own pot rather than the other defendants'. This helps parties move from stalemate to progress.

The procedure is fairly straightforward. First comes preparation and diagnosis. I typically hold a initial joint session with all parties and one or more caucuses (private, confidential meetings with fewer than all parties). Because multi-defendant negotiations are cumbersome, plaintiffs often are surprisingly willing to share their more or less realistic, desired settlement number earlier on in the process, to enable the mediator to be effective. This is essential to the method's success. During the initial caucuses – first with the entire group of defendants and then with subgroups of defendants – the mutual finger pointing becomes apparent, producing its diagnosis. To address this problem, I hold a series of caucuses with each of the defendants. In each caucus I ask the same set of questions:

1. What is the likelihood the plaintiff will win at trial, and, if so, how much?
2. What percentage liability will be allocated to each defendant?
3. How much will it cost to try this case?

Answers to these questions are recorded on an Excel spreadsheet, with a horizontal row for each defendant's answer and a vertical column for each defendant discussed. Examples of these spreadsheet templates are presented in tables 1, 2, and 3, below. Question "1" is developed a bit further, to account for any comparative share allocated to a successful plaintiff. A final row is added to take the averages of the input from all defendants.

Table 1

	% Chance Plaintiff Wins	**Damages**	**Plaintiff's Comparative Share**	**Resulting Case Value**
Party A				
Party B				
Party C				
Party D				
Party E				
Party F				
Party G				
Party H				
Party I				
Party J				
Average				

Table 2

	Percentage Allocations									
	Party A	Party B	Party C	Party D	Party E	Party F	Party G	Party H	Party I	Party J
Party A										
Party B										
Party C										
Party D										
Party E										
Party F										
Party G										
Party H										
Party I										
Party J										

Average										

Table 3

	Costs Through Trial
Party A	
Party B	
Party C	
Party D	
Party E	
Party F	
Party G	
Party H	
Party I	
Party J	
Average	

By the time this approach is used, there has been back and forth, in joint session and via initial caucuses, on all parties' views of the strengths and weaknesses of the case, addressing both liability and damages. Risk analysis, if needed to develop greater realism, can be performed before or in conjunction with the discussions in these caucuses. My general observation is that by the time we have gathered answers to the above three questions, the parties have reached a certain degree of realism, and have developed some trust in the process and in the mediator.

When the interviews have been completed, I develop three different types of "pots" or economic scenarios.

(1) **Trial Outcome & Transaction Costs**. Using the trial outcome predictions recorded on the Excel spreadsheet, I calculate the average of the amount the plaintiff is predicted to win. Thus, *e.g.*, if there are ten defendants, there will be ten educated guesses of damages at trial, which can be averaged. By luck of the draw, in most instances where I have used this there has been minimal doubt that Plaintiff will win, but exuberant disagreement on the allocation of responsibility among defendants. Therefore, in these scenarios, there is little need to apply a total loss risk factor to the averaged damages number. See, *e.g.*, the results reflected in Table 4, below.

Table 4

Assumption: Plaintiff Wins Every Time				
	Plaintiff Wins	**Damages**	**Plaintiff Share**	**Resulting Case Value**
Party A	1	$ 2,800,000.00	0.333333333	$ 1,866,666.67
Party B	1	$ 2,300,000.00	0.25	$ 1,725,000.00
Party C	1	$ 2,775,000.00	0.2	$ 2,220,000.00
Party D	1	$ 2,500,000.00	0.25	$ 1,875,000.00
Party E	1	$ 2,250,000.00	0.33	$ 1,507,500.00
Party F	1	$ 2,300,000.00	0.25	$ 1,725,000.00
Party G	1	$ 3,250,000.00	0.333333333	$ 2,166,666.67
Party H	1	$ 3,750,000.00	0.25	$ 2,812,500.00
Party I	1	$ 2,000,000.00	0.5	$ 1,000,000.00
Party J	1	$ 3,100,000.00	0	$ 3,100,000.00
Averages	**1**	**$ 2,702,500.00**	**0.269666667**	**$ 1,999,833.33**
			Case Value Rounded Up:	***$ 2,000,000.00***

In the above table, a "1" is assigned to the "Plaintiff Wins" column, serving as a 100% type multiple against the damages and any plaintiff's comparative liability share. If, however, there were a strongly perceived risk that the plaintiff will have an outright loss, that risk factor column can also be completed and averaged. The resultant average can be applied to the average damages number to produce the defendants' collective view on case value. An example of this additional calculation is displayed in Table 5, below.

Table 5

Assumption: Varying Views of Plaintiff's Likelihood of Getting Any Damages/Winning Anything				
	Plaintiff Wins	**Damages**	**Plaintiff Share**	**Resulting Case Value**
Party A	0.75	$ 2,800,000.00	0.333333333	$ 1,400,000.00
Party B	0.8	$ 2,300,000.00	0.25	$ 1,380,000.00
Party C	0.9	$ 2,775,000.00	0.2	$ 1,998,000.00
Party D	1	$ 2,500,000.00	0.25	$ 1,875,000.00
Party E	1	$ 2,250,000.00	0.33	$ 1,507,500.00
Party F	0.66	$ 2,300,000.00	0.25	$ 1,138,500.00
Party G	0.5	$ 3,250,000.00	0.333333333	$ 1,083,333.33
Party H	1	$ 3,750,000.00	0.25	$ 2,812,500.00
Party I	0.5	$ 2,000,000.00	0.5	$ 500,000.00
Party J	0.9	$ 3,100,000.00	0	$ 2,790,000.00
Averages	**0.801**	**$ 2,702,500.00**	**0.269666667**	**$ 1,648,483.33**

The net result, with either set of expectations on Plaintiff's likelihood of winning at trial, is the defendants' collective assessment of case value. By itself, this could be used as a framework for negotiations.

Beyond this, the predicted defense costs can also be calculated as in Table 6, below.

Table 6

	Costs Through Trial
Party A	$ 250,000.00
Party B	$ 200,000.00
Party C	$ 250,000.00
Party D	$ 200,000.00
Party E	$ 150,000.00
Party F	$ 175,000.00
Party G	$ 250,000.00
Party H	$ 250,000.00
Party I	$ 75,000.00
Party J	$ 250,000.00
Average	**$ 205,000.00**
Rounded Average:	***$ 200,000.00***

Signficantly, one might make the common observation that collective transaction costs outweigh the risk of loss at trial. These costs are properly cumulated (added) rather than averaged. When combined with Trial Outcome, they give us the collective sense of the combined exposure to damages and transaction costs. An example is shown below, in Table 7, positing the simplified case of all defendants' recognizing that plaintiff will win something at trial. Figures for this table are drawn from Tables 4 and 6, above.

Table 7

Assumption: Plaintiff Wins Every Time			
	Trial Outcome	**Costs through Trial**	**Combined Case Exposure**
Party A	$ 1,866,666.67	$ 250,000.00	$ 2,116,666.67
Party B	$ 1,725,000.00	$ 200,000.00	$ 1,925,000.00
Party C	$ 2,220,000.00	$ 250,000.00	$ 2,470,000.00
Party D	$ 1,875,000.00	$ 200,000.00	$ 2,075,000.00
Party E	$ 1,507,500.00	$ 150,000.00	$ 1,657,500.00
Party F	$ 1,725,000.00	$ 175,000.00	$ 1,900,000.00

Party G	$ 2,166,666.67	$ 250,000.00	$ 2,416,666.67
Party H	$ 2,812,500.00	$ 250,000.00	$ 3,062,500.00
Party I	$ 1,000,000.00	$ 75,000.00	$ 1,075,000.00
Party J	$ 3,100,000.00	$ 250,000.00	$ 3,350,000.00
Av/Total	**$ 1,999,833.33**	**$ 2,050,000.00**	**$ 4,049,833.33**

If there is any doubt about the candor of various defendants' own cost estimates, the costs can be averaged for use when discussing likely costs with a particular defendant. See, Table 6, above. There is also the more cumbersome approach of including costs for every defendant in the third question during the initial interviews of each defendant, and using those figures. This is typically unnecessary, but can be used to produce the numbers to fill in the "Costs Through Trial" column of Table 7, above.

With the development of the above numbers, the mediator is in a better position for discussing risk analysis and transaction cost analysis with any defendant.

(2) **Probable Settlement Number**. It also pays to make note of the amount the plaintiff needs to settle the case. The first set of numbers, on case outcome and transaction costs, can now be used to reassess the realism of the plaintiff's probable settlement number. Before holding further discussions with defendants, I might reengage the Plaintiff in an exploratory caucus to get a better sense of what is needed to settle the case. Of course, it is important to be careful not to disclose to the Plaintiff confidential information gathered in the defendant caucuses. Nevertheless, all of the information supports the development of an educated guess at a probable settlement number. For purposes of our examples, let us assume that the Plaintiff would settle the case for $1.5 million.[3]

(3) **Graduated, Lesser Offer Pots ("GLOP")**. The goal of the overall exercise is to arrive at a proposal that might work for all parties, and that will be perceived by the defendants as credible and savvy. The ADR community is well acquainted with the concepts of integrative bargaining and principled negotiation. Fisher, Ury and the Harvard Negotiation School have alerted us to the drawbacks of positional, as opposed to interest based, bargaining.[4] Nevertheless, it is typical of negotiations for cases of this sort to occur in stages, with a pattern of alternating decreasing demands and increasing offers.

[3] While this is just a hypothetical, given the assumptions in Tables 4 – 6, this is not an unrealistic number. $1.5 million is 75% of the average projected case outcome where plaintiff wins every time ($2 million per Table 4), and is a lesser discount off of the projection where plaintiff is seen as having some risk of outright loss (approximately $1.65 million per Table 5). There are benefits in having present use of funds, as opposed to waiting for trial (although somewhat offset by New York's 9% judgment interest rate). There are also benefits to plaintiff's counsel, often operating on a contingent fee, in spending less time on the case, avoiding outlay of expenses on experts and other litigation related costs, and in trading an uncertain win after trial and possible appeal for the certainty of a settlement. Of course, we are assuming that the entire group of defendants has not radically underestimated realistic damages at trial. Use of risk analysis in the caucuses where this information is gathered can help with quality control for these figures.

[4] *See, e.g.,* R. Fisher & W. Ury, Getting to Yes.

Thus, it is wise for the mediator to develop two or more smaller numbers, one smaller than the next, that can be used as initial and subsequent offers to the Plaintiff on behalf of all defendants. Developing these numbers will enhance the overall credibility with defendants of the mediator's message and approach. For purposes of our example, where $1.5 million is the projected settlement pot, let us call the smallest GLOP $1 million and the next GLOP $1.25 million.[5]

Individual Defendant's Shares. Next it is time to develop each defendant's share of the settlement pot. Using the information gathered on the Excel spreadsheet, the mediator now derives the average of all defendants' views concerning each defendant's relative liability. An example of this approach can be seen in Table 8, below.

Table 8

	Percentage Allocations										
	Party A	Party B	Party C	Party D	Party E	Party F	Party G	Party H	Party I	Party J	**Total Percentage**
Party A	0.2	0.25	0.15	0.1	0.1	0.05	0.05	0.05	0.025	0.025	1
Party B	0.3	0.15	0.2	0.1	0.1	0.05	0.025	0.05	0	0.025	1
Party C	0.35	0.25	0.1	0.075	0.1	0	0.05	0.025	0.025	0.025	1
Party D	0.2	0.2	0.15	0.1	0.1	0.1	0.05	0.05	0.025	0.025	1
Party E	0.2	0.15	0.2	0.125	0.1	0.05	0.075	0.075	0.025	0	1
Party F	0.25	0.2	0.15	0.1	0.1	0.05	0.05	0.05	0.025	0.025	1
Party G	0.25	0.25	0.1	0.125	0.075	0.05	0.025	0.05	0.025	0.05	1
Party H	0.2	0.15	0.2	0.075	0.125	0.05	0.075	0.05	0.05	0.025	1
Party I	0.3	0.2	0.1	0.1	0.1	0.05	0.05	0.05	0	0.05	1
Party J	0.25	0.2	0.15	0.1	0.1	0.05	0.05	0.05	0.05	0	1
Average	**0.25**	**0.2**	**0.15**	**0.1**	**0.1**	**0.05**	**0.05**	**0.05**	**0.025**	**0.025**	**1**

The averages for each defendant are shown in the bottom row. The right hand column may be used as a check, to be sure that the percentages are correct. The total of all percentages should be 100%, shown as a "1" in that column. Any comparative share for

[5] As with the observations in Footnote 3, *supra*, associated with the Probable Settlement Number, one might keep in mind that GLOPs of $1 million and $1.25 million are made in the context of a $2 million projected trial outcome (Table 4, where Plaintiff always wins something) or $1.65 million projected trial outcome (Table 5, where Plaintiff is assumed to have some risk of outright loss). These GLOPs represent at the low end 50% of the Table 4 risk, and a lesser discount off the Table 5 risk. They nevertheless, provide encouragement to the Plaintiff with a seven figure starting offer. As comfort to Defendants, they still represent about only 25% of the Defendants' Combined Case Exposure ($4 million per Table 7). It is interesting to observe how factoring in transaction costs widens the zone of savings realized by Defendants and theoretically should encourage them to sweeten the pot for Plaintiffs, coming closer to Plaintiff's projected trial outcome. Steve Hochman refers to this effect as the "win/win range."

the plaintiff has already been worked into the Trial Outcome, Projected Settlement pot and GLOP numbers described above.

As mentioned above, it is important to move the defendants away from thinking in terms of percentages to thinking in terms of their own dollars. Thus, once each defendant's percentage has been obtained, the mediator can create different charts on the Excel Spreadsheet for each of the three sets of numbers[6] described above. Let us look, for example, at a chart applying each defendant's percentage to the Trial Outcome number. We can posit a trial outcome of $2 million and ten defendants collectively assessed to bear the proportionate shares reflected in the averages in Table 8, *i.e.* : 25%, 20%, 15%, 10%, 10%, 5%, 5%, 5%, 2.5%, and 2.5%. Under that scenario, the dollar allocations would be as shown in Table 9, below.

Table 9

	Trial Outcome
Party A	$ 500,000.00
Party B	$ 400,000.00
Party C	$ 300,000.00
Party D	$ 200,000.00
Party E	$ 200,000.00
Party F	$ 100,000.00
Party G	$ 100,000.00
Party H	$ 100,000.00
Party I	$ 50,000.00
Party J	$ 50,000.00
TOTALS:	**$ 2,000,000.00**

Application of a defendant specific transaction cost figure would add that defendant's acknowledged defense costs to that Defendant's Trial Outcome number. So, for example, a defendant with a $500,000 trial outcome allocation and a projected $250,000 transaction cost would be assigned a combined projected risk and transaction cost figure of $750,000. Applying the allocation percentages shown in Table 8 to the costs recorded in Table 6 and the presumed trial outcome quantified in dollars in Table 9 produces the total per defendant case exposure figures shown in Table 10 below.

Table 10

	Trial Outcome & Costs
Party A	$ 750,000.00
Party B	$ 600,000.00

[6] The three sets of numbers are Trial Outcome, Projected Settlement, and GLOP.

Party C	$	550,000.00
Party D	$	400,000.00
Party E	$	350,000.00
Party F	$	275,000.00
Party G	$	350,000.00
Party H	$	350,000.00
Party I	$	125,000.00
Party J	$	300,000.00
TOTALS:	**$**	**4,050,000.00**

Again, if the defendant's acknowledged defense cost seems off, an adjacent column could display the sum of that defendant's projected share of trial outcome and average defense costs. Thus, if average defense costs were $400,000, the number for Party A, above, would be $900,000.

There is no need at this stage to add general risk factors. Any meaningful risk factor for the Plaintiff should have been worked into the calculation of the Plaintiff's projected Trial Outcome. Risk factors relating to a given Defendant's liability should already have been worked into the derivation of that Defendant's percentage share. There is a separate question on "spin." What does the mediator do with the old fashioned hardball negotiator, the consummate low profile liability ducker, the outright spinmeister? The mediator has some choices here. One is simply to let the numbers do their magic. The greater the number of defendants, the lower the impact of one defendant's outrageous denial of obvious risk. Take for example, a defendant with an objective risk of 25% liability – let us call that defendant "HN," for hardball negotiator. If there are twenty defendants and each assesses HN's liability at 25%, but HN assesses its own liability at 5%, the average of the 20 estimates would be 24%, a modest adjustment. *See*, Table 11, below.

Table 11

	Percentage Allocations
	HN
Party A (HN)	0.05
Party B	0.25
Party C	0.25
Party D	0.25
Party E	0.25
Party F	0.25

Party G	0.25
Party H	0.25
Party I	0.25
Party J	0.25
Party K	0.25
Party L	0.25
Party M	0.25
Party N	0.25
Party O	0.25
Party P	0.25
Party Q	0.25
Party R	0.25
Party S	0.25
Party T	0.25
Average	**0.24**

Of course, if there were just ten defendants, the average would permit somewhat greater skew. Nevertheless, even with ten defendants, the variance would be just two percentage points, with an average of 23%. See, Table 12, below.

Table 12

	Percentage Allocations
	HN
Party A (HN)	0.05
Party B	0.25
Party C	0.25
Party D	0.25
Party E	0.25
Party F	0.25
Party G	0.25
Party H	0.25
Party I	0.25
Party J	0.25
Average	**0.23**

At a certain point – say, with five defendants, where the average would be 21% (*see* Table 13, below) – the variance might grow intolerable.

Table 13

	Percentage Allocations
	HN
Party A (HN)	0.05
Party B	0.25
Party C	0.25
Party D	0.25
Party E	0.25
Average	**0.21**

This leads to the question of whether the mediator might make a separate "spinmeister" adjustment. An adjustment of this sort raises all sorts of ethical questions, of course.[7] But, before making any such adjustment, it pays to be aware of other social phenomena. First, there is the age old observation that force begets counterforce. Sometimes, precisely because of his hardball tactics, the hardball negotiator incurs the suspicion and ire of other defendants. This might be reflected in their assessment of that defendant's risk. Of course, if this goes overboard, there is the question of whether a countervailing adjustment is needed. In addition, there is a host of different negotiator personalities involved in any multi-defendant case. There might be one defendant/representative who understands that it objectively bears the lion's share of the risk. This defendant might be eager to resolve the matter. As a consequence, it might be willing to take on even a modest increase in its own portion, to be sure that the case settles. That defendant's representative, and others, might be well aware of the hardball curmudgeon and be openly willing to adjust rather than let HN gum up the works. It is helpful to keep in mind throughout these reflections the difference between the Trial Outcome share and the share that includes transaction costs. There is typically a good amount of "fat" created by the combined share, which can help justify either an adjustment or failure to make an adjustment.

It grows clear that the issue of whether, and, if so, how, to make adjustments is a tricky one. The ideal approach is to make no adjustments, or to engage in adjustments as much as possible at the front end, in the initial caucus with each defendant. If adjustments are made, I would feel an obligation to disclose that adjustments of that kind

[7] These questions, relating to candor, transparency, quality of the process, long term impact on repeat users of the mediator and on the mediator him or herself, the mediator's role, inter-party fairness, and other issues might be reserved for another article or for a forum discussion.

were made when explaining the consensus based risk allocation model and its results to all defendants.[8]

Returning to our numbers, just as percentages are applied to the Trial Outcome numbers, so too percentages are applied to the other two sets of numbers – the Proposed Settlement Number and the GLOP. Typically, we copy and paste the first chart and then substitute in the alternative assumption – Proposed Settlement Number or GLOP – which, thanks to the magic of Excel, changes the balance of the numbers for each Defendant's share. The results are displayed in Table 14, below.

Table 14

	Trial Outcome	Trial Outcome & Costs	Projected Settlement	Smallest GLOP	Largest GLOP
Party A	$ 500,000.00	750,000.00	375,000.00	250,000.00	$ 312,500.00
Party B	$ 400,000.00	600,000.00	300,000.00	200,000.00	$ 250,000.00
Party C	$ 300,000.00	550,000.00	225,000.00	150,000.00	$ 187,500.00
Party D	$ 200,000.00	400,000.00	150,000.00	100,000.00	$ 125,000.00
Party E	$ 200,000.00	350,000.00	150,000.00	100,000.00	$ 125,000.00
Party F	$ 100,000.00	275,000.00	75,000.00	50,000.00	$ 62,500.00
Party G	$ 100,000.00	350,000.00	75,000.00	50,000.00	$ 62,500.00
Party H	$ 100,000.00	350,000.00	75,000.00	50,000.00	$ 62,500.00
Party I	$ 50,000.00	125,000.00	37,500.00	25,000.00	$ 31,250.00
Party J	$ 50,000.00	300,000.00	37,500.00	25,000.00	$ 31,250.00
TOTALS:	**$ 2,000,000.00**	**4,050,000.00**	**1,500,000.00**	**1,000,000.00**	**$ 1,250,000.00**

The Joint Defendants Conference Call.

[8] To the extent a mediator thinks of making adjustments, a result oriented approach might include the pragmatic consideration of whether the dollar figures for each of the defendants can be obtained from that defendant. This can integrate financial capacity, intransigence, bargaining style, and all sorts of *real politik* factors. Again, it would be ideal to make no adjustment, in order to maintain the purity of the model and lessen the predictable gamesmanship that might ensue after the necessary disclosure of the mediator's methodology.

Once all numbers are worked out,[9] I typically hold a joint conference call with all defense counsel. I explain what I did and ask whether the Defendants would like to hear the outcome of this experiment. Invariably, all are eager to hear the results. It is important to explain that the settlement assessment and each of the proposed defendants' shares are the result of a collective effort. With their agreement, I let defendants know what the collective proposed settlement pot is, as well as what two or more lesser pots (the GLOP) would be. I then give them the dollar share (not percentages) for each defendant contributing to the pot in question. One variation of this approach is simply to present the lowest pot, and explain that, while this is not expected to settle the case, it seems like a good start. In all instances, where there is no "spinmeister adjustment," it is important to highlight that the numbers are entirely a pass through of the defendant's best estimates. Any adjustment would pose a test of the mediator's tact to communicate this without upsetting the apple cart. Defendants can be told that this is essentially the result of their estimates but that the mediator might have made a "tweak" here or there in order to obtain a workable package. This balance of transparency and obscurity is an art that actually generates approval and greater acceptance of the result.

Seeking permission is key to obtaining Defendants' buy in. Beyond this, it is required since the proposed numbers will be presented as the collective result of confidential caucuses, and thus are based upon confidential information. Not surprisingly, the defendants have consistently expressed unanimous interest in the outcome.

Typically, defense counsel return to their carriers or clients with a report on this unusual conference call. I will follow up with each of them by phone caucuses, or might simply get an email approving of a defendant's share. More often than not, the vast majority of defendants return with approval. At times, there might be a need for further adjustment of one or more shares. This can involve some telephone caucusing and, perhaps, some horse trading with the help of one or more parties who, for one reason or another,[10] have some additional flexibility.

In sum, I deliver to the defendants three packages for presentation to the plaintiff – an initial, a subsequent, and a final pot – identifying, by dollar figure only, each defendant's contribution to each of these three pots. A doable settlement path appears in place of what had been a field of warring soldiers. Through channeling Defendants' own information into reasonable grids, the consensus based risk allocation model can create productive order out of the chaos of multi-party bargaining sessions.

---

[9] Depending on the circumstances, parties and the numbers involved, "working out the numbers" might also involved making caucus calls to specific defendants to test the waters on the numbers that will be appearing for that defendant in the Proposed Settlement Number and GLOP charts.

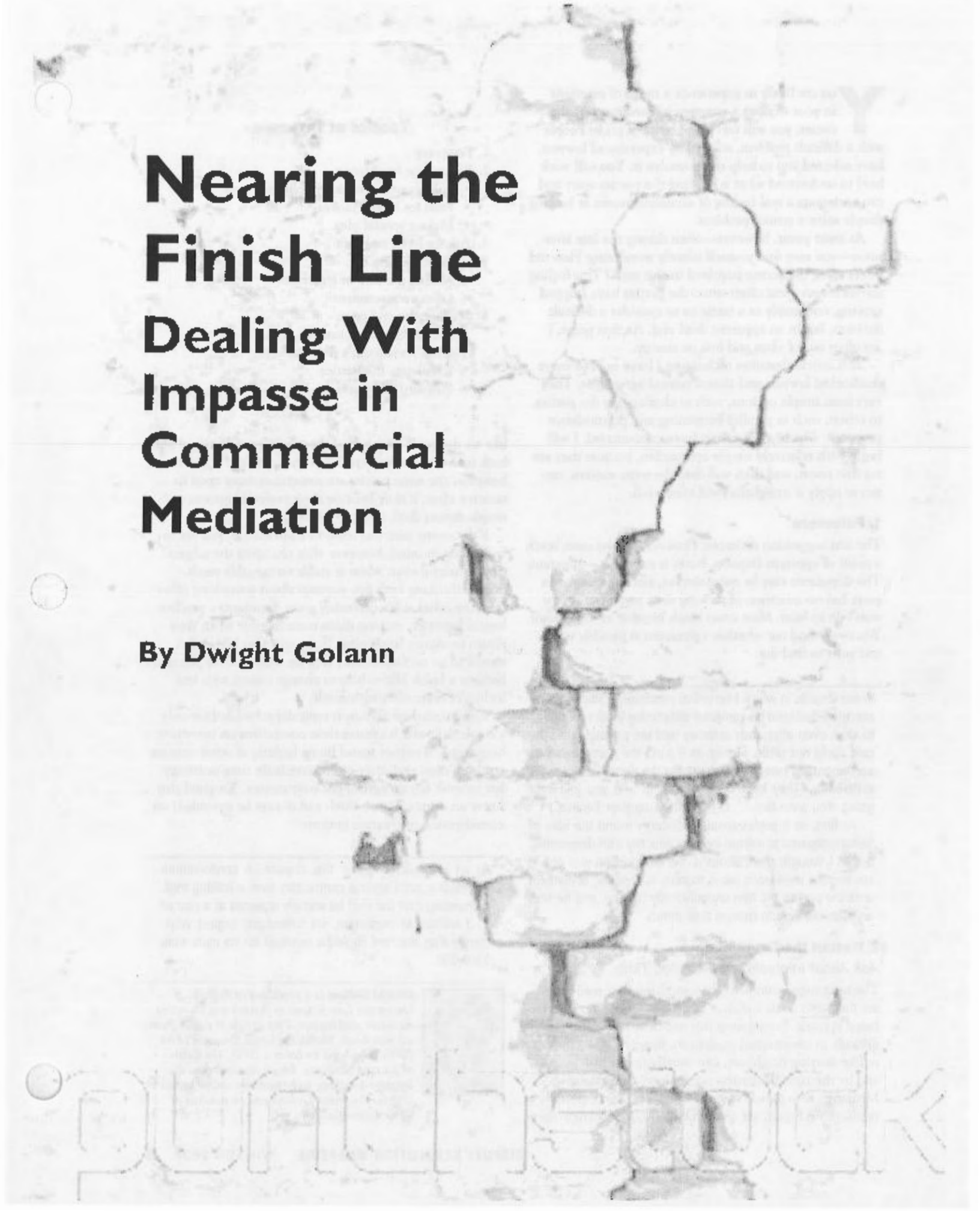
[10] Reasons for flexibility could include that they have assessed their risk as worse than the collective number would suggest, that their combined risk and transaction cost well exceed the proposed number, that they have greater distance and recognize one or more recalcitrant parties as potentially holding up a good settlement or as possibly having even less risk than has been assessed for them.

***Simeon H. Baum, President of Resolve Mediation Services, Inc. (www.mediators.com), was the first Chair of NYSBA's Dispute Resolution Section. Mr. Baum has mediated over 900 disputes, including the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site and Trump's $ 1 billion suit over the West Side Hudson River development. He was selected for New York Magazine's 2005 - 2011 "Best Lawyers" and "New York Super Lawyers" listings for ADR, and Best Lawyers' "Lawyer of the Year" for ADR in New York for 2011. He teaches Negotiation Theory & Skills at Benjamin N. Cardozo School of Law and is a frequent speaker and trainer on ADR, For over a decade he has trained mediators for the Commercial Division of various counties of the New York Supreme Court, and more recently through the NYSBA's Dispute Resolution Section.*

Nearing the Finish Line

Dealing With Impasse in Commercial Mediation

By Dwight Golann



You are likely to experience a range of emotions in your work as a commercial mediator. At the outset, you will feel a real sense of pride: People with a difficult problem, advised by experienced lawyers, have selected you to help them resolve it. You will work hard to understand what is keeping the parties apart and can anticipate a real feeling of accomplishment at helping people solve a serious problem.

At some point, however—often during the late afternoon—you may find yourself silently wondering: How did I ever agree to become involved in this mess? This feeling arrives for me most often when the parties have stopped moving, not simply as a tactic or to consider a difficult decision, but in an apparent dead end. At that point, I am often out of ideas and low on energy.

This article describes techniques I have used to move deadlocked lawyers and clients toward agreement. They vary from simple options, such as challenging the parties, to others, such as parallel bargaining and postmediator proposals, which you may not have encountered. I will begin with relatively simple approaches, because they are my first resort, and then will describe more esoteric tactics to apply if straightforward efforts fail.

1. Persevere

The first suggestion is simple: Persevere. Many cases reach a point of apparent impasse, but it is only that—apparent. The disputants may be quite sincere, but the fact that a party has no intention of moving does not mean that it won't do so later. Most cases reach impasse at some point. You never find out whether agreement is possible unless you push to find out.

In one dispute in which I served as mediator, a Silicon Valley executive had sued his company after being fired. I continued to work even after each attorney told me privately that the case could not settle. Finally, at 9 p.m., the parties reached agreement. As I went over the terms the defendant's lawyer exclaimed, "They kept beating you up and you just kept going. You were like . . . like . . . the Energizer Bunny!"

At first, as a professional mediator, I found the idea of being compared to a drum-beating pink toy a bit demeaning. But as I thought more about it, the comparison was apt. A commercial mediator's job is to keep advocating settlement until the parties tell him unequivocally to stop, and he sees no plausible way to change their minds.

2. Restart the Bargaining

Ask About Interests, for a Limited Time

The next suggestion is to try something that mediators are taught to do as a matter of course—probe for interest-based options. Stimulating interest-based bargaining is difficult in commercial mediation, however. Businesses, unlike warring neighbors, can usually find a new partner, and by the time mediation occurs have often done so. Mediators who pursue interest-based options, especially a relationship repair, are often rebuffed ("If you knew them like we do, you'd understand that the idea of letting them back into our operation is out of the question!") Later, however, the same parties are sometimes more open to creative ideas, if only because their preferred option, a simple money deal, is not available.

If discussing interests leads to a settlement, you are in luck. Keep in mind, however, that changing the subject can be helpful even when it yields no tangible result. Simply thinking for a few minutes about something other than the other side's obstinacy gives disputants a psychological breather, making them more flexible when they return to money bargaining. Someone who had earlier vowed to go no further may now be willing to do just that because a break allows him to change course with less feeling of contradicting himself.

Commercial mediation is typically scheduled for only a single day, which creates time constraints on inventive bargaining. If parties spend hours looking at other options but hit a dead end, they often have little time or energy left to work out an agreement over money. To avoid this I may set a time limit (which can always be extended) on consideration of creative options.

As an example, consider this dispute. A condominium association sued several contractors over a leaking roof, demanding that the roof be entirely replaced at a cost of $1.3 million. In mediation, six defendants argued vehemently that the roof could be repaired for no more than $300,000.

Tactics at Impasse

1. Persevere
2. Restart the bargaining
   - Ask about interests, for a limited time
   - Push for linked moves
   - Make a special plea
3. Ask for help, and wait
4. Change the process
   - Modify the mix or structure
   - Offer an assessment
5. Manage the end game
   - Play confidential listener
   - Offer a mediator's proposal
   - Challenge the parties
   - Adjourn and pursue

Dwight Golann *is a professor at Suffolk University Law School in Boston and an active mediator and trainer. This article is drawn from his new book,* Mediating Legal Disputes *(ABA 2009). The book includes a DVD,* The Skills of a Legal Mediator, *which demonstrates the impasse-breaking techniques described in this article. Professor Golann can be reached at dgolann@suffolk.edu.*

Hearing this, I said to the defendants: "I suggest we think about whether you as a group can agree to repair and guarantee the roof. From what you tell me, that might be a much lower-cost option. I'm aware, though, that Nancy has to leave for the airport at 4 p.m., and she holds the largest checkbook. So I suggest we explore the repair option for the next hour and a half. If it doesn't work we can go back to putting together a money offer."

The defendants talked cooperatively for 90 minutes, but the initiative foundered over their unwillingness to guarantee the repair for 10 years. We returned to talking about money—and within an hour the group raised its offer from $200,000 to $700,000. A month later the case settled at $1.1 million.

Push for Linked Moves

As this example demonstrates, when creative discussions are not successful, the other option is to continue pure-money bargaining. Parties are often more willing to make monetary concessions if they know what they will get in return. Mediators can provide this information by proposing some of the following linked moves.

"What if." The simplest way to feel out parties about reciprocal concessions is to ask "What if?"; as in, "What if I could get them to come down $200,000 . . . if I could get that much movement, could you make a deal at that point?" Or, "Let's say I could get them to drop that far—what do you think you could do in response?" The "what if" phrasing suggests that the other side is resisting the idea of conceding, reducing the listener's tendency to devalue the potential concession. It also suggests that the adversary will have to make a concession first, satisfying a positional bargainer's wish to have its adversary "sweat for a deal."

Simultaneous steps. Another approach is to ask both sides to make concessions simultaneously ("I'm going to ask you to drop 200, and at the same time I'll ask the defendant to go up 150"). This plays on the human wish for reciprocity: Each party knows that it will not have to move without getting something in return and also what the reply will be. If parties agree to make a large mutual jump, this approach can reinvigorate the bargaining process by giving each side a signal that the other is seriously interested in a deal.

Range bargaining. A variant on this is range bargaining. Here the mediator proposes that future bargaining will occur within a stated range of numbers. If parties are at, say, $80,000 and $200,000, a mediator might say, "Can we agree that we will bargain from this point on between 120 and 150?" This is the practical equivalent of parties making simultaneous jumps, but it is sometimes psychologically easier for litigants to accept, because each side can tell itself that it has agreed only to go as far as the specific number and that most of the concessions from that point on will have to be made by the other.

Parallel-track bargaining. Parties are sometimes willing to indicate privately that they will compromise, but will not do so "publicly" to their opponent. The result can be a frustrating standoff in which neither side is willing to be the first to make a serious concession. One way to deal with this is by conducting "hypothetical," or "parallel-track" bargaining.

For example, suppose a plaintiff is at $3.5 million and a defendant at $500,000. The defendant admits privately to you that it is willing to "go to the very low seven figures" to settle, but it won't do so until the plaintiff gets to a "reasonable" position, and, it says, $3.5 million is not it. You respond by asking, "What would you consider reasonable at this stage, given that you are at 500?" The defendant answers, "No more than $2 million." You then say, "Assume for a moment that the plaintiff is at $2 million. What offer would you be willing to make then?" The defendant answers "Then I'd go to 700."

Now you ask the plaintiff the same questions: What would be a reasonable stance for the defendant to take at this point? (Say the answer is "$1 million.") How much would you come down if the defendant got to $1 million? ("$2.5 million.") The result is that you now have the defendant at $700,000 and the plaintiff at $2.5 million (admittedly, based on different assumptions about the bargaining situation).

You can then repeat the process, asking the defendant, "What would you expect the plaintiff to do in response to your $700K?" ("1.5 million") "What would you do if they did go there? ("850K") You can then pose the same questions to the plaintiff. Gradually, the parties will approach each other.

Lawyers are at first wary of parallel bargaining because it calls for them to make a concession without having actually received one from the other side. But they understand that the other party is working under the same ground rules, and if you seem confident about what you are doing, they will often cooperate. As a result, parties can come quite close to each other without knowing it. At that point, you can ask each for permission to reveal its most recent offer and the assumption on which it was based, provided that the other side does so. Alternatively, you can use the information to support other approaches, such as a mediator's proposal.

Make a Special Plea

Personal request. If linked moves are not successful, you can sometimes obtain a concession by asking for it explicitly. Frame it as a personal request: "If you could make one more move to help break this deadlock, I'd appreciate it. I would tell the defense that you had been adamant, and only agreed to this because I asked you."

It is easier for a disputant to make an additional concession if it is portrayed as a special gesture to the mediator because it appears to be a one-time move rather than the start down a slippery slope. This means, however, that the tactic will only work once or twice in a single mediation; repeated requests are likely to be met with, "Why don't you ask them to be reasonable for a change?"

Final move. Parties will often agree to make an extra

effort if they know that it is the last you will ask them to make and not simply a prelude to further compromise: "I'm going to ask you to go to $1.1 million. That's my last request. If this doesn't work, it's over, and I'll tell the plaintiff that. I won't come back to you again."

This is a risky strategy because you cannot go back on your word—if you say that you will not come back for more, you can't unless something truly unexpected happens. But a last-and-final plea will often produce an additional concession.

3. Ask for Help, and Wait

This suggestion should follow "persevere," but I have delayed it because turning the initiative over to others seems counterintuitive to those of us who are active problem solvers. I have found that when parties are stuck, one good option is to summarize the situation calmly and sympathetically, and then wait silently for a few moments. Ask the disputants for ideas, and then observe how they respond. I have found, surprisingly, that when I do this, disputants often take the initiative. Even when they don't, sitting back for a moment gives me a mitubreak; I learn something from their reaction, and can use the pause to think about other options.

4. Change the Process

Modify the Mix or Structure

Changing the participants or the structure will sometimes restart the process. The simplest is to experiment with the format. If caucusing is not working, would another format be more effective? Options include:

- Disputants meet together
- Key decision makers meet apart ("only you can do this . . .")
- Experts or lawyers meet ("professionals confer")
- One person meets the opposing team ("into the lion's den")
- Participants meet in an informal setting
- People are added to or subtracted from the process

Any of these variations can unfreeze the process enough for parties to resume bargaining, and in unusual circumstances may resolve the controversy entirely.

Disputants meet together. In this option, all the disputants are convened in what amounts to a new joint session (assuming, as is usually true in commercial mediation, that they have adjourned to separate caucus rooms). The purpose is not for each side to reargue its case. There may be a single issue that can be illuminated by a direct discussion.

Alternatively, you can assemble the disputants to deliver a message; for example, that the process is in peril and that you plan to ask each of them for a special effort to avoid a breakdown. You could, of course, deliver the same message separately to each side, but calling a special meeting and saying it to everyone together makes it clear that the problem is real, and no one is being singled out for blame. Laying out a situation in this way can also serve as a springboard for challenging disputants to come up with ideas, either together or in caucuses—a version of "Ask for Help, and Wait."

Key decision makers only. In commercial disputes, there is often a key decision maker for each party team. One option is to bring them together for a private conversation. The dynamic in these private meetings is often strikingly different than when adverse groups talk with each other. A direct meeting is likely to seem familiar and informal, much like a meeting outside litigation. Disputants chat, talk informally, and present at least an air of cooperation, particularly if they had a good relationship in the past. Lawyers often ask the mediator to be present at such meetings to ensure that the discussion remains on a productive level or guarantee confidentiality, but principals can also meet alone.

Mediator Eric Green calls this the "Napoleon gambit" because he often adds an implied message to the process: "Only you have the wisdom, breadth of vision, authority, and decisiveness to end this conflict. This case is a difficult one, but you can. . . ." Disputants with sizable egos are likely to rise to the challenge and take it as a personal goal to achieve a deal.

For example, a manufacturer was in a dispute with its insurer over the insurer's refusal to pay huge claims arising from a mass-tort class action. The parties agreed to go to mediation. The insurer's CEO prepped intensively for the process, planning to have a point-by-point discussion of policy coverage and other issues with representatives of the manufacturer.

When the parties convened in joint session and the insurer CEO tried to discuss the case, however, the manufacturer's inside counsel said that he wasn't interested. He had listened carefully to his litigation team's analysis, he said, and saw no point in having a debate. The CEO was angry and frustrated by this, but at my request agreed to stick with the process. The parties adjourned into caucuses, and negotiations went forward painfully.

The turning point came months later when the manufacturer's counsel (the same lawyer who'd refused to debate with the CEO) asked me to invite the executive to meet him in the bar of the hotel where the mediation was being held. As a dozen lawyers and I sat around conference rooms, speculating on what might be going on, the two key players talked for over an hour and cut a deal.

Experts or lawyers only. Submeetings need not be not limited to parties; you can also put experts such as accountants or product managers together. When experts talk with each other, they tend to have the kind of conversation they are accustomed to in their daily work, often leading to a disagreement being narrowed or at least the cause becoming clearer.

Attorneys are experts on the litigation process. If the lawyers have a good working relationship, it can be helpful to bring them together. Freed of the need to posture in front of clients, they sometimes talk candidly, admitting to risks, hinting at client-relations issues, and suggesting

solutions. You can achieve some of the same effect by talking to each lawyer alone, but direct discussion is usually more effective.

One person meets the opposing team. At times, the people who need to hear something go beyond a single member of a team. If so, you can ask one person to meet with the entire bargaining team for the other litigant. This has a "Daniel in the lion's den" quality. The very act of going into the other caucus room without allies has symbolic impact, which may make the person's message more credible.

In one such situation, a franchisor and franchisee were in a dispute over the franchisor's alleged inability to deliver services and the franchisee's failure to pay a $60,000 quarterly fee. It became clear that any settlement would require continuing the franchise relationship. The franchisor, however, would not consider this, arguing that the franchisee was a deadbeat who had made up his allegations simply to avoid paying the fee. Asked about this, the lawyer for the franchisee explained that his client had been planning to make the payment and had only withheld it because the attorney told him to do so.

I knew that the opposing lawyers in the case respected each other, and so I asked the franchisee and his attorney if the lawyer would be willing to go into the franchisor's caucus room to explain why the payment had not been made. I suggested that the lawyer go in alone, so there would be less suspicion that he was simply protecting his client.

The lawyer went into the other caucus and explained that the franchisee had acted on his instructions. After talking privately, the franchisor team told me that they thought the franchisee had gotten bad legal advice, but were less concerned about his good faith and were willing to consider restructuring the franchise.

Meet in an informal setting. Sometimes the key to breaking an impasse is to change the physical setting. Most commercial mediators work in conference rooms, but at times other settings can be effective because they make participants more comfortable or have positive connotations.

This approach worked in the following case. A doctor sued a high-tech company, arguing that it had illegally diluted his interest in the company by issuing stock to new investors without his permission. There seemed to be a very personal element in the case: The doctor felt that he had played a crucial role in sponsoring the start-up and that its young CEO, a friend of his daughter, had betrayed his trust. Settlement discussions reached an impasse, and we adjourned.

With the defense's assent, I suggested visiting the doctor at his home before work one day. He beamed as he showed me his porcelain collection and mementos of his medical achievements while his wife watched. Talking over coffee and grapefruit, the doctor talked about the dispute in a much more relaxed way, and a few days later we had a settlement.

Add or subtract people. It is sometimes useful to change the mix by adding people or taking them out of the process. It is usually easier to add players than subtract them; suggesting that a participant leave is often interpreted as a judgment that he is being unreasonable or, if made by an opponent, as an effort to "push us around." It is sometimes possible to eliminate a problem player indirectly, however, by (for example) suggesting that both sides bring in someone from a higher level: "Perhaps if we could get the plaintiff to bring in its CFO and you did too, we could explain your thinking on damages. . . ."

Offer an Assessment

At this point in the process, the participants should have enough trust in you, and enough frustration with the results of their approach to the conflict, to accept advice. Consider offering some, or sharpening advice that you have already given. Opinions can cover at least three separate topics:

- What offer to make next
- Whether particular settlement terms satisfy a disputant's broader interests
- The likely outcome if the case is adjudicated

The first option is to offer advice about the bargaining situation—what is necessary to move the process forward. This is the least risky opinion to offer because you are unlikely to be blamed even if your advice is unwelcome: You are simply confirming, after all, what the listener has known from the outset—that its adversary is unreasonable. Parties may still refuse to move, however, complaining (for example) that "It's time for *them* to get realistic!" If so, you can sometimes jump-start the bargaining by suggesting linked moves as described above.

Another option is to offer an opinion about the value of an offer, either in terms of a party's broader interests ("Given what you've told me about wanting to put this behind you . . . ") or the party's litigation alternative ("In light of what I know of Judge Jones's attitude toward discrimination cases. . . . ").

Before evaluating the litigation outcome, however, focus on the cost of continuing the litigation. Parties may not welcome a reminder of how much it will cost to achieve "justice," but they should by this point in the mediation be willing to take account of it. If drawing attention to costs is not enough, and you have not yet given either side a "hard" evaluation of the legal merits, this may be the time to do so.

How to evaluate effectively is a topic in itself. Briefly, however, the key is not to give your *personal* opinion of who is likely to win (which, after all, is irrelevant because you will never decide the case). Rather, think of yourself as a legal meteorologist, forecasting the weather in a future courtroom. You may predict a 70 percent chance of bad weather, but it is not because you personally prefer rain—it's simply the way you read the evidentiary barometer. You can:

Evaluate more of the case, for example, going past stating a view about a single issue to give an opinion about a

party's overall chance of winning.

Make an opinion more definite, by replacing a characterization such as "you'll have difficulty winning on liability" with "Given Judge Smith's rulings in IP cases, I think you have a 30 to 40 percent likelihood of prevailing on liability at trial."

Set a specific monetary value on the case ("probably a $150,000 to $200,000 case, in this county").

Make your evaluation more forceful by putting it in writing, but be careful about embarrassing a participant.

5. Manage the End Game

Play "Confidential Listener"

Toward the end of a process, you can probe for the parties' bottom lines. One way to do this is to play "confidential listener." This involves asking each side privately how far it will go to get an agreement, then giving all parties a verbal characterization of the gap. This allows parties to give the mediator and each other a signal about their willingness to compromise, without having to make a specific concession. Effectively applied, the confidential listener tactic can give both you and the disputants a clearer sense of each side's actual goal.

Don't ask disputants for their last-and-final number. Parties almost never give it, and such requests put them under pressure to mislead you. Worse yet, if a party does answer sincerely, it may feel that it has to stick with the number for the sake of consistency, even if later it becomes willing to stretch further. You are likely to get more candid answers if the parties fear failure from seriously gaming the process. It makes sense, therefore, to wait until disputants are close to impasse and to characterize the technique as one of the last things you can do to find a solution. I would introduce the option in this way:

> Your offers are a million dollars apart, but I think you are in fact much closer than that. Let me try something I call "confidential listener." I'll ask each of you to give me what I'll call your "next-to-last number"—a number one step away from the lowest you'd accept or the most you'd pay to settle this case.
>
> I won't reveal either side's number to the other, or give you a number answer on how far apart you are; if I did that, each side could calculate what the other party's number was. Instead I'll call the lawyers together and give a verbal statement of how far apart you are, such as "very close" or "far apart." That keeps anyone from being locked in. I'll be back in a few minutes to ask for your number.

Once you have gotten the parties' numbers, you can give them a characterization of the gap between them. For example:

- "The gap is substantial, but I think it can be bridged."
- "You are closer than the cost for each of you to litigate this case through trial, so it's worth continuing to talk."
- "You are very far apart. Unless a party changes its view of what the case is worth in court, it'll be hard for you to agree. Should we consider getting an expert opinion?"

After giving verbal feedback you have an additional option, which is to ask each side for permission to reveal its number to the other on a mutual basis: "I'm going to ask both sides if you would agree to let me disclose your number to the other side, on the condition that they authorize me to tell you theirs."

Offer a Mediator's Proposal

Under a mediator's proposal, the neutral suggests a set of terms to both parties to which they must respond under the following ground rules:

- Each litigant must tell you privately whether or not he or she would agree to the proposal, assuming that the other side has done so as well.
- The terms must be accepted or rejected unconditionally; in other words, no "nibbling." For example, "We'll accept, but the warranty has to be three years, not two" would be treated as a rejection.
- Each side must answer, but without knowing the other's reply. If a party rejects a proposal, it will never learn whether its opponent would have accepted it.
- Usually, each side will answer within 5 to 20 minutes. However, if accepting would require a party to go beyond its authority, you may need to set a response deadline for the next day or several days later. If one side asks for repeated extensions, there is sometimes a problem: It becomes apparent that the other side has said yes—otherwise why would you extend the process?

Parties thus know that they may be able to achieve complete peace by saying yes to a mediator's proposal, but that if the effort fails, the other side will never learn of its willingness to compromise, and its bargaining position will not be impaired. My practice is usually to require both sides to answer even if one side quickly rejects the proposal; my thinking is, first, that these are the ground rules, and second, that it is useful for parties at impasse to think hard about how far they will go to get a deal.

Many mediators avoid this technique, perhaps because it involves presenting terms on a take-it-or-leave-it basis and thus taking over the bargaining process. My sense, however, is that parties often reach a point at which they want me to take over responsibility. Doing so relieves them of the "water torture" of positional bargaining, in which they have to make one painful concession after another without knowing whether it will get them a deal. It also allows parties that expect to be second-guessed by outsiders to use the mediator as a convenient scapegoat: "This lousy compromise wasn't our idea, it was the mediator's." I find that mediator's proposals are accepted by both sides at least two-thirds of the time.

If you decide to make a proposal, how should you decide what the terms will be? My proposals do not reflect an evaluation of the parties' legal cases, and I tell them that. Doing so also reduces the risk that a party will feel that I have ruled against them on the merits. I am likely to say:

> In framing the proposal my goal is not to please either side. I could suggest terms that you would be very happy with, but it would be a waste of time because the other side would reject them. For the same reason, I can guarantee that my proposal won't make them happy either. I'm afraid that we're at the point where any proposal has to balance the pain each side will feel in accepting it. My goal is to find a set of terms that both parties will decide, however reluctantly, is better for them than litigating the case through trial.

If a proposal fails. Assume that the parties have rejected your mediator's proposal. Is this the end of the road? No. You can ask the rejecting party to take the initiative: "I understand that you can't accept my proposal, but what do you need to make it minimally acceptable?" Parties usually reply by giving a new number that often falls between your proposal and their last offer: "We won't go to 500, but we could go to 400." You can then ask to present the party's new number to the other side: "Can I tell them that you'd settle if they would go there?" Often a party that had refused to make any further concessions will now agree to put forth a new offer.

It may seem strange that a party would offer compromises beyond its announced bottom line. This may be due to what is called the "contrast principle": A further concession may look good, compared to the "unacceptable" proposal you have made. Or it may be that a party that has rejected a proposal feels that it should make a gesture to preserve its relationship with the mediator. Or the fact that the other side has rejected a mediator's proposal may convince a party that it must go the "last mile" or face failure. Whatever the motivation, the failure of a mediator's proposal often sets the stage for new offers that had been unavailable before.

Successive proposals. It is sometimes possible to make two mediator's proposals.

As an example, suppose a plaintiff is adamant that the defendant, if pushed hard enough, will pay $150,000 to settle a case. You privately think that the defendant will reject that number, but the plaintiff believes that it will, and as long as he does will not consider settling for less. You therefore make a proposal to both sides at 150. The plaintiff accepts, but the defendant immediately turns it down.

You can then meet with the plaintiff team and say, "I made the proposal at 150, to hold their feet to the fire and see if they were bluffing. But they've turned it down flatly. They just won't go there. I think we now have to consider a different strategy. I'm willing to keep looking for a deal, or even make another proposal, but it'd have to be at a lower number. Sticking with 150 would just be beating our heads against a wall. What do you think we should do?"

Challenge the Parties

If all these techniques fail, you can once again challenge the parties to take the initiative. Simply asking the parties for ideas as described above is a gentle challenge, but you can also pose a question more bluntly: "It looks like we have a real problem here. We may be at the end of the road. What do you want to do next?" And wait.

Adjourn and Pursue

Mediation often requires parties to accept deals much worse than they had expected going into the process, and litigants sometimes cannot quickly adjust to the resulting feelings of loss. Even when emotions do not block a decision, there may be other problems. A party may not have enough authority to settle, or may feel the need to confer with a constituency to shield itself from after-the-fact criticism. Some forms of mediation occur over a series of sessions, which provide breaks to deal with such issues. Commercial mediations, however, are typically scheduled for a concentrated time period, usually a single day, which leaves little time for adjustment and consultation.

Adjournment, of course, carries dangers. Parties make difficult concessions in part because they hope to achieve peace. Once they leave, there is a risk that they will become discouraged or decide that they have gone too far. In practice, however, this does not seem to happen; I have rarely seen a commercial mediation fall apart because of an adjournment. If there is failure, it is usually because an impasse that existed at mediation cannot be overcome, not because anyone backpedaled or gave up.

Indeed, commercial mediations increasingly seem to require more than a single day. When the process cannot be completed within the originally scheduled time, you still have options.

Arrange status calls. The easiest option is to ask lawyers to participate in a status call: "Let's agree that I'll call each of the lawyers on Wednesday morning to talk about next steps." Agreeing to status call does not commit people to make decisions or guarantee an interactive process, but it does give you a chance to gather information and then propose a structure for further discussions.

I find that it is almost always better to talk with each side privately, rather than have a joint call. A private call permits disputants to give more honest information about obstacles and to signal flexibility without hurting their bargaining position. The key point is to create a time frame and expectation of further discussion.

Schedule another meeting. The next option is to set up another meeting. Before suggesting one, ask yourself these questions:

- Are all of the parties ready to move forward? Does a litigant need more time to calm down, or do the parties need to do additional investigation?
- If there is another meeting, how should it be structured? In particular, can the process be set up in a way that makes it less likely that it will simply repeat the last session?
- I often make some of the following points when proposing another meeting:
- Because each side has already argued its case, it will not be necessary to hold a second opening session.

(This is usually greeted with expressions of relief.) It may make sense, however, for the parties to meet jointly for a specific purpose, such as to hear a defendant's critique of the plaintiff's damage analysis.

- There is usually no need to commit to another full day. Indeed, doing so may give the signal that the parties are still far from a settlement and should wait to make their final concessions. Given the progress made so far, two to four hours should be enough for a follow-up session. I often suggest that we agree to meet after lunch, or to go only until noon. Setting a short time frame does not mean that the process cannot continue longer, and often it does. Doing so does signal that the process is moving toward closure and that disputants should come prepared to make hard decisions.
- I may go further, emphasizing that it is time to "cut to the chase" and that I expect everyone to be ready to make final decisions at the session.

Use telephone and email diplomacy. Often it is not possible to schedule another meeting quickly. Disputants may have flown in for the first meeting and are not willing to return for another one or need time to confer or gather data. Luckily, there is usually less need to meet in person a second time because you have developed a working relationship with the disputants. Once a session has been held, it is much easier to carry on follow-up discussions by telephone or email.

Electronic communication has disadvantages, of course. Over the telephone, participants cannot see each other's body language, and with email, they cannot hear each other's voices. With email, in particular, there is a danger that messages will seem harsh because they are in writing and have no body language or tone of voice to soften their impact. The biggest disadvantage of electronic communication may be the loss of focus and continuity—people drop a case and then pick it up again, often reading a message or taking a call when they are distracted by other matters.

Conduct a time-block telephone session. One way to inject focus into a process conducted electronically is to set up "time-block mediation." In this format, disputants agree that during a certain time period, say from 2:00 to 5:00 p.m. one afternoon, all the attorneys and decision makers will be at a telephone or computer, ready to receive a call or email from you. They may work on other matters but will interrupt them to respond to your calls or messages. You can then conduct shuttle diplomacy. The advantages of time-block mediation are that it is less subject to interruption, and the time limit motivates the parties to make hard choices.

Pursue them. Remember that one of the traits lawyers report that they most value about mediators is persistence. The time to follow up and willingness to plug on may be a key advantage that a new mediator has over "star neutrals" who go on to a new case every day. Even if the parties do not agree to a follow-up process, call the lawyers on your own initiative within a few days of an unsuccessful session to ask their thoughts and sound them out about next steps. Almost no attorney resents such a call.

Remember that you are the guardian of optimism about the process. Disputants tend to assume the worst and look to you for signals about whether it is worth continuing. Unless you have no realistic hope for the process, keep a positive tone.

Set a final deadline. The only thing that will motivate some people to make difficult decisions is a firm deadline. You can create one by setting a time at which you will declare the mediation over and stop acting as mediator. The parties can continue to negotiate alone, of course, but the implicit message is, "If you have not been able to reach agreement with assistance, why should you think you will be able to do so by yourselves? And if you don't settle, is your litigation alternative really as rosy as you have been claiming?"

A polite warning that you will end the process can cut through posturing and put pressure on the parties to make additional efforts. To avoid making disputants feel that you are pushing them around, stress that you are not setting the deadline to coerce anyone but simply are recognizing the reality of the situation—at some point everyone has to make decisions and move on.

Apparent impasses in commercial mediation are nearly inevitable, but they need not be final. With these and other techniques—and persistence—you can bring even the most stubborn cases to closure. ◆

Alternatives

TO THE HIGH COSTS OF LITIGATION

CPR INSTITUTE FOR DISPUTE RESOLUTION VOL. 19 NO. 11 DECEMBER 2001

DIGEST

NEUTRALS' TECHNIQUES
Highly skilled neutrals manage mediation processes by relying on a large arsenal of techniques to get past impasse to resolution. Veteran Philadelphia mediator **Bennett G. Picker** identifies 15 barriers to resolution, and the ways to overcome them. ..... **Page 251**

COMMENTARY
Los Angeles neutral **Jeffrey Krivis** explains how ADR produces multiple resolution options. ..... **Page 251**

CPR NEWS
Details on CPR's new Inter-Insurer Dispute Resolution Commitment, and a solicitation to members to participate in a study of ADR applicability to cases using the recently released CPR Mediation Analysis Screen.. **Page 252**

SPECIAL SUPPLEMENT
Excerpts from October's edition of ADR 2001, CPR's online seminar series on hot ADR topics.... **Page 253**

ADR BRIEFS
More Sept. 11 reports: The disaster victims' fund special master uses ADR in spirit—with practice to be determined—while the CUNY Dispute Resolution Consortium says it will collect, examine, and assess the ADR profession's responses to the hijacking attacks. ..... **Page 259**

DEPARTMENTS

CPR News	Page 252
ADR Briefs	Page 259
Cartoon by Chase	Page 259
Index Info	Page 261, 264
Online Info	Page 268

PULL-OUT FEATURE

ADR Counsel In Box *This issue: Expert Witnesses and Mediation*

How to Best Aid Negotiation By Breaking Down Barriers

BY BENNETT G. PICKER

NEUTRALS' TECHNIQUES

Mediation of commercial disputes has risen significantly over the past decade. As the result of (i) multistep dispute resolution provisions in contracts; (ii) state and federal court-mandated mediation programs; (iii) governmental agency programs requiring mediation; and, perhaps most significantly, (iv) corporate America's mandate to use mediation where appropriate, mediation is now part of the fabric of dispute resolution in the United States.

In a recent mediation training session, a participant asked me, "Once a client makes the decision to explore a settlement, why do we need a mediator? Why can't we get there on our own?" These questions suggest a reason to mediate that has received far less attention—the process is an extremely effective alternative to direct and unassisted negotiations.

Direct and unassisted negotiations can and should be considered as the initial path to resolving disputes. When successful, negotiation is the most flexible and cost-effective approach to resolving disputes whether or not litigation is pending. The negotiation process, however, depends upon the parties' ability to communicate, their willingness to make concessions and their ability to recognize possible solutions. Especially in

(continued on page 263)

Mediation's Value Comes from The Many Options It Produces

BY JEFFREY KRIVIS

COMMENTARY

What's the first thing you think about when you hear the phrase "civil justice?" The search for the truth, of course. In every litigated case, the pressure is on all the participants to search for the truth. The judge is empowered to assure fairness and truth. The lawyers believe in their cases and want the truth to come out. The clients feel righteous about their positions and yearn for the truth.

The mediator is a deal maker who concentrates on allowing the parties to accept a settlement that acknowledges both sides' desire for truth, but recognizes that playing the right/wrong game will not necessarily achieve a deal. As a result, the mediator is in the awkward position of asking the parties to set aside their instinctive desire to prove the righteousness of their cases in favor of accepting a compromise that might be less than what they can achieve in court.

For a settlement to occur, the trial lawyer must begin the process of seeing himself or herself as conflict resolver who happens to have a specialty in trial work. This process necessarily involves communicating in an environment where he or she must tolerate some amount of ambiguity, since settlement negotiations are rarely straightforward.

(continued on page 267)

VOL. 19 NO. 11, DECEMBER 2001 | CPR INSTITUTE FOR DISPUTE RESOLUTION | ALTERNATIVES 263

How to Best Aid Negotiation by Breaking Down Barriers

(continued from front page)

substantial commercial disputes, the barriers to resolution often are so significant that parties will not even attempt a negotiated resolution or often will reach impasse if they do attempt to negotiate.

Certain barriers to resolution occur with some frequency. The purpose of this article is to identify these barriers and to explore the ways in which a skilled and experienced mediator can overcome them.

1. Selective Perception in Making Evaluations. Parties to a dispute and their counsel—both corporate counsel and outside counsel—invariably have difficulty making an objective evaluation of their own case. Recent studies by the Harvard Program on Negotiation and other institutions establish that self-interest and selective perception make it virtually impossible for any party or counsel to make a truly objective evaluation. Parties generally look for facts and law to support their own claims and overlook the evidence that might defeat their claims.

As Winston Churchill said, "Where you stand depends upon where you sit." A skilled mediator may be the only person in the room who can make a truly objective evaluation and act as an agent of reality. While mediation is a facilitative process, especially in its beginning stages, mediators can appropriately challenge parties to consider whether their assessments are realistic without offering their own opinions on the merits.

2. Wrong Baselines. Parties in a negotiation commonly compare what is on the table with what they want or need or with what they consider to be fair. A skilled mediator can work with the parties to have them make a real world comparison—one that compares what is on the table to the consequences that will occur in the absence of a negotiated resolution. A skilled mediator can challenge the parties to consider any offer in relationship to their Batna, or Best Alternative to a Negotiated Agreement, and Watna, Worst Alternative to a Negotiated Agreement. These become the baselines for what parties should accept or reject. Moreover, within these baselines, a skilled mediator will continually challenge parties to make realistic assessments.

3. Reactive Devaluation. It is common for a party to reject a proposal made by an adversary if for no reason other than the fact that it was proposed by the adversary. Parties often are unable to assess the accuracy of information or accept a settlement proposal as made in good faith because they distrust the source. This phenomenon is known as "reactive devaluation." A skilled mediator can overcome this phenomenon by presenting proposals as his or her own or by simply floating hypothetical proposals. After learning the disputants' general settlement parameters, a mediator often can float proposals likely to work for all parties.

4. Failure to Communicate. In some cases, parties litigate for years without any communications about settlement. Notwithstanding communications about pleadings, motions, discovery and hearings, many litigators focus on trial preparation and strategy to the exclusion of settlement. Many lawyers avoid settlement initiatives to dispel any suggestion of weakness. Settlement can occur—sometimes rather easily—if only the parties had communicated earlier and more openly. I have acted as a mediator in a few cases where there were not only the usual "gaps" between the parties, but there were "overlaps."

In one case, a plaintiff said that while it would accept $800,000 to settle its claim, the defendant would, in the plaintiff's view, pay only $500,000. The defendant confided that it would pay $900,000 to resolve the dispute, but it was certain the plaintiff would not settle for less than $1 million. Thus, there was an unrecognized $100,000 overlap. In this instance, both parties had made realistic assessments about value, but inaccurate assessments about the other side's settlement position. A skilled mediator can facilitate good communication about settlement in cases where the parties are reluctant to do so on their own.

A skilled mediator will be in a position to conduct an intramural mediation between the client's representatives so that they can be aligned on settlement goals and positions.

5. Gaps in Information. Information gaps often present barriers to resolution. In preparing for mediation sessions, a skilled mediator will recognize the existence of such gaps and encourage the other side to provide information, such as an accounting, that supports a claim for damages, or case law that supports an important legal position. Information exchanges can help parties resolve disputes on their own. In one case involving a professional partnership dispute, such an exchange resulted in the withdrawal of all claims and the termination of the dispute. Similarly, mediators are in a good position to clarify misunderstandings concerning the information provided or positions taken by either side.

6. Insufficient Focus Upon Underlying Interests. Many parties engage in "distributive bargaining" in which they exchange offers and demands in an effort to "divide the pie." As a consequence, these parties fail to capture an opportunity to create value. In contrast, a skilled mediator will encourage the parties to engage in "integrative bargaining" and take a more collaborative approach to negotiations. Parties are encouraged to focus upon their interests as well as their rights and look for business-driven solutions.

(continued on following page)

Bennett G. Picker is a partner in Philadelphia's Stradley Ronon Stevens & Young LLP, and chair of its ADR Practice Group. He is a member of CPR's Panels of Distinguished Neutrals, a Fellow of the American College of Civil Trial Mediators and the International Academy of Mediators, and a member of the board of directors of the American Arbitration Association and co-chair of its National Mediation Committee. He is author of the "Mediation Practice Guide—A Handbook for Resolving Business Disputes," published in August 1998, as a joint project of the American Bar Association and Pike & Fischer Inc. in Silver Spring, Md. He also is a former Chancellor of the Philadelphia Bar Association.

Aid Negotiation by Breaking Barriers

(continued from previous page)

For example, distribution agreements can be restructured to provide for new provisions on territoriality or exclusivity. Supply agreements can be restructured to provide for future price discounts. If there is a continuing relationship, the parties will be asked to compare and contrast the issues in dispute with the importance of the relationship itself. Even in pure monetary disputes, parties can provide for creative means of monetary exchange. While much has been written about the potential for "win-win" in mediation, the possibility of such a result is not purely theoretical. In some mediations, parties view the result to be better than their probable best result in litigation.

7. Inability to Align Client's Interests. Many parties and their inside and outside counsel perceive a dispute as having only one dimension. In a typical dispute between two parties, the focus of negotiations will be primarily upon differing views between the parties as to facts, claims, defenses, rights, obligations, experts, damages, issues of credibility and outcomes. A more sophisticated analysis also will include the objectives, interests and needs of the parties. This one-dimensional approach ignores the possibility that the problem may have more to do with differences among and between the various constituent representatives of the client than differences between the parties. In one mediation, for example, the principal settlement obstacle was a disagreement about which division's profit-and-loss statement would be "hit" by a substantial payment to the plaintiff. In another, the principal obstacle was a disagreement about when to settle given the fact that a settlement would require the company to restate its earnings. A skilled mediator will recognize such problems and be in a position to conduct an intramural mediation between the client's representatives so that they can be aligned on settlement goals and positions.

8. Disconnects Between Attorney and Client. A one-dimensional approach to a dispute (focusing solely upon differences between the parties) also ignores the fact that differences between an attorney and the client can create barriers to resolution. In numerous realistic assessments where counsel overstated the likelihood of success at the outset of a dispute or failed to communicate with the client on an adequate basis. Conversely, counsel may make a fairly reasonable litigation-risk assessment—only to have the client refuse to accept bad news. In a recent dispute, upon hearing the opinion of counsel, the president of a fairly large company stated to his own attorney, "I thought you were *my* lawyer."

In another dispute, at the conclusion of a successful mediation, an attorney privately said to me, "Thank you for telling my client what I could not say to him." Contingent fees also may present barriers to resolution. In one such dispute, counsel for the plaintiffs argued against a settlement the client was otherwise prepared to accept because the settlement would not produce a sufficient return on counsel's investment of time. Mediators are in a good position to discern and deal with any disconnect between attorney and client.

In direct negotiations, parties and counsel often will behave poorly and engage in conduct destructive to the negotiation process.

9. Anger and Embarrassment. When one party to a transaction believes the other party has engaged in misrepresentation or, in garden-variety breach-of-contract cases, the business representatives directly involved in the dispute often become hostile. Partnership disputes in which long-term partners and family members have stopped speaking are common. A skilled mediator can provide a forum in which to facilitate communication and permit the parties to vent, overcome anger and recognize the need for closure. In a number of "angry" disputes, an apology serves

a predicate for a rehabilitated relationship. Parties also can become entrenched in their settlement positions, especially where they draw a "line in the sand" in negotiations at an early stage of a dispute. Many parties, even in the face of new information, become too embarrassed to change their positions. A skilled mediator can present new information and facilitate negotiations in ways that enable parties to change their positions and save face.

10. Behavior of Parties and Counsel. In direct negotiations, parties and counsel often will behave poorly and engage in conduct destructive to the negotiation process. Threats to walk away, assertions of lack of authority, nonnegotiable demands and intimidation are just a few examples of the techniques or tricks that can derail direct negotiations between parties. The mere presence of a mediator usually alters such behavior. In a mediation, parties and counsel are usually on good behavior as they want to convince the mediator that their conduct giving rise to the dispute was responsible. They also want to convince the mediator that their approaches to the negotiations are both fair and reasonable.

11. Poor Negotiating Skills. Well over 90% of all cases in litigation are resolved prior to trial. While most litigators are well trained in advocacy and trial skills, they approach negotiations on a somewhat intuitive basis. It is not at all surprising, therefore, that many lawyers find it difficult to resolve a case until the ultimate imperative arrives—the looming trial date. Parties and counsel often approach settlement negotiations with a firm view of what they want or need, but without any consideration of what they might have to accept—their bottom line. Parties and counsel commonly make a thorough analysis of their own rights and interests, but often fail to make a significant analysis of the other side's perspectives and interests. In most negotiations, advocates are far too focused on trying to convince the other side of the strength of their positions and insufficiently attentive to what the other side is saying. Many parties are unwilling to make a significant move in a negotiation because they subscribe to the conventional wisdom that "a party should not bid against itself."

Most highly skilled mediators are well versed in the art and science of negotiations. Training and experience permits a skilled mediator to assist parties with their negotiating strategies and decisions. For example, notwithstanding the conventional wisdom that parties should not bid against themselves, a skilled mediator can show parties how they can anchor a negotiation in *their* zone by making the "first credible offer." Mediators can also set a stage for parties to listen to each other carefully and respectfully. As suggested earlier, mediators can urge parties to make more objective evaluations and to compare proposals not to abstract wish lists, but to the consequences should settlement negotiations fail.

12. Inappropriate Reliance on Experts. In many disputes, parties develop hardline positions in negotiations due to a heavy reliance on their own experts. Given the late stage in the litigation process at which expert reports are exchanged, parties can be unaware for years of the positions of their adversary's experts. A skilled mediator can provide for an early, informal exchange of opinions by experts. These exchanges can occur even before experts have formed their final opinions or offered their written reports. In several cases, I have conducted what can be characterized as a "minitrial within a mediation." These mediations featured an informal, mediator-moderated exchange of experts' opinions, where the experts have had a limited opportunity to state their conclusions and to pose questions to each other. In these "minitrials," attorneys and clients attending the mediation have merely observed this controlled exchange. In each case, the opportunity to observe an exchange of the views of experts has resulted in a softening of hardline settlement positions and served as a predicate to resolution. [For more on experts, see the centerfold feature, *ADR Counsel In Box*, in this issue.]

13. Preoccupation With Winning. Many companies commence litigation upon a belief that they have been wronged in a commercial transaction. Upon being served with a complaint, many companies perceive that they have been wrongfully attacked and, at least initially, adopt a win-at-any-cost approach. Business persons directly involved in the transaction at the core of the litigation often urge their key executives to seek a declaration of rights in order to be vindicated. While many larger companies have institutionalized ADR, the support from within is often neither very broad nor very deep. Moreover, smaller and more entrepreneurial companies rarely involved in litigation are even less inclined to compromise and often view the need to prosecute or defend a suit to be a matter of principle. In mediation, a skilled mediator can get the parties to recognize that not every case should be interpreted as a matter of principle. As one legal analyst stated: "Every case is a matter of 'principle' until the client receives the third and fourth bill from outside counsel at which time they will begin to spell the word differently—'principal.'"

Skilled mediators are particularly adept at determining whether the impasse is a matter of posturing or whether it is real.

In addition, a skilled mediator often will be successful in convincing parties that they need to focus not upon what happened, but upon the evidence a court will hear. While parties often want to litigate to establish the truth, a skilled mediator can suggest why they can only hope for "court truth" as distinct from "absolute truth." Ultimately, the mediator's challenge is to urge the parties to take a more bottom-line approach in pursuit of their claims and defenses. By examining all of the relevant considerations and viewing the dispute as a problem to be solved, most parties will realize that their most responsible decision will be one that involves some compromise.

14. Inability to Break Impasse. Parties who elect to engage in the process of direct unassisted negotiations often find it difficult to overcome an impasse on their own. Skilled mediators recognize the first signals of approaching impasse when they hear statements such as "This is my bottom line," or "I knew

(continued on following page)

Aid Negotiation by Breaking Barriers

(continued from previous page)

this would be a waste of time," or "We are leaving." A skilled mediator can also detect early signs of possible impasse from the nonverbal conduct of the parties. Skilled mediators are particularly adept at determining whether the "impasse" is a matter of posturing or whether it is real. If the perceived impasse occurs as a consequence of posturing between the parties or by a party with the mediator, mediators use a number of techniques to generate movement and overcome the problem. Even when a real and ultimate impasse occurs, skilled mediators are well versed in a number of impasse breaking techniques, for example, adjournment, requesting a "last-best" offer proposal, or using a double-blind proposal. In such an instance, the proposal is made to each side confidentially for their acceptance or rejection. Unless both accept, a party will not know whether the other side has accepted the proposal.

15. Process Barriers. Each of the above paragraphs illuminates the barriers to resolution in party-to-party negotiations and the ways in which a mediator can overcome them. In addition to the techniques, skills, and strategies that a mediator brings to the process, the simple fact that there is an event—the mediation itself—enhances the potential for resolution. In many cases, parties are simply not ready to resolve a dispute in direct negotiations because of their need for a day in court. Mediation can provide the needed "day in court" by giving the parties an opportunity to tell their story and get feedback from a neutral. Moreover, in mediation, parties are better prepared for negotiations and are required to make decisions within a defined time frame. Further, in direct negotiations parties often need authority to settle at levels beyond their authorization or are concerned about the need for cover in order that their settlement decisions not be criticized at higher levels within the organization. Recommendations or feedback from a mediator often can satisfy these needs and concerns. Finally, in direct negotiations it is easy to blame the other side for any failure to achieve resolution. In contrast, parties in mediation are likely to become invested in the process and work harder to achieve a resolution; achieving resolution becomes a part of the definition of "success."

In direct negotiations it is easy to blame the other side for any failure to achieve resolution. In contrast, mediation partners are likely to become invested in the process and work harder to achieve a resolution.

* * *

Whatever the barriers to resolution, good mediators bring to the table an understanding of the social psychology of negotiations and an appreciation for how parties perceive and deal with the issue of risk. Highly skilled mediators are well versed in mediation techniques like paraphrasing, framing and the use of mediator transparency. They also know how to manage the process when a party is not acting in good faith or where there is an imbalance of power. The best mediators apply leadership and problem-solving skills and earn the trust of the parties. Ultimately, they will involve the parties directly in the search for solutions. While direct and unassisted negotiation should remain the initial path to dispute resolution, where some of the above barriers appear to be an impediment, parties should recognize the benefits of a facilitated negotiation with the help of a skilled and experienced mediator.

FURTHER READING

These observations on barriers in negotiations are based on my experiences in mediations. There are a number of important works that examine similar barriers in negotiations from a theoretical perspective. Among these are Robert Mnookin's diagnostic approach, which identifies four classic barriers to agreement: cognitive, strategic, principal-agent and reactive devaluation. See Robert H. Mnookin, "Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict," 8 *Ohio State Journal on Dispute Resolution* 235 (1993). Christopher Moore, in his "Circle of Conflict," identifies conflicts as emanating from data, interests, structure, values or relationships. See Christopher W. Moore, "The Mediation Process" 27, Jossey-Bass Publishers (1986).

Any critical analysis of the negotiation process also must recognize the effectiveness of a problem-solving approach, in contrast to a more competitive approach focused upon winning. Carrie Menkel-Meadow addresses the benefits to be achieved by parties crafting solutions to expand the available resources and meet the needs of the parties. See Carrie Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem Solving," 31 *UCLA L. Rev.* 754 (1984).

Gerry Williams' analytical approach identifies the five steps for recovering from conflict (denial, acceptance, sacrifice, leap of faith and renewal). Drawing upon the literature in law, psychology, anthropology and related disciplines, he discusses the potential for the disputants to be transformed by the process. See Gerald R. Williams, "Negotiation as a Healing Process," 1996 *J. Disp. Resol.* 1.

—*Bennett G. Picker*

Cognitive Barriers To Success In Mediation: Irrational Attachments To Positions And Other Errors Of Perception That Impact Settlement Decisions

by Bennett G. Picker, Gregg Relyea

When preparing for mediation, most parties establish benchmarks for settlement in advance of the process. In disputes primarily about money, after assessing the likely risks and costs of litigation, most parties identify settlement ranges and some establish tentative "bottom lines." Often these assessments are unconsciously influenced by limitations in our five senses and the way information is processed, collectively called "cognitive barriers." When establishing benchmarks for settlement, parties and counsel should make every effort to avoid the following errors of judgment that may affect their evaluations and decisions about settlement.

1. Cognitive Dissonance. This bias refers to the fact that it is psychologically uncomfortable for most people to consider data that contradicts their viewpoint. Disputants and their attorneys tend to resolve conflicting information by justifying their own conduct, blaming others, and denying, downplaying, or ignoring the existence of conflicting data.

2. Advocacy Bias. Most parties and counsel have difficulty overcoming self-serving judgments about the likelihood of success on the merits in litigation (or arbitration). The bias results from (1) selective perception and (2) the fact that most parties spend substantial time identifying their strengths but pay insufficient attention to or discredit possible weaknesses. In one study on advocacy bias, given the same set of facts and an instruction to make an objective evaluation of a case in order to provide the client with a benchmark to assist in making settlement decisions, participating "plaintiffs" overwhelmingly found in favor of plaintiffs and for substantially higher amounts than did participating "defendants." This Harvard/MIT Study concludes that it is almost impossible for a lawyer or client with an interest in the outcome of a dispute to make a completely objective settlement assessment.

3. Assimilation Bias. The tendency of individuals to see or hear only that information that favors their position is called "assimilation bias." Victims of assimilation bias behave as if adverse information was never presented to them.

4. Endowment Effect. This cognitive barrier refers to the tendency to over-value things in which one has a property interest (homes, cars, personal property, and as lawyers and parties to disputes – the value of claims in dispute).

5. Certainty Bias. Studies on negotiations have established that most people overestimate their degree of certainty when answering questions or making assessments about probable outcomes in litigation. As a group, lawyers are particularly likely to overestimate their degree of certainty. This bias should be examined when making settlement recommendations and decisions, particularly when predicting the likely result at trial on a percentage basis. Given the uncertainty in litigation, it is difficult to predict outcomes in litigation in exact percentages, in contrast to a range of percentages.

6. Egocentric Bias. Individuals tend to claim for themselves greater responsibility for a joint action than would be given by an outside observer. Egocentric bias is also at work when negotiators consider subjective issues such as "fairness." Thus, it is important to examine both the economic elements of a case as well as the "egonomics."

7. Inattentional Blindness. We tend to see/hear only that which we are focused on. One classic example is a videotape of several people standing in a circle, passing a basketball among them. Viewers are asked to count the number of times the basketball changes hands. In the middle of the approximately 90-second video, a young man dressed in a gorilla costume walks into the center of the circle, turns to the camera, pounds his chest, and walks away. More than one-half of viewers are so focused on completing the task of counting basketball passes that they completely miss the gorilla, with some swearing that a gorilla never appears in the video. Similarly, many parties and their counsel fail to see and assess the "big picture" (e.g., overall case value, themes of a case, jury appeal factors, witness appearance) because they are focusing sharply on other specific points.

8. Mistaking a Small Part of the Truth for the Whole. The classic story, by the Persian mystic and poet Jalaluddin Rumi, involves five Indians who were invited into a darkened circus tent to experience an elephant for the first time. One feels its ears and describes the elephant as a "giant fan." Another feels its leg and describes the elephant as a "giant pillar." Yet another feels its trunk and describes the elephant as a "giant hose." And so on. When the lights are turned on and they see the full elephant, they all realize that they have mistaken a small part of the truth for the whole truth. Especially in cases involving a multiplicity of issues and arguments, most negotiators will forcefully assert their own arguments ("parts of the elephant"), while losing sight of the bigger picture, e.g., the themes of their case and the appeal of their client.

9. Reactive Devaluation. People tend to minimize the value of an offer or proposal from another party due to concerns about the credibility or competence of the source of the offer ("consider the source").

10. Competitive Arousal. There is a tendency for negotiators to lose sight of their bottom line "reservation price" due to the drama of the negotiation ("auctioneer's effect"). Based upon the principle of "social facilitation," there is also a tendency to "grandstand" for the other party (especially attorneys acting in the presence of clients).

11. Change Blindness. This bias refers to the tendency to fail to detect large changes to objects and scenes because the mind tends to fixate on the first image. In the classic experiment, viewers are shown two alternating still photographs that have significant parts of the scene altered (e.g., people boarding a jet plane with a large jet engine in one photograph and the same scene where the jet engine has been deleted from the photograph). Consistently, a large percentage of people are unable to identify the changes in the scenes. Likewise, attorneys may overlook significant factual developments in their cases as discovery progresses and they may fail to re-evaluate based on new information.

12. Risk Aversion (Loss Aversion). Studies on negotiation have established that parties make different decisions about risk depending upon whether they categorize (or "frame") the risk as a gain or a loss. Usually, from the reference point of the status quo, most parties are risk-averse when protecting settlements regarded as current "gains" and are risk-seeking when making decisions involving results regarded as current "losses." For example, most plaintiffs would prefer receiving $100,000 (i.e., a settlement offer framed as a "gain"), while avoiding the perceived loss of a 50% chance of a verdict of $200,000. Conversely, most defendants would prefer a 50% chance of a verdict of $200,000 over a certain payment (framed as a "loss") of $100,000.

13. Hindsight Bias. Parties and counsel invariably overestimate the predictability of past events and fail to recognize, when making predictions, that hindsight is twenty-twenty. As a consequence, the assessment of whether or not conduct is wrongful is likely to be determined differently by one person making an objective decision before the fact and another person (or jury) assessing the same conduct after the fact. For example, a decision that it is not necessary to adopt a safety measure will be viewed more critically after the fact in the context of a trial to determine, whether or not the failure to take a precaution caused an actual harm.

14. Attributional Bias. This bias refers to the tendency of a person to be hostile to an adversary and impute negative intent toward that person even in the absence of any negative acts (simply because the parties are involved in a dispute). The anger and blame resulting from this bias often will make cooperative problem-solving more difficult.

15. Perception of a False Dichotomy Between Competition and Compromise. Parties in conflict tend to believe they have a choice only between competition (i.e., the pursuit of self-interest) and compromise (i.e., making unnecessary and damaging concessions). This over-simplification blinds parties to other approaches, such as one that permits the interest of both sides to be considered, as well as integrative solutions that can achieve all parties' objectives.

Perhaps Winston Churchill said it best: "Where you stand depends upon where you sit." As a matter of human nature, it is only normal for a party's or counsel's assessments to be skewed by the above cognitive barriers and other errors of judgment. However, in order to make a responsible settlement decision consistent with the interests of the client, both

parties and their attorneys should make every effort to recognize and overcome the above cognitive barriers that may impact their judgment.

Bennett G. Picker biography and additional articles: http://www.mediate.com/people/personprofile.cfm?auid=112

Gregg Relyea biography and additional articles: http://www.mediate.com/people/personprofile.cfm?auid=1004

A Mediator's Proposal – Whether, When and How It Should Be Used

By Stephen A. Hochman, Esq.

As most mediators know, a mediator's proposal is a settlement proposal that the mediator makes to all parties, and each party is requested to accept or reject it on the exact terms proposed in a confidential communication to the mediator. It calls for either an unconditional "yes" or "no" answer, without modification, and the mediator is not permitted to disclose the answers he or she receives unless both answers are "yes." Thus, if one party says "yes" and the other party says "no," the one who said "yes" will not be prejudiced if settlement negotiations (or subsequent mediations) occur at a later stage of the litigation.

In this article I will assume that the dispute that is the subject of the mediation is *ostensibly* a money dispute that is either in litigation or, if not settled in the mediation, would proceed to litigation (or arbitration), and that all parties are represented by counsel. The reason I say the dispute is *ostensibly* about money is that, in almost all cases, including the money cases, there is an emotional component. That is why, as noted below, it is important for the mediator to permit the parties to vent their feelings (usually anger at their adversary), and for the mediator to validate those feelings, whether or not the mediator considers those feelings rational, before beginning the risk analysis and reality testing phase of the mediation. For simplicity, I will assume that there are only two parties and one dispute (which could involve more than one issue), but a mediator's proposal can also work when there are multiple parties and multiple disputes.

When Should a Mediator's Proposal Be Used?

A mediator's proposal should be used only as an "end-game," *i.e*., only after all other attempts to avoid impasse have failed. Before considering the use of a mediator's proposal, the mediator should first avoid making what I consider the ten mistakes that even good mediators may make. My list of those 10 mistakes is:

1. Failing to get the right persons at the table.

2. Failing to explain the mediator's role as "agent of reality."

3. Permitting settlement negotiations to begin prematurely – *i.e*.,

    a. prior to permitting the parties to vent; and
    b. prior to risk analysis and reality testing.

4. Failing to orchestrate the negotiations:

    a. by discouraging "out of the ballpark" offers or demands; and
    b. by discouraging moves that send the wrong signal.

5. Failing to recognize that unrealistic expectations must be lowered gradually.

6. Being evaluative (a) too early or (b) in a joint session.

7. Failing to suggest ways to avoid reactive devaluation of sensible settlement proposals from the adversary.

8. Believing "bottom line" offers or demands.

9. Failing to "test the waters" before making a mediator's proposal.

10. Being impatient or failing to be persistent or giving up prematurely.

A full discussion of these 10 mistakes is beyond the scope of this article. However, some of these mistakes will be referred to below.

It is important to emphasize that every other possible impasse breaking technique should be used by the mediator before resorting to a mediator's proposal, including attempting to

narrow the gap by using the conditional offer technique. For example, by asking the defendant in caucus, "If I could convince the plaintiff to reduce its demand to $X, would you be willing to increase you offer to $Y?" Conversely, in a caucus with the plaintiff, you can ask "If I could convince the defendant to come up to $Y, would you be willing to come down to $X?" Even if the mediator knows from a confidential caucus communication that a party is willing to come down to $X or up to $Y, an offer that a party perceives its adversary needs to be convinced to make may have a greater psychic value to the other party than if the offer was freely given by the adversary.

The longer the negotiation process continues, the easier it becomes to close the gap and help the parties reach agreement without the need to resort to a mediator's proposal. That is because the more time that the parties have invested in the mediation process, the more they are motivated to have it succeed rather than fail. In cases where the definitive settlement agreement is likely to have contentious issues (*e.g.*, provisions relating to confidentiality, non-competition and non-disparagement, and provisions for liquidated damage or other remedies if those provisions are breached), it may make sense to suggest that the parties first try to agree on the terms of the definitive settlement agreement, leaving the dollar amount blank for later negotiation. Once the parties have agreed on the terms of the definitive settlement agreement, the likelihood of reaching agreement on the dollars increases because the parties are more motivated to avoid a failed mediation.

When Should a Mediator's Proposal Not Be Used?

I believe it would not be appropriate to make a mediator's proposal if either party objects after the mediator suggests the making of a mediator's proposal. My preference is to suggest the

idea of a mediator's proposal and wait to see if either party objects rather than first asking permission from the parties to let me make a mediator's proposal. That is because I am less likely to get an objection if I first state my belief that a mediator's proposal is likely to overcome the impasse and avoid a failed mediation.

What Are the Possible Disadvantages of Making a Mediator's Proposal?

The main reason that many mediator's oppose the use of a mediator's proposal is their argument that, if a mediator gets a reputation of using a mediator's proposal as an impasse breaking technique, the parties are likely to spin the mediator by posturing and taking unrealistic positions in order to create an impasse rather than being candid with the mediator and negotiating in good faith. However, my experience is that the parties rarely admit to me the weaknesses in their case and do their best to convince me that they have a winning case in the hope that I will lean in their direction if and when I make a mediator's proposal.

Whether or not the parties anticipate that I will make a mediator's proposal, in my experience they rarely tell me what they consider to be their bottom line or worst case settlement alternative to litigation. Whenever parties tell me their bottom line, I thank them for sharing with me their present thinking. Most attorneys experienced in mediation advocacy will spin the mediator to some degree, and the most experienced ones will avoid insulting the mediator by claiming to have a bottom line that is totally out of the ballpark of reality. As discussed below, in deciding on the terms of a mediator's proposal I avoid being influenced by what the parties tell me is their bottom line in our private caucuses.

What Criteria Should the Mediator Use in Formulating a Mediator's Proposal?

Assuming the mediator is comfortable making a mediator's proposal and playing the role of "agent of reality," it is important that the mediator explain that role to avoid making mistake number 2 in the above list of ten mistakes. It is important for the parties to understand the fact that, in the caucuses, I will focus them on their weakness rather than their strengths does not mean that I am favoring their adversary. I assure each side that, when I caucus with their adversary, I will similarly be playing devil's advocate with them.

I usually explain to the parties in my introduction that I am the only person in the room with no stake in the outcome. That is because it has been clinically proven that those with a stake in the outcome, including the attorney/advocate, cannot be totally objective in valuing their case. I also explain that it is the lawyer's job to focus their efforts on supporting the strengths of their client's case. As a result, they tend to underweigh the weaknesses in their case and often fall in love with their most creative arguments. I admit that when I have been an advocate, I also fell in love with my arguments and let my advocacy bias cause me to have non-settlor's remorse after the arbitrators rendered their award. To emphasize my impartiality, I make it clear that I have no interest in whether the case settles on the high end, the middle or the low end of the range of possible settlements, and my only agenda is to help the parties settle on terms that both parties agree is better than their litigation or arbitration alternative.

Most mediators try to choose a number for their mediator's proposal that they believe has a chance of being accepted by both parties without taking into account what the mediator believes is the value of the case. I submit that the mediator should endeavor to select a number that, in addition to having a chance of being accepted by both parties, is in the win-win range.

An example of the win-win range is, if the mediator believes plaintiff has a 50-50 likelihood of winning $1 million and the parties will each spend $100,000 to get a court to give them an all-or-nothing decision, the win-win range is $400,000 to $600,000. It is not unusual for both parties in a 50-50 case to come to the mediation believing that they are at least 70-75% likely to win. Of course, they cannot both be right. That is why it is important for the mediator to avoid making mistake number 3.b. in the above list of ten mistakes by being sure to do risk analysis and reality testing before permitting the parties to begin negotiating numbers.

I believe that the dollar number that the mediator proposes should be based on the mediator's independent judgment as to the value of the case based on an objective decision tree analysis and not on the midpoint between what the parties claimed to be their respective bottom lines. Ideally, the mediator should propose a number in the middle of what s/he believes is the win-win range (*e.g.*, $500,000 in the above example). I would not be comfortable in the above example of proposing a number below $400,000 or above $600,000 merely because I thought it might be accepted by both parties. The issue is not what the mediator believes is fair (a totally subjective standard), but what the mediator objectively believes is better for both parties than their litigation alternative. I never believe bottom lines that are outside of the objective win-win range. Of course, even if both parties in the above example honestly believe they are 60% likely to win despite the risk analysis and the reality testing that they heard from the mediator in caucus, they may still accept a $500,000 mediator's proposal based on the their non-monetary interests and needs, including the need to avoid risk and put the dispute behind them.

Before deciding on the dollar number of the mediator's proposal, it is important for the mediator to avoid making mistake number 9 in the above list of ten mistakes, which is to "test

the waters" in caucuses with each party before deciding on the number to insert in the mediator's proposal. For example, if the mediator tells the plaintiff in the above example that she is considering a number it the range of $450,000 to $500,000, the mediator can gauge the plaintiff's reaction. Similarly, the mediator can gauge the defendant's reaction to a number in the range of $500,000 to $550,000. If plaintiff rejects the $450,000 out of hand more strongly than the $500,000, and the defendant similarly rejects the $550,000 more strongly than $500,000, the mediator can feel that there is a good chance that both parties will accept a $500,000 mediator's proposal.

Often a party will agree to the dollar number in a mediator's proposal even though it would never have agreed to the same number if it were an ultimatum by its adversary. Because the number is the mediator's number and not the adversary's, it eliminates reactive devaluation. It often boils down to the parties choosing between the lesser of the two evils – either a less than ideal settlement or a long, uncertain and costly litigation.

What Are the Advantages of a Mediator's Proposal?

The most important advantage is that a mediator's proposal can overcome the posturing that often goes on in negotiation. Of course, there is a number below which the plaintiff would be rational in choosing litigation rather than accepting that number in settlement, and there is a number above which the defendant would be rational in refusing to pay. However, the parties rarely offer to settle for that worse case number and prefer to shoot for their best case number. The beauty of using the mediator's proposal as a last resort is that, from the plaintiff's perspective, the money is "on the table," at least conditionally, and both parties may accept it, albeit reluctantly, even if it is slightly worse than what they considered their worst case number

during the negotiation process. Also, the fact that the parties know that the mediator will not choose a number that is outside of the objectively determined win-win range will often increase the likelihood that it will be accepted by both parties. That is because it comes with a stamp of fairness and legitimacy, assuming the parties respect the competence and integrity of the mediator.

Is There Anything a Mediator Can Do If Only One Party Accepts the Mediator's Proposal?

On the rare occasion that only one party accepts my mediator's proposal, I might ask the accepting party if it would be willing to release me from the pledge of confidentiality and let me tell the rejecting party that the accepting party would be willing to make a slight improvement in my mediator's proposal in the interest of avoiding a failed mediation. In a case where the defendant gave me permission to make a second mediator's proposal if it did not exceed the increase it was willing to pay, the plaintiff agreed to accept that increased number. That was because it met the emotional need of the plaintiff to feel that it squeezed the proverbial "last nickel" out of the defendant, who the plaintiff felt had treated him unfairly. Even in cases that are ostensibly only about money, I have found that the percentage of those cases that have an emotional component is, "give or take, 100%."

How Should The Parties Be Instructed to Respond to a Mediator's Proposal?

I always prefer to get the answers to my mediator's proposal from both parties at the same time, and I usually ask each party how much time it thinks it will need to decide on their answer. By getting answers at the same time (*e.g.*, by asking each party to send me a one word "yes" or "no" email between Noon and 5:00 PM on the agreed date), it avoids the situation where I am reluctant to continue my attempt to explain to the more unrealistic party why I

believe my proposal is better than its litigation alternative. If that unrealistic party finds out or suspects that I previously received an answer from its adversary (who I believe is more likely to accept my proposal), continuing my attempts to do reality testing with the unrealistic party could compromise the confidentiality that I promised to both parties that I would not disclose the answers to my proposal (either by words or actions) unless both parties responded with a "yes."

Attached as an Appendix is an example of instructions that I sent to counsel for both parties explaining the procedure for replying to my mediator's proposal in a case that I knew would be difficult for the plaintiffs to accept because of the unrealistic expectations they had as to the value of their case prior to their coming to the mediation. It was a case that I spent many hours with the parties helping them reach agreement on the wording of a complicated definitive settlement agreement, and I knew I would have much difficulty in helping the plaintiffs realize that my proposal was preferable for them than their litigation alternative. Fortunately, plaintiffs' attorney realized that my mediator's proposal was clearly better for his clients than their litigation alternative, but he needed my help in convincing his clients to overcome their anger at the defendant and avoid what would most likely be a worse result for them if the case went to litigation. Because I expected that it would take much time for me and plaintiffs' counsel to convince all three plaintiffs to accept my proposal, I instructed the parties to each let me know when they were ready to give a "yes" or "no" answer, but to refrain from telling me what that answer was until I was told that both were ready to give their answers. That way I could continue to help plaintiffs' counsel convince his clients to accept the proposal as being preferable to the litigation alternative without causing plaintiffs to suspect that the defendants had previously accepted the proposal.

Conclusion

I believe that the mediator's proposal is an effective end-game to break impasse for those mediators who are willing to be evaluative when necessary to avoid impasse. I find it works 98% of the time that I use it. I believe that to give up without attempting to use it as a last resort is a missed opportunity, assuming that the parties hired the mediator to help them settle their dispute on terms that they ultimately decide is better than their litigation or arbitration alternative.

APPENDIX

Re: Instructions for Replying to my Mediator's Proposal

Dear _____ and _____,

Now that you both know that $_____ is the dollar amount that I propose be inserted in the previously agreed final draft of the Settlement Agreement, I want to explain the procedure for communicating to me, in confidence, your clients' "yes" or "no" response to my mediator's proposal.

I realize that neither of your clients will be happy with the number I proposed. One definition of a good settlement is when both sides are equally unhappy. Particularly because I know that both sides will be unhappy with my proposal, it is important that neither side make a hasty decision as to whether to accept or reject it.

In order to give both sides ample time to make a rational business decision, I am requesting each of you to let me know **when** your client has reached a decision, without telling me at that time **what** that decision is. Once I hear that both sides have made a decision, I will then ask each of you to simultaneously send me a confidential email in which you indicate your client's decision, which must be either an unconditional "yes" or "no." The reason that I do not want to know the answer from either side prior to knowing the answer from the other side is to give me an opportunity to do some additional risk analysis with one side without that side believing that I would not be doing that risk analysis if the other side had not previously said "yes." Getting simultaneous responses will enable the side that says "yes" to be sure that, if the other side says "no," the party that said "no" will not know whether the other side said "yes" or "no." That way, if we don't end up with a settlement that is acceptable to both parties, the party that said 'yes" will not be prejudiced in any possible future settlement negotiations.

As I previously explained, the mediator's proposal is an "end-game" which a mediator should use only after all other efforts to settle have failed and the parties have reached an unbreakable impasse in the negotiation process. It is a last resort effort to see if we can salvage what would otherwise be a failed mediation. Although it is a non-negotiable "take it or leave it" settlement proposal, it represents what I believe should be better for both parties after factoring in the risks, uncertainty and costs of the litigation, including the intangible costs. In the over 350 cases that I previously mediated, there were only seven in which I did not get two yeses to my mediator's proposal. In six of those cases I got one "yes" and one "no, and in all of those six cases the side that said "no" ended up with a worse litigation or arbitration result than it would have had if it had accepted my proposal. My hope is that we can avoid that happening in this case so that neither side will end up having "non-settlor's remorse."

Please feel free to contact me at any time with any questions, and I hope to be having conference calls with you and your clients in the near future.

Sincerely,

Stephen A. Hochman, Esq.
Mediator & Arbitrator
600 Lexington Avenue
15th Floor
New York, NY 10022
Tel: 212-750-8700 (Ext. 129)
Fax: 212-223-8391
Email: shochman@prodigy.net

ABA DR Section
February 25, 2009

Why Not Embrace Impasse?

David W. Plant
New London, NH, USA
DPlantADR@aol.com

"Many of us go to our grave with our music still inside us"[1]
"It ain't over 'til it's over."[2]

I. Impasse

A situation that has no solution or affords no escape.

II. Is Impasse In Commercial Mediation Always Bad?

No, not always.
Hardly ever "bad", in commercial mediation.
Even if – Bitter disputes over important rights and wrongs.
Even if – Difficulty in working out a joint arrangement.
Why not embrace impasse?
Why not turn impasse to the parties' advantage?

III. Impasse In Commercial Mediation

A situation in which it *appears* at *the moment* there is no solution.
Is it real?
Is it permanent?
Why do we appear to be at impasse?
Substantive? Procedural? People ? Financial? Emotional? Cultural?
Human beings created the "impasse". They can create a solution!
What is the role of fear?

---

1 Oliver Wendell Holmes

2 Philospher and former NY Yankees catcher, Lawrence "Yogi" Berra.

IV. Why Do We Appear To Be At Impasse?

Parties have not prepared.[3]
Parties have been unable to communicate clearly, candidly, and empathetically.
Parties are driven by emotion.
Counsel have aggravated the situation – indeed, have been destructive.
Counsel may have a financial stake in the outcome.
Business representatives cannot develop a rapport and cannot engender mutual trust.
Players not at the table may raise apparently impenetrable obstacles.
Insurers, investors, customers, licensees, bankers et al. may play significant roles, e.g. by placing a non-negotiable number on the table.
Parties have not identified and acknowledged each other's real interests and needs.
Parties have not identified and acknowledged each other's BATNAs.
Parties have been unwilling to explore options – or have engaged in only limited exploration.
A party has been unwilling or unable to stand in another party's shoes.
Parties may not have understood and acknowledged cultural and emotional needs.
Parties have not separated the person problem from the substantive problem.
Forces beyond the control of any party overpower the parties.
A government agency may have a stake in the outcome.
A party may not acknowledge its role in the genesis of the dispute.
The outcome of a dispute in another jurisdiction may be material.
A party may want this conflict.

---

[3] See D. W. Plant's Thirteen Rules of Preparation, in We Must Talk Because We Can, ICC Feb. 2008.

V. Why Is All This Not Bad; Why Should It Be Embraced – Always?

An experienced mediator can help the parties transform these situations in to joint problem solving endeavors.

Recognize the situation may not be permanent.
Recognize the situation may be objectively dire, but not inevitably fatal.
Help the parties in defining the real problem.
Review real interests and real needs jointly with the parties.
Review BATNAs jointly with the parties – and assess their feasibility.
Assess risks and rewards of not solving the problem.
Organize and manage brainstorming potential solutions/options.
Help each party understand the issues as the *other* party sees them.
Help each party understand precisely *its own* and the *other* party's sticking point.
Help each party understand cultural and communication barriers and needs.
Help each party understand its own and the other party's emotional needs.
Help each party understand whether the problem is people, process or substance.
Help the parties agree to gather further information.
Help each party understand the importance to that party and the *other* parties of perpetuating the conflict.
Help each party understand the relative value of money versus another form of compensation or assistance (e.g. granting ancillary rights, apologizing, or acknowledging another's difficulty).
Assist in agreeing on a new schedule for further negotiations.
Assist in changing the players.

Any or these moves (and other moves) by an experienced mediator may clarify the situation for the parties and defuse the impasse.

On reflection, without a mediator's intervention, the parties may *themselves* re-assess the situation in light of a new, objective understanding of the realities.

Each party may have reconsidered the dimensions of the problem.
Each party may have reconsidered its own interests and needs.
Each party may have reconsidered the other party's interests and needs.
Each party may have reconsidered each party's BATNA.
Each party may have better understood cultural differences and needs.
Each party may have reconsidered options, i.e. to create and claim value.
Each party may have a new understanding of risks and rewards.
Each party may temper its emotional needs, its need for a day in court, its need to extract a concession as to "the principle" as the party sees it, or its need to reach agreement on who is "right" and who is "wrong".
The cold, grey dawn may cast fresh, revealing light on the matter.
A party may have sought counsel from an advisor, other confidant or the boss.

The mediated negotiation may itself, even after impasse, assist the parties in reflecting on the risks and rewards of not solving their problem.

Real or apparent impasse may crystalize for the parties the virtues of solving the problem rather than continuing with the problem unsolved.

Real or apparent impasse my *compel* parties to renew their efforts to solve the problem.
Or turn to an attractive BATNA.

VI. What To Do About Fear?

Parties fear impasse.
Counsel fear impasse.
Non-parties fear impasse.
Mediators fear impasse.
Should we fear impasse? Can we welcome it?
Impasse is almost inevitable.
The parties often enter the mediation in a state of impasse.
It is likely to occur more than once.
Impasse provides the parties an opportunity to create value.
Impasse stimulates the parties, counsel and the mediator to –
Reassess the situation from top to bottom.
The problem.
Material facts.
Interests and needs.
BATNAs.
Emotional needs.
Cultural interests and needs.
Explore old options in greater depth.
Consider new options previously overlooked.
Reassess the value of continuing the conflict v. resolving the conflict.
Reassess the risks and rewards of permitting a third person (or persons) resolve the conflict as defined in pleadings v. the value of the parties themselves resolving and reconciling a broader or deeper problem.
Mitigate the fear of impasse; embrace impasse as stimulating new views of the problem and potential solutions.

VII. Seize The Opportunity To Create Value

Seize the opportunity to re-evaluate the situation – from top to bottom.
Transform the situation into a problem-solving endeavor.
Unless each party's BATNA is indeed real, available and better than the deal on the table, redouble your efforts to find a solution.
If one party's available and realistic BATNA is better than the deal on the table,
Impasse may not be bad for that party.
Impasse may compel the other party to reassess the situation.
Impasse may assist the mediator in helping the other party to exceed the first party's BATNA.
Impasse may assist the party with the attractive BATNA to help the other party to make a new move.
Impasse may assist the mediator in demonstrating to the party that its BATNA is not as good as it seems.
Even if impasse is not broken, each party will have learned much about itself, the other parties, non-parties, the problem, the market, etc.
Perhaps enough learning to reframe the problem, explore new options, reach for resolution – and to become unstuck.

Do not leave your music inside you!

EXIT STRATEGIES:
MEDIATING TO THE HOPEFUL END

Joshua Jacks[1], Matt Schweisberg[2], Douglas Thompson[3], and Elissa Tonkin[2]

end n. 1. *a limit or limiting part; a point of beginning or stopping; boundary.* **2.** *the last part of anything; final point; finish; completion; conclusion.* **3(a).** *a ceasing to exist; death or destruction* **b)** *the cause or manner of this ...* **7.** *an outcome; result; upshot; consequence.*

Barn's burnt down, now I can see the moon. Mizuto Masahide (1657-1723)

Introduction

We are four mediator friends who, in life and in mediation, have seen each other through some memorable endings--and, inevitably, beginnings. As we have grown older, closer, and perhaps a little braver about confronting our own limitations, we began a deliberate conversation about endings. Our conversations have never been linear and the right words often seem to elude us, but the richness of the topic and its ceaseless relevance to our work has propelled us forward. We attempt here to capture the essence of our collective musings; we invite you to join and continue the conversation, recognizing that, as with all things related to endings, we're just getting started.

Why This Topic?

In Mediation 101, most of us were taught that, once we have helped the parties listen, be heard, clarify the issues, problem-solve, and generate options, we are practically home free. All that remains is for us to facilitate agreement and, after deflecting the parties' effusive praise ("Not at all--you did it *yourselves!*"), send them back to their lives. Like an origami instruction book that painstakingly lays out a series of simple steps and then, inexplicably, turns a rectangle covered with dotted lines into a magnificent swan, we are given to believe that if we lay the proper foundation, the final leap will naturally follow. If we embrace the mish mash of interests, emotions, and ideas that we've elicited from the parties during the mediation, then the once elusive step of facilitating agreement will seamlessly follow.

---

[1] Metropolitan Mediation Services, Brookline, MA
[2] Regional ADR Program, U.S. Environmental Protection Agency, Region 1, Boston, MA
[3] The Keystone Center, Ashland, MA

In Reality 101, we are startled to discover how often the swan actually appears. Though that final transformation often seems less a graceful leap than an excruciating heave, it is always magic. We gather the ingredients of resolution using all of the techniques we have practiced and--presto--an agreement emerges. Except, of course, when it doesn't.

The Cases We Don't Feature in Our Brochures

Mediators often suggest to potential participants that there is little to lose and much to gain by giving the mediation process a try. While this may be a reliable--and often true--pitch to engage parties, a frank look reveals a more complex set of possibilities.

Mediation endings take many shapes and tones. At the end of a mediation, parties may achieve a thoroughly, mutually satisfying outcome. Alternatively, parties may achieve a toughly negotiated settlement, requiring compromise, sacrifice, or pain or they may arrive at a state where they feel that, though the conflict is not resolved, valuable new understandings have been achieved. The toughest endings are those where parties not only fail to resolve their conflict but feel further alienated from one another as well as the mediation process, with fresh exposures to the abrasions of conflict. The truth is that parties can leave angrier, rawer, and more exposed to the risks associated with conflict than when the process began.

One of our most talented and successful colleagues told us a story of a mediation where, at the end, one of the disputants told him, "You achieved something I didn't think was possible...you made a bad situation worse!" Mediators inevitably speculate about the reasons for bad endings. Was it because of a mediator's failure either to exhaust all potential strategies or a failure to execute those strategies skillfully? Alternatively, did it end badly due to an unforeseeable, but inevitable flow of powerful currents of emotions, interests, personalities, politics, and other forces beyond any third party's control? A natural tendency, we suspect, is for many mediators to assume in hindsight that, had they done something differently, it would have altered the outcome. These mediator post-mortems can be either self-congratulatory ("but for my skill...") or self-critical ("if only I had done..."). We may be prone to either overly credit or overly disparage ourselves once the outcome is known. Still, there is little doubt that mediator skill affects the quality of the process.

In happier, cooperative circumstances, ending the mediation process is fairly easy, with parties and mediators enthusiastically engaged in acknowledging their accomplishments and planning the execution of a new agreement. In the more difficult circumstances, whether and how to end the process is more challenging.

In such circumstances, a mediator might be confronted with questions such as:

- How do I exit without the feeling of leaving a battlefield of wounded soldiers? How do I salvage a bad ending?
- How do I know whether it is time to throw in the towel or to press bravely ahead?
- When a party says (maybe repeatedly) that he or she wants out, when do I continue to engage that party and when do I graciously hold open the door?

At such times, we might wish to help the parties "get to a better place." But where do we presume that place to be? How will we know when we have delivered the parties safely there? Perhaps underlying this mediative impulse is the hope to achieve:

- A sense that the process the parties and we have endured was not a waste of time.
- A path to potential future reconciliation or agreement making, or, at least, a path protected from ongoing conflict full of threat and danger.
- A positive perception by the parties (and by us) of the worth of the process of mediation and of ourselves as mediators.

Any of These Situations Sound Familiar?

Mediations or other neutral-assisted processes most often draw to an end in some natural fashion. Parties and the neutral agree with one another, either tacitly or explicitly, that the process is over and the conclusion—most often an agreement of some sort or a decision not to agree—arrives more or less uneventfully. However, there are other circumstances where the ending deviates from the norm. These might include "Sports Center" endings that are memorably successful or calamitous; situations where matters are more in transition than at an end; and circumstances where it is not clear if the process is over or not. At other times, parties and neutral(s) may disagree on whether it makes more sense to continue or end a process.

Some basic categories of endings include:

Happy Endings. Everyone's favorite. These endings are characterized by parties finding themselves to be better situated than before the process started. The engagement has produced an agreement, improved understanding, a narrowing of the issues in contention or some other measure of improvement. The sentiment may be joyous, bittersweet or a mixture of emotions but the parties generally feel better off by some measure for going through the process.

Bad Endings. Just as Tolstoy said each unhappy family is unhappy in its own way, so it can be with mediations. Bad endings will leave the parties feeling the process was of little value or, worse, detrimental to them. They leave feeling more frustrated, more estranged from one another and perhaps assuming positions more antagonistic and polarized than at the outset. Some bad endings are spectacular with parties storming away from a negotiation, eager to describe what a terrible mediator they had to endure. Others may end with quiet despair, with no ill-feelings expressed but the parties feeling that no progress occurred. Even worse, some bad endings result in a broadening of the dispute (e.g., filing of counterclaims, additional issues of contention, or demands for greater compensation).

Extra Innings. In some situations, mediators and parties may experience *faux* endings. An agreement might be reached and signed but the parties find there are more issues for discussion. Perhaps a monetary claim is settled with a signed agreement but parties continue a discussion about some aspect of their past or prospective relationship. What appears to be an end to the mediation actually proves to create the conditions for another, often more meaningful conversation.

Passages. The mediator may pack his or her briefcase, shake hands and leave but the work may continue for the parties. The parties may feel they have reached a point where neutral assistance is no longer needed (or the value added is no longer worth the cost). The neutral assisted phase of the negotiation ends but the negotiation continues in some fashion. The mediator may remain "on call" in case things become difficult or complicated.

Pause Button. Sometimes in order to save face, comply with an authority not at the table, or for some other reason, parties feel a need to bring a process to a close even though there may be potential gains by continuing. The language used by either the parties or the mediator ("at this juncture" or "suspending discussions" or "it may make sense to reconvene once this new report is available") explicitly or implicitly suggests a hiatus rather than a fully closed door. In other cases, parties may be reacting primarily from anger or frustration or fatigue and the mediator can "end" the process in a manner that could nevertheless allow an opportunity for graceful reengagement. Sometimes breakdown must precede breakthrough.

In other circumstances, the question is less one of what the ending looks like but an even more basic question--whether or not to draw things to a close.[4] Such situations include:

---

[4] The Model Standards of Conduct for Mediators adopted in 2005 by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution, have something to say about this question of whether and when to end a process. Standard

When parties get swept up in the momentum of a resolution that appears to be coming together quickly, their longing for a swift and happy ending can cause lapses in judgment and attention to detail. They are prone to gloss over terms that they don't understand, overlook important implementation questions or not realize that different assumptions are at work. Are the parties rushing into a collaborative embrace that might be too good to be true? You are now face to face with perhaps the most challenging obstacle to impartiality that mediators must overcome--the intoxicating allure of an agreement—for it is hard to play mediator as killjoy. How far should you go to question whether the parties have considered all the angles? The answer, of course, is that it depends on countless questions of context. A guiding principle might be that you should go as far as you need to go to satisfy yourself that the parties know what they're doing. This encompasses the possibility that the parties are making an informed choice to forge ahead without regard to all of the details or potential problems. They may have good reasons for not worrying, but whether they do or not, you have done your job by probing. By the same token, if a deal falls apart as a result of your testing the parties' grasp of its implications, you have also done your job. In that case, a happy ending may have eluded the parties and you may become the repository for their disappointment. Those are the tough days when you need a mediator friend to buy you an ice cream cone and remind you that you did the right thing.

Concluding Transition

Perhaps it is trite to suggest that every ending is a beginning, but it seems undeniable that, short of Armageddon, every ending is a transition to something else. Sometimes those transitions cry out for a guide (and sometimes they don't). Despite the practical suggestions we offer above, our conversation about endings has led us to no definitive answers. But it has helped us to clarify the question we have been chasing, a question that we will continue to ask ourselves: When and how can a mediator help to assure that the ending of a process is a transition to something that allows parties safety, dignity, and hope?

Note: Submitted in connection with the panel discussion "Exit Strategies: When and How to End a Process Well," 11th Annual ABA Section of Dispute Resolution Spring Conference, New York City, NY, April 2009. The views expressed in this piece are solely those of the authors and do not necessarily reflect the official position of the agency or organizations with which they are affiliated.

Parties Disagree with Each Other. By dint of temperament, strength of their best alternative to a negotiated agreement ("BATNA," in current negotiation lingo), and other factors, parties often differ on the usefulness of continuing a neutral-assisted process. Some might be conflict junkies who love the toxic intimacy; others prize efficiency or dislike protracted discussion and wish to withdraw. Some parties might be subject to external pressures, lending a feeling of greater or lesser urgency to the proceeding. How should the neutral approach a situation where some parties want a process brought to an end and others see value in continuing?

Neutral(s) and Parties Disagree. Sometimes parties agree that the process should end (or in some cases never begin) yet the neutral senses potential benefits in continuing. How does the neutral balance party autonomy against the knowledge that parties' feelings of hopelessness during a mediation may be a poor predictor of outcome? In the opposite circumstance parties wish to continue but the mediator believes it is time to bring things to a close. A group may fall in love with itself and find it difficult to end. Or parties communicating well may nevertheless develop separation anxiety when they contemplate moving ahead without mediator assistance. In some cases, party stamina for conflict and impasse may exceed that of the mediator.

Neutrals Disagree with Each Other. In cases where there is a team of neutrals, members of the team may have different proclivities and tolerances for ending vs. continuing a process. What "diagnostics" should they look at to determine whether pressing on or finding a graceful exit would be in the better interest of the parties? How do you avoid giving up too soon/too easily versus how to avoid holding people in a process that is no longer serving their interests sufficiently?

In a strong co-mediating relationship, competing tendencies between neutrals about whether and when to end are likely to provide a helpful balance. Such neutrals might choose to handle their differences transparently, including the parties in a discussion of their divergent views. Alternatively, co-mediators might opt to resolve their differences in private consultation with the goal of offering the parties a unified message about the end game. Either way, parties are likely to get the benefit of a well-considered approach from such a partnership.

I.A. Self-Determination, requires us to conduct the process "based on the principle of party self-determination," specifying that "[p]arties may exercise self-determination at any stage of a mediation including...withdrawal from the process." To give us the necessary leeway to perform our magic, the Standard goes on to qualify our obedience to the principle of self-determination. Subsection I.A.1. provides that we may need to balance this "fundamental principle of mediation practice" with our "duty to conduct a quality process." So much for bright lines. On the other hand, phew!

Implications for Practice

When things seem to be getting messier rather than headed for a tidy, comfortable close, when that light ahead is more likely an oncoming train than the other end of the tunnel, what is a mediator to do? What thoughts might mediators have rolling around in their minds when considering whether and how to influence the end of a process? Here are ten questions mediators may want to consider and which just might help stave off the nightmare ending.

1. *Are you the only one who needs more closure? (It's a mediation, not a hostage situation.)*

Sometimes, without fanfare, parties are clear that they're done and ready to go home. This happens regardless of whether they loved or hated the process or outcome. They've just reached their limit and their hearts and minds are out the door. Be open to the signs of this. Resist the impulse to drag them through a ritualized closing process to satisfy your notion of a good ending. Wrap things up, mercifully and quickly, before parties start to feel as if they're in mediation jail. You can always linger and do the closure thing with any remaining parties who feel the need. But beware of tacitly encouraging impatient parties to leave too early. Sometimes haste is not in their best interest and, if you can hold them a bit longer to be certain the substance is concluded, they and the others will be grateful that you did.

2. *What does it mean when a party threatens to or actually storms out? (Anticipating the calamity)*

Probably not, "Gee, this sure is a fabulous process!" But it could mean any number of things. Perhaps something was said that the party found terribly upsetting. Perhaps the party wants to intimidate others in the room. Perhaps the party wants attention. Perhaps, but not necessarily, the party is signaling the end of the process. In volatile situations, where parties might seem inclined to use stormy departures as a form of expression, it may be possible to negotiate a deal up front that will benefit the process. Recognizing that parties may choose to leave at any point, ask them in advance if they will agree to talk with you (in confidence) before walking out. "If you begin to feel this isn't working for you, like you want to leave, please ask for a break and let's talk." The purpose is not to talk them out of their inclination, but to understand what is on their mind and to see if there is a way to address their needs in the process. Apart from the value of such conversations, should they ever occur, legitimizing and reinforcing a party's right to leave may take the wind out of a potentially disruptive departure.

3. *Are these parties capable of procrastinating until the end of time? (Have a plane to catch)*

When you are dealing with parties who will fill whatever time they think is available and will only get serious five minutes before the end, establish a non-negotiable ending time.

4. *Is this a nap or a funeral? (Calling it a nap might make it one)*

If you can't tell whether an impasse, breakdown or other type of pause in the process is final, help the parties characterize it as a hiatus rather than an ending. The cease in negotiations may have a sobering effect on one or more parties and cause them to reassess their negotiation posture. If the time comes when they are ready to resume discussions, the hiatus characterization will allow them to come back to the table without losing face. It will also give them license to be in contact with you so that you can help them figure out whether and when to come back–without any party visibly taking the first step.

5. *Have you reached the point where your greatest contribution to the parties' progress would be to leave? (Too much of a good thing)*

The goal here is to give the parties no more and no less than what they need. The "no more" part is often harder than the "no less" part, especially when you are being paid by the hour. Don't shrink from a clear-eyed look at whether the parties are now positioned to do for themselves what they once could only do with your assistance. Helping the parties realize that they don't need you any more may be bad business but it's great mediating–and in the end it's probably good business as well.

6. *Did anyone besides you notice how much was accomplished? (Offer a humble catalogue)*

Some of the biggest achievements of a process are invisible to the parties immersed in it. Identify and draw attention to the less obvious benefits and accomplishments but do so with humility. Don't presume the value that parties' attach to particular outcomes; take care in characterizing achievements, erring on the side of understatement, lest you be perceived (perhaps accurately) as touting your own mediative *tour de force* oblivious to how the parties experienced matters. Don't make a mole hill out of an ant hill, but be sure the ants know that they've made a hill.

7. *Did the process unfold in such an unexpected way that no one knows what the ending is supposed to look like? (Shifts happens)*

This is a corollary to questions 5 and 6 above. Sometimes the mediation carries the parties to a new place that renders their initial goals irrelevant. Perhaps a greater level of understanding has created more tolerance for conflicting perspectives and what was once a burning issue no longer seems urgent, though it remains unresolved. Whatever the particulars, a once unbearable constellation of circumstances has shifted. In these cases, there may be no obvious endpoint. Rather at any number of points you can help the parties take stock of where they are, bring their process to a close, and return their somewhat transformed situation to the unmediated world where it will continue to unfold.

8. *Is it party time? (Love fest or vanishing act—only the parties know for sure)*

At the successful conclusion of a long, arduous process, help the parties explore whether and how to celebrate their ending together. In a multi-party case, it is rare that everyone is both privately and publicly pleased enough with the outcome to pop the champagne cork together (one party's triumph is often another party's embarrassment). But what a kick when it happens. Be careful not to force the issue and recognize that the parties may need a breather between resolution and celebration (even if they don't recognize it, you may need to help them do so). They also might need you, the neutral, to toss the idea out to them, to help them sort out the pros and cons, and, if the pros prevail, to help them design an event that is true to their collaborative success.

9. *What are the parties reading into their inability to reach agreement? (Addressing the "what does this say about me" question)*

When a process concludes without a resolution, parties might feel a profound sense of failure--not only did they find themselves in a dispute for which they sought mediation (for some, a sign of failure in itself), but worse yet, they couldn't even succeed with a mediator's help. "What's *wrong* with me?" they may be asking themselves or fear being asked by others. You can provide a more positive—and arguably, more accurate--response to this unspoken, self-flagellating question than the one they are likely to give themselves. Your alternative response might include: acknowledging that it's a really hard situation; commending them for their courage in giving mediation a try despite the magnitude of the challenge; applauding their hard work and creativity during the process; and pointing out that, whatever happens going forward, they now have the satisfaction of knowing that they made an earnest attempt to resolve it and found no easy answer around the corner to meet them. Sincerity here is a plus (avoid referring to note-cards when making this speech).

10. *Is a happy ending too good to be true? (Dare to burst the bubble)*

Mediator Self Care

Mediator Self-Care

Presentation by John Kinyon and Ike Lasater
Article with Julie Stiles

The American Bar Association
11th Annual Spring Conference for the Section of Dispute Resolution
ADR: Building Bridges to a Better Society

Held at the Sheraton New York Hotel and Towers, New York City, NY

9:45-11:15 a.m.
April 17, 2009

Overview

As mediators our work necessarily includes being with people who are in conflict. In the process, our own reactions to the subject matter of the conflicts and to conflict in general become stimulated. Especially because of these reactions, we each need to care for ourselves—to support ourselves to continue the work of stepping into the conflict arena. All too often we fall short of the critical voices in our heads that judge us against an impossible standard of perfection. Each of these thoughts triggers a cascade of neurochemical releases that are consistent with believing that thought. We don't enjoy our lives when we are experiencing this. We doubt you do either.

This article provides an overview of how to use the skill of self-empathy from the body of work initially developed by Marshall Rosenberg, called Nonviolent Communication. (For more information see: CNVC.org) We have built upon our understanding of Marshall's NVC mediation model, and here write about the aspect of that model that we can, and regularly do, apply to care for ourselves in the course of our work and day to day life. One of the insights of NVC is to recognize that each of us is animated, moment by moment, to meet our needs. By "needs" we are referring to those qualities that enable us to survive and thrive. These are universal to all humans, such as the need for air, sustenance, shelter, touch, care, protection, autonomy, celebration, intimacy, etc. (For a list of needs see: http://cnvc.org/en/what-nvc/needs-list/needs-inventory). A key aspect of this self-empathy process, in addition to greater presence with our inner experience, is to translate and transform our internal judgmental thinking of ourselves and/or others into needs met or not.

We distinguish three different phases in which mediator self-care can be practiced—before, during, and after mediation. Each of these phases is characterized by a common process, which is to identify the needs on each side and have them understood by the other side. Before mediation, we typically want to translate judgments about the parties in the conflict or about ourselves. These judgments disconnect us from ourselves and others. Transforming our judgments, into self-awareness of our present moment experience, reconnects us to ourselves and makes us available for connection with others. During the mediation, thoughts of judgment often arise about something that a disputant has said or done, or even something that we have said or done. Judgments such as these tend to result in being less connected with the parties and ourselves. Following the mediation, we so often judge our contributions and those of the others involved. We can practice self-care again in this context. For this article, we will focus on an example from the phase of post-mediation. Of course, we hope you will see that this life-skill can also be applied to all the phases of mediation, and in fact can support you in all areas of your life.

Increasing Self-Awareness: Noticing Internal Conflict

Before we get into a specific example, it might be helpful to look into how we might realize that we are in conflict internally. Our experience is that any time that we have judgmental thinking of ourselves or others happening inside us, we are in a state of internal conflict. There is an absence of inner peace and centeredness. We can often go for hours, days, or even weeks without realizing that we have warring voices within. We have found various clues useful to alert

ourselves that we may be in conflict internally: thoughts, bodily sensations, and our interactions with the environment.

For some people the clearest sign of internal discord will be thoughts of judgment of oneself or others. For example, if an interaction with another person during mediation did not go the way we would like, we might notice thoughts of blaming; "I messed up." "I should have done it this way or that way." "Well it's really so-and-so's fault, if he had been this way or done that then things wouldn't have been so screwed up." These voices continue to go back and forth, and eventually we catch on and notice that we are blaming ourselves or other people for what happened.

We might not notice these voices; they may be under our radar, or we fool ourselves into thinking that we are not blaming anyone, even thinking that we are above doing that. We might notice, though, that we feel crummy when we recall the mediation or think about a specific interaction. When any kind of thoughts exist in our consciousness, we will automatically have feelings that are consistent with them, even if we are not fully aware of the thoughts at the time. Thus, we might first become aware of the feelings we are having, which can alert us to look for the thoughts that are creating those feelings.

A third clue we might use to look for internal conflict is through reference to our external environment. We might notice tension around us, particularly in our interactions with other people. Sometimes things just are not going very well; perhaps we have a sense of walking through thick mud, things are arduous instead of easy and flowing. In these cases we might want to look internally to see if our external environment is simply a reflection of an internal tension caused by blaming, criticizing, or judging ourselves or other people.

The Structure of Internal Conflict

Whenever we find these thoughts of judgment and criticism, we are in internal conflict. Every moment we are making choices, so we have a part of ourselves that makes those choices. We call that at voice within ourselves the "chooser." However, we also have a part of us that evaluates our choices. Often, however, that voice, which we can call the "educator," tries to educate through judgment, blame, and criticism. Generally, when anyone comes at us from a judging and criticizing energy, whether someone outside of us or a voice in our own head, we will resist out of our needs for respect for our autonomy and choice; the chooser contends, after all, that it had good reasons for doing what it did. Thus, we can often understand our internal conflicts as being between these two parts of ourselves, the chooser and the educator.

When the conflict stays in this dynamic, we don't experience the kind of ease, peace and self-connected awareness that comes from resolution. We continually focus our attention how to avoid judgment, criticism and blame, in part by shifting these to others. This avoidance dynamic can also undermine our confidence and ability to interact effectively with others. Instead of learning how to avoid, we would prefer to focus on creating what we want in the world—to be drawn forward by learning to meet our needs. Learning a more satisfying way to deal with these internal conflicts is a critical piece of mediator self-care.

The way out of the endless recording loop is to listen underneath what is being said by the chooser and educator. When the educator speaks, we listen for the needs of ours that were not met by what we did, so we can learn from the situation. With the chooser we listen for the needs we were trying to meet by doing what we did. In the example below, we will see how the NVC mediation model, which can be used for internal conflicts, is designed around revealing these needs.

Post-Mediation Self-Care

One way to approach mediator self-care following a mediation is to anticipate that there will be internal judgments about how the mediation went, judgments that are about oneself as the mediator or about the participants in the mediation. If we expect this, then following mediation we can take some time to look for those judgments, thus, preemptively approaching our proclivity for self-judgment.

We have learned that it helps to first identify what we liked about how the mediation went and any "positive" judgments. We celebrate the things that we liked, the ways we responded that seemed to work or aspects of the session that are satisfied about when we recall them. As we celebrate these, we connect with what needs of ours were met by them. For example, perhaps we liked what resulted from a certain response we made to a participant's expression of anger because it seemed to bring into her awareness her needs not met by the conflict. As we reflect on this memory, we notice that our own need for contribution is met.

In remembering what we liked about the mediation and our needs that were met, there's a fullness and richness that makes it easier to approach the judgments we are having about what did not go as we would have liked. We might then ask ourselves whether there were times in the session when we felt uncomfortable, or responded in ways we did not like, and look for any judgments or blame we might be carrying as we think about the mediation.

Often, people find it difficult at first to separate out the different voices in their head. One way to become more proficient at identifying them and learning to mediate between them is to externalize them. Since we have identified that these voices are in conflict, treat them as if they are separate people in a conflict situation, and mediate between them.

The goal is to eventually be able to identify and mediate these chooser/educator conflicts internally on your own. If at first, you practice externalizing an internal conflict and see it mediated outside of yourself a few times, it becomes easier to distinguish the voices internally and get support from a person who can help you find the needs each voice is seeking to meet. Eventually, you are able to do the whole process internally.

The following is an example of how to externalize an internal conflict, using the five stage NVC mediation model and "Three-Chair" learning process that we use in our trainings. The three-chair model consists of setting up a role-play of a conflict situation, with one person in the mediator chair and two people as the disputants. Others might be present as coaches or observers, but the simplest form consists of these three players. The role-play might be an imagined situation or a real situation that one of the people is in the midst of. For the purposes of

this article, of course, we are using an internal conflict; thus, the two disputants are the two voices in conflict—the educator and the chooser.

To set up this kind of role-play, the person with the internal conflict tells the role-playing disputants what these internal voices say. It is often enough to just give two or three sentences for each voice. Though we can never be inside someone else's head, we have found in our trainings that we are all remarkably similar in the ways our judgments and criticisms operate; it is often plenty for someone to have just a couple of sentences to be able to accurately portray an internal voice. The person whose conflict is being externalized can choose which role they want to play. At times it might be helpful to embody one of the voices and experience receiving empathy for that part of oneself, or to be the mediator and give empathy to both sides. If enough people are present, he or she could also choose to be an observer.

We will use a real post-mediation example that one of the authors (John Kinyon) experienced in relation to critical judgments he was having towards himself following mediation. The mediation was between a husband and wife. In the course of the session, John expressed his thoughts about the behavior of the husband, who was expressing himself in what John perceived to be an angry and unhelpful manner, along the lines of the following: " Look at how you are talking to your wife right now. I think that's what she is talking about." The man afterwards said he felt "beat-up on" by what had been said, and thought John was siding with the man's wife. Upon reflection, John realized that he did have some negative judgments about the way the man was acting, which inadvertently came out when he offered his perspective on the man's behavior. He then judged himself; his educator essentially saying to the chooser, "you screwed up, you should have known better."

To put this internal conflict into the three-chair model, one person would take on the voice of the part that chose to express to the man about his behavior, and another person would take on the voice of the part that judged that action. For this example, let's say John plays the mediator of his situation. For clarity, let's call the educator voice in this example Educator, and the other voice Chooser. John would start with one of the parties and ask to hear what that person had to say about the conflict. In the case of self-judgment it can be helpful to begin with the voice of the educator as that voice is less likely to be able to hear anything else until it has first been heard.

This voice often expresses itself in terms of good and bad, right and wrong, and "shoulds" of how we should have acted or what we should have done, for example: "What the hell were you doing? You were completely unprofessional; you used your authority as mediator to make a point. It was wrong. You hurt the guy, and most of all, you made the situation worse because the guy thought he was being judged. You weren't doing what you were there to do; you weren't doing you job. You idiot."

The first step is for John, in the role of mediator, to empathically connect with Educator, which might sound something like: "Are you upset because you really wanted to contribute to this man being understood, and to creating understanding and connection between him and his wife?" This process might take a number of guesses to connect with what is accurate for the person playing this role, but for now let's say that it was about needs for contribution and understanding.

The second stage of the mediation model is for the mediator to request for the other party - in this case, Chooser—to reflect back the needs he just heard stated. John might say to Chooser, "Would you be willing to just tell Educator that you heard him say his needs were for contribution and understanding?" Occasionally this requires some additional empathy for any reluctance or an explanation of the purpose of doing so, but typically people are willing to reflect back what they heard the other say with this kind of additional support. The point of doing so is for Educator to trust that Chooser has heard him.

Stages three and four are a repeat of the first two, with the attention now on the other party, Chooser. The mediator asks Chooser for his account of what happened. With internal conflict, the voice of the chooser often sounds defensive. Chooser might say something like, "Well the guy was being a jerk! I just wanted to give him some feedback, like, 'hey buddy, take a look at yourself; you're talking in a way that is not going to get you what you want. Wake up! You're getting all rage-oholic talking to your wife this way, what do you think is going to happen?'" I just wanted to let him know that I didn't think what he was doing was helpful.'" John attempts to listen through the defensiveness and respond by guessing what needs Chooser was trying to meet by his actions. "It sounds like you were concerned that the man's actions were sabotaging his goals for being in mediation, and wanted to contribute to him being understood and getting his needs met. Is that right?" Again, it may take a few rounds of dialogue to get at the needs that Chooser was trying to meet by what he chose to do. After these needs are clear, the mediator then turns back to Educator and asks him if he would be willing to say that he heard Chooser state that his needs were also for contribution and understanding.

Once you have sufficient clarity that you are beginning to mediate internal conflicts in your head, the second and fourth stages—asking the other party to reflect—are often skipped. However, it can be a powerful exercise to try to include them. When we have internal conflicts, we tend to flip between identification with each voice; one moment we are identified with the educator, another moment with the chooser. Staying with one voice and asking it to reflect back the needs of the other can assist in the process of reconciling the two voices as well as help us recognize more easily these different parts and how they interact. This can be a bit confusing, however, and it is helpful to have another person to assist you, or you can track the mediation using a recording device or on paper, keeping notes on what each side says and the needs each is trying to meet.

In the NVC mediation model, these first four stages constitute what we think of as the connection phase of the mediation; that is, the purpose of these four stages are to connect the parties with each other. You know they are connected when they are hearing each other, as they would each like to be heard. These four stages are repeated as many times as necessary to create this connection. Using these first four stages, we are slowing down the conversation so each side gets heard to their satisfaction, not only at the story level, but at the need level—the level at which the disputant identifies the basic human need he or she is seeking to meet by doing what she or he are doing.

The fifth stage moves into the resolution phase of mediation. Once the parties are connected, they often begin to spontaneously collaborate towards creating strategies that will meet all of the needs expressed. The mediator in this last stage assists the parties by continuing to facilitate any unresolved issues that come up (even sometimes moving back into stages 1 through

4 if necessary), and by helping the parties create strategies that are doable, and if necessary that include agreements which are intended to increase the likelihood that the primary agreement will be fulfilled as contemplated.

In an internal mediation, however, the fifth stage is different since there is not a "resolution" in the sense that there would be in a regular mediation. In an internal mediation, the resolution phase is more of a process of learning; using the information that has emerged in the first four phases, the person can reflect on what they might want to do going forward. This might include thinking about what they might do differently in a similar situation in the future, and it might include planning for a follow-up to the interaction that led to the internal conflict.

For example, after mediating the above internal conflict, John realized, "I really like that I was trying to be honest and straightforward with the guy, but I want to find a way to convey that honesty in a way that doesn't have any judgment to it. I want to do it in a way that is connecting and supports understanding. When I have a reaction, I don't want the reaction to be speaking for me; I want to speak from what I care about, what I value." In the next mediation session with the couple the husband brought up that he had felt "beat-up" in the prior session by what John had said. In response, John expressed his mourning about what had happened, saying something similar to the following, "You know, I was having some reactions to what you were saying that were about me and were making you wrong. I regret not being able to hold you and your wife equally in how you were trying to meet your needs. Would you tell me how you feel hearing what I just said?" John then empathized with the man's response to this question.

In order to make sure that whatever value comes out of doing this type of internal work does not end up simply being forgotten or put aside, it is helpful to think of this whole process as part of a learning cycle. This cycle has three stages; planning/practicing, doing, and learning. The planning/practicing stage often starts with mourning needs not met by some aspect of our conduct. And out of this clarity about what needs of ours are not being met, we may make a plan of how we imagine we might be able to conduct ourselves in the future so as to increase the likelihood we will have our needs met. For example, if we decide to have a follow-up conversation to the interaction that sparked our internal conflict where we try on the new behavior that we want to integrate, we make a plan about how to do that. We might practice in our heads what we want to say to the person. It can help to again enlist another person's support to role-play the interaction so we can practice out loud the things we would like to say and how we would like to say them. We might even ask the other person to react in ways that we fear the person might, and practice our responses. Then, in the doing stage, we have that interaction as best we can. Afterwards, we move into learning by celebrating the things that went well, and again looking to see if we have judgments or criticism about any part of it, particularly judgment of our own actions. If we find we do, we can then distinguish the voices of the educator (telling us what we should have done) and the chooser (defending what we did), and go through the mediation process described above. This learning cycle is a very effective way of moving us towards implementing the changes we would like to make; each time we go through it, we incrementally increase our abilities to act in new ways through reflecting on what happened, distinguishing our judgments about it, identifying the needs we hope to meet, developing new strategies to try to meet them, and implementing those strategies. (For more about using this model to support personal change, see: NVC Conflict Coaching, by Ike Lasater with Julie Stiles, http://cnvc.org/en/nvc-conflict-coaching.)

Conclusion

We have offered a description of a way we use to care for ourselves in our work as mediators. This approach to mediator self-care is an extension of our basic approach to mediation. When we are asked to act in the role of mediator we use the same approach as we do when mediating between the warring voices in our own heads—we set about to have each person to be heard as to their needs, not just their story.

We are writing a book about our approach to mediation and hope in the next year or so to have that for you. Until then, what we have written about our approach is collected at the following site: http://wordsthatwork.us/site/articlesandbooks.phtml.

Presenters' Biographies

Ike Lasater facilitates the resolution of conflicts, coaches people in conflict, and teaches these skills to others. His mediation work is based on the principles of Nonviolent Communication (NVC), a communication model developed by Marshall B. Rosenberg with whom Ike has done most of his formal NVC training. Ike has facilitated NVC and NVC Mediation workshops across the U.S. and in Australia, Hungry, New Zealand, Pakistan, Poland and Sri Lanka. He has served as a board member of a number of organizations including: the Center for Nonviolent Communication, the Association for Dispute Resolution of Northern California, and the California Yoga Teachers Association (founding owner of *The Yoga Journal* magazine). Ike engaged in civil trial practice in the San Francisco financial district for twenty years initially as an associate attorney with Brobeck, Phleger & Harrison. He co-found Banchero & Lasater, a twenty-person law firm specializing in complex, multiparty, commercial, and environmental cases. His experience in conflict resolution includes almost four decades of marriage and parenting of three now adult children (who seem to enjoy interacting with their parents), long-term practice of aikido, Zen meditation, yoga, and integrating NVC into his daily life since 1996. To learn more about Ike go to www.WordsThatWork.us.

John Kinyon is a staff trainer of the Center for Nonviolent Communication and a co-founder of the Bay Area NVC (BayNVC) organization. John has offered NVC training and facilitation to thousands of people around the world and specializes in mediation and spiritual practice applications of NVC. John provides mediation services for individuals, groups, and organizations, and has developed with colleague Ike Lasater an extensive training program in NVC mediation. In early 2002, John and Ike offered conflict resolution training to Afghan tribal elders along the Pakistani border. John also works closely with NVC founder Marshall Rosenberg, Ph.D., and is regularly invited to be a staff trainer with him at 9-day international intensive trainings. John has a background in clinical psychology and has started three businesses. To contact John: nvcmediation [at] johnkinyon.com. For more information see www.cnvc.org, www.nonviolentcommunication.com; and www.johnkinyon.com.

Hawking Our Wares in the Marketplace of Values –
Sell Quality Not Cost When Promoting Mediation; the
Interplay of Global Norms of Justice and Harmony in the Mediation Forum

I. Introduction: A Tale of Two Panels – Meta Considerations Emerging from the Conference

One benefit of an event like Fordham's 6th Annual Conference on International Arbitration and Mediation is that it affords participants the occasion to hear experts in the field – those on the panels and those in the more comfortable audience seats – express observations and insights that lead the listeners to further, general reflections on ADR. My presentation for this conference, titled *Attitude, Atmospherics and Techniques in Transforming Impasse into Opportunity* was delivered for the first day's panel: "Mediation: a Functional Approach." The Conference director, Art Rovine, so dubbed our panel to distinguish it from the next day's mediation panel, which focused on variations in mediation across the international spectrum and thus was named: "Mediation: Geography and Institutions."

Our own, earlier panel's focus was on approaches, skills, insights, and techniques in mediation, and process variations, without necessarily making comparative references across nations or cultures. For that panel I drew on an article that I contributed to a recently published book on impasse breaking.[1] This article bore the pithy title: *The Technique of No Technique: A Paean to the Tao-te Ching and Penultimate Word on Breaking Impasse*. This piece – appearing in a compendium of impasse breaking techniques – makes a simple point. When it comes to promoting continued party engagement and resolution, of far greater effect than any technique or method is the mediator's character, orientation and presence. More particularly, this presence communicates a caring and openhanded connection, a quality of deep listening and flexibility, and the trust and respect that engenders confidence and generates a reciprocal attitude from the parties. It is more important to be freshly and deeply attentive and responsive to what actually presents itself in mediation than to be busy sorting through, and applying tools from, one's bag of impasse breaking tricks.

We will return to the central message of that article and my presentation later in this chapter. For now, we should note that the presentation drew heavily on 2,500 year old Chinese classic: the *Tao te Ching*. This classic is the most central text of the Taoist tradition, which, along with the Confucian and Buddhist traditions, constitutes one of the three major religious-philosophical traditions of China.

Having disposed of my duties as panelist on day one, I relished the opportunity to hear the geographically oriented panelists speak on day two. Sure enough, a second of these three Chinese traditions was featured in Joseph McLaughlin's remarks. When

[1] Definitive Creative Impasse-Breaking Techniques, Molly Klapper, ed. (New York State Bar Association 2011).
http://www.nysba.org/AM/Template.cfm?Section=Shop&template=/Ecommerce/ProductDisplay.cfm&ProductID=5141

discussing the viability of mediation as a process for use in China, Joe McLaughlin observed that the Confucian tradition, as one which values harmony in the five relations,[2] has long supported the use of mediation. He made this point in the context of discussing cultural differences, and followed a bit later with a memorable tale from his own experience representing the Chinese government in an arbitration. When he reported a legal victory, his client's representative, a Chinese minister, to Joe's surprise described it as a "catastrophe." This victory had caused the counterparty to "lose face," making it much harder to negotiate a compromise through the use of a neutral third party and to do business together in the future. Again, there, a higher value was placed on harmonious relations than on being "right" and victorious.

Another aspect of Joe McLaughlin's remarks caught my attention. Joe began his presentation with the question of how to incentivize parties around the world to enter the mediation process – this was not specifically a geographical question but a universal question to institutions and parties. His response lists the most commonly referenced grounds: savings in time and cost, and reduction of disruption. He adds to the list the results of a recent study which shows that parties are often ineffective at predicting court outcomes. Plaintiffs frequently reject offers in mediation that exceed what they get at trial. Defendants, while less frequently wrong, are on average off by over $1 million to their detriment when they make the error of rejecting an offer and waiting for the trial outcome. Finally, Joe noted that mediation affords parties flexibility in designing resolutions that take into account not only the relative legal risk and cost, but also other factors, like the possibility of an ongoing business relationship. This places a value on party autonomy, as well.

I came away from Joe's remarks mulling over two interrelated reflections. First, what do we risk when we sell ADR, and mediation in particular, by focusing on savings in time and expense? What should be mediation's chief selling point? For me, Joe's mention of flexibility, autonomy and even his cross-cultural insight into the importance of harmony in Chinese culture hold the key. In selling mediation, we can describe what is unique about the mediation process itself – how it affects parties' communication and relationship; how it liberates parties to consider a wide range of needs, interests and realities; its humanistic focus; its possibilities for empowerment, recognition and understanding; its fostering of creative and appropriate resolutions; and its unique capacity to serve as a forum for the integration of the norms of justice and harmony. Quality of the process, rather than quantitative measures of time and expense, is major in selling mediation.

This leads directly to the second reflection. As a forum that fosters effective communication, respect for parties, and the ability to adjust to party needs, sensibilities, values, principles and circumstances, mediation is an ideal setting to bridge cross-cultural

[2] These relationships run between: (1) ruler and subject; (2) father and child; (3) husband and wife; (4) older sibling and younger sibling; and (5) elder and junior friends. [DEVELOP THIS FOOTNOTE TO DISCUSS: li, propriety; jen, humanity; reciprocity; yi, righteousness; http://faithresource.org/showcase/Confucianism/confucianismoverview.htm, Chan, Wing-tsit, A Source Book in Chinese Philosophy.

misunderstandings. A corollary is that in mediation, as a facilitated negotiation, it is critical to recognize cultural differences that might, if misunderstood, impede the negotiation. Some of a broader set of classic examples are misunderstandings where one culture might be communicate directly where another might communicate indirectly; high or low context cultures; cultures which are more assertive or more accommodating or conflict avoiding; hierarchical as opposed to egalitarian cultures; cultures where with different boundaries between the public and the private; cultures more or less comfortable with uncertainty; and cultures focused more on long term relationships or on short term transactional outcomes, such as in the Chinese minister example cited by Joe McLaughlin.[3] Mediators sensitive to these cross cultural differences can help parties grow in understanding and avoid needless impasse.

It is natural for a regular conference on international ADR to reflect on cross cultural differences and on means for bridging cross cultural misunderstanding. This model presumes a pluralistic global community. While pluralism is rightly in vogue, we cannot fail to observe such remarkable growth in global community that, occasionally, a universal human community emerges. As a, perhaps, novel advance in this discussion, we will take a step beyond simply looking to avoid cross cultural misunderstandings in a pluralistic world. Beyond bridging divergent communities, there are times when we can borrow cultural norms or values from different communities to enhance our own – to the benefit of each. One instance can be found in appropriating the harmony norm that Joe identified, which can be found in both Taoist and Confucian traditions, to clarify the nature of mediation and to enhance the quality and function of that process. Thus the second effort in this piece will be to consider mediation as a forum for integrating the norms of harmony and justice.[4]

II. Selling Quality, Not Quantity, in ADR At Home & in the International Market

The use of alternative dispute resolution processes continues to rise both within the United States and on the international scene. As cross border transactions increase, there is a growing desire to find dispute resolution forums that offer no "home court" advantage. Arbitration and mediation provide an answer to this need. The New York State Bar, for example, has recognized the importance of ADR to international business transactions through the work of a Task Force in which Joe McLaughlin played a

[3] Fascinating work on cross cultural differences has been undertaken by Geert Hofstede. Charts by which he compares cultural differences of various countries can be found at: http://www.geert-hofstede.com.

[4] For roughly 20 years, I have seen mediation as a unique forum with the extraordinary capability of integrating the norms of justice and harmony. Apparently, I am not alone. Approaching the end of this paper, I found a far more detailed exposition of this theme in the work of Omid Safa, In Search Of Harmony: The Alternative Dispute Resolution Traditions Of Talmudic, Islamic, And Chinese Law (December 2, 2008), http://law.wm.edu/academics/intellectuallife/researchcenters/postconflictjustice/documents/Safacomparativelawpaper.doc. *See, also,* A. Berner, "Divorce Mediation: Gentle Alternative to a Bitter Process", in *Jewish Law Articles,* > www.jlaw.com/Articles/berner.html (visited 12 March 2000), suggesting that the search for peace and harmony is given paramount importance by of the same traditions whose prophets have trumpeted the call for justice. *See, also,* Berner's unpublished, "Pshara: The law of Compromise & Justice in Jewish Jurisprudence."

significant role.[5] Further evidencing the recognition of the importance of arbitration on domestic and international fronts, the NYSBA Dispute Resolution Section has issued protocols for discovery in domestic commercial arbitration and for international arbitration.[6]

As ADR use spreads, providers and enthusiasts, including counsel who would introduce the idea of mediation to their clients or adversaries, continue to refine their sales pitch. For years, savings in time and cost have been major selling points for mediation, and not without good cause. There is little doubt that cases can be brought to resolution in mediation in far less time and for much lower cost than would be incurred were the case to continue down the litigation track. Despite this intuitively plain observation, years ago, the RAND Corporation issued a report concerning mediation in Federal District Court pilot programs, stating that there was no statistically significant evidence that mediation saved parties time and cost.[7] This caused quite a stir in ADR circles. Closer analysis of that report revealed that emphasis needed to be placed on the concept of "statistical significance"; RANDs data was just too thin. The available data did show, in the limited cases studied savings of time and cost, after all.[8] Subsequent studies and the wealth of experience with mediation over the years show that mediation does save parties time and cost.[9]

[5] *See*, Final Report of the New York State Bar Association's Task Force on New York Law in International Matters, with accompanying brochure "Why Choose New York For International Arbitration?" June 25, 2011, http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentFileID=53613. The Report offers reasons to adopt New York law in international transactions, and to feel comfortable resorting to New York courts. Nevertheless, the Report stresses advantages that can be found in using ADR processes as well. It annexes a brochure on international arbitration (beginning at page 85), and also contains a section stressing the importance of mediation as an alternative to both arbitration and litigation. *See*, *id.*, *at* page 34.

[6] In 2009, while I was Chair of NYSBA's Dispute Resolution Section, a task force led by Carroll Neesemann, John Wilkinson and Sherman Kahn published a Report on Arbitration Discovery in Domestic Commercial Cases. *See*, http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/DiscoveryPreceptsReport.pdf. That report addressed proposes a balance between the extremes of excessive and insufficient discovery aided by a list of factors to be considered by arbitrators in making discovery decisions. The following year, NYSBA's Dispute Resolution Section prepared a set of Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitration. *See*, http://www.nysba.org/Content/NavigationMenu42/November62010HouseofDelegatesMeetingAgendaItems/internationalguidelines.pdf.

[7] RAND, "An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act"(1996)(the "RAND ADR Report").

[8] *See* observations of *Report of New York County Lawyers Association Committee on Arbitration and ADR Comment on ADR Program Implemented Pursuant to Civil Justice Reform Act of 1990 In the United States District Court for the Eastern District of New York*, as sent to the ADR Advisory Group to the United States District Court for the Eastern District of New York, (September 22, 1997), http://www.mediators.com/adr-com.html.

[9] *See*, *e.g.*, Report to the Judicial Conference Committee on Court Administration and Case Management, entitled *"A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990,"* by The Federal Judicial Center, (January 24, 1997).

One factor that emerged from the early RAND Report was that, apart from benefits of time and cost, the vast majority of parties and counsel who used mediation were satisfied with the process. Satisfaction studies begin approaching the most significant features of mediation – that there are process differences that create a different quality of experience for participants in this form of dispute resolution. It is important that mediation experts, attorneys, in-house counsel, and corporate representatives responsible for the creation or choice of dispute resolution mechanisms keep their focus on this qualitative benefit of mediation. Beyond quality of the process, flexibility of results and attendant control of the dispute resolution outcome is also a key, related selling point.

Apart from RAND type challenges on time and cost, which have generally fallen by the wayside, one reason to stay focused on qualitative benefits is the consequence of quality or value-based critiques. To argue primarily in terms of time and cost can lead purists and persons of integrity to conclude that they are willing to wait and pay the price for the "right" result. These users might believe that they should reject mediation as a poor substitute for justice; a lazy, pusillanimous short cut; and avoidance of cost, delay, risk, and difficulty that persons, or companies, of integrity would face. The argument continues that we need legal outcomes to build the great society; to enhance long term utopian goals of progressive development of social good. If, as a society, we are to send a message to future disputants that certain rules must be obeyed, then short term losses – in the form of cost, delay, risk and disruption in connection with a particular case – must be shouldered by today's disputants for the benefit of future humanity.

In short, the preceding critique puts the norm, value and ideal of justice front and center. We will turn later to examine the role of justice in mediation and to consider the degree to which individualized justice, as well as positive societal impact, are furthered by that process. We will address that in the context of a discussion of mediation as a forum in which we can integrate the norms of justice and harmony. At this point, it bears noting that a focus on quality of the mediation process and the benefits it offers in controlling and fashioning an appropriate outcome does not generate the same offended reaction as do arguments about time, cost, and disruption. This does not, of course, negate the additional efficiency values of saving time, limiting cost, and reducing disruption through mediation.

III. Qualitative Advantages Fostered by the Mediation Process

Listed and developed below are aspects of the mediation process which provide qualitative advantages over dispute resolution approaches found in litigation and arbitration.

Depth and Range

Mediation has been variously defined. A centrist view is that mediation is a negotiation or dialogue facilitated by a neutral third party. Many things can happen, emerge, and be addressed in a negotiation or dialogue. The wide range of human

valences addressed in mediation is part of what makes this so rich and rewarding a process. We go far beyond assessment of legal issues and can span the range from intimate personal disclosures, to business considerations and financial constraints, social pressures, hierarchical concerns and personal, philosophical, cultural or even religious values. A skilled mediator can facilitate discussion in a manner appropriate to each. Empathetic, compassionate listening appears for emotions. Appreciative inquiry applies to values, experiences and perceptions. Creative wonder fosters brainstorming. Reflective questioning and analytic clarity can develop legal alternatives; including risk and transaction cost analysis. Thoughtful encouragement, practical engagement, and creative testing of possibilities foster business discussions. Humor, tact, clarity, and sensitivity keep discussions moving between the parties and overcome snags, awkwardness and entanglements. The ability to have these various human dimensions handled in a way that is appropriate for each is a vital selling point of mediation.

Freedom

Mediation, as Joe McLaughlin pointed out, has some universal features. It is an expression of party freedom. Parties, not counsel, court, jury, or arbitrators, make the decisions that affect the mode of their interparty communication as well as the outcome of their negotiation. Freedom is a quality worth selling.

Flexible, Free, Creative, Appropriate Resolutions (Individualized Justice)

A corollary to this freedom is the nature and form of the parties' resolution. Parties can fashion agreements that work best for their needs, independent from legal considerations. They can do business deals that a court could never invent. They can issue apologies which a court can never force. They can preserve, restore, and even enhance relationships in ways beyond the capacity of any third party to impose.

Acknowledging Actual Circumstances

Mediation can take into consideration the entirety of parties' circumstances and look to develop a negotiation process and resolution that is sensitive to and works for these circumstances. These are wonderful qualities of mediation, well worth touting.

Process Control, Flexibility and Responsiveness

Unlike trial, mediation is a process which is designed for party control. Mediators check in with the parties, and with counsel, to see whether it makes sense to continue in joint session or in private meetings, known as caucuses. Mediators take cues from parties on what issues they would choose to address. The flexibility and responsiveness of the process, to accommodate the reality, needs, interests, preferences, communication styles, and timing considerations of all participants is yet another selling point worth highlighting.

Fostering Empowerment and Recognition

Mediation theorists identify various quality enhancing features of mediation. The transformative mediation school sees mediation as a process that can focus on the quality of parties' communication, and as a consequence the quality of their relationship. Conflict, itself, is seen as a crisis in relationship. The mediator in this view has the dual purpose of fostering party empowerment, and fostering recognition. Empowerment involves recognizing the wide range of choices that present themselves at any moment – whether it is the choice to negotiate or not, choices to make or withhold disclosures of information, to express an emotion or simply to note it internally without expressing it, choices to engage in brainstorming, risk analysis, case and transaction cost analysis, to express empathy or understanding of the other party, and how, when and under what terms to resolve the dispute. Understanding that one can make this range of choices builds a feeling of control and empowerment which, consequently, reduces that party's defensiveness. This generates the sense that it is safe to try to understand the other party's perspective and to show recognition of that other party's needs, interests, feelings, and life situation. This growth of empathy or of recognition is the moral transformation from which "transformative" mediation draws its name.

Building Understanding

Similarly, mediators Himmelstein and Friedman promote an "understanding based" model of mediation. This involves digging beneath the opposing positions or claims to understanding more deeply what is going on for each of the parties. The mediator's orientation brings peace, rather than conflict, into the room.

Humanistic Focus Nevertheless Observing the Shadow of the Law

These approaches, as well as the centrist, facilitative, problem solving model have a humanistic focus. Of chief concern is not simply a set of rights that needs to be vindicated or obligations that need to be enforced. People, and life realities – not simply surrounding systems or rules – have primacy in the mediation arena. This is not to say that legal issues do not impinge on the parties' bargaining or undergo analysis and development in discussions held within the mediation context. Particularly in commercial mediation parties come to mediation with counsel, prepare the mediator with pre-mediation statements that can include law and legal analyses, and can participate in risk analysis that includes assessment of legal implications and possible outcomes. This is underscored by the number of times the phrase popularized by Robert Mnookin is quoted: parties "bargain in the shadow of the law."[10]

Nevertheless, the mediation process is designed to cultivate discussion and exploration of much more than the legal shadow. Using active listening skills – validation, empathy, clarification, summarizing, reflecting back – mediators foster an environment where parties' emotions, perceptions, values, goals, aspirations – as well as hierarchical, social and economic needs and constraints – may be expressed and have

[10] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale LJ 950 (1979).

significance. Pure legal analysis might limit the locus of truth to a statute or a line of cases and their decisions and verdicts. The humanistic focus of mediation recognizes persons, in all their simple depth and varied complexity, as a legitimate locus of truth.

Holistic Healing – The Great Quality that Needs a Different Marketing Brand

The word "holistic" almost invites a wry "Kumbaya." Its core meaning, though is that not the part, but the whole is involved in defining both problem and solution. Not just the intellect, but emotions; not just the facts, but also values and perceptions; not just legal obligations, but equities and feasibility in light of financial capacity; not just a judgment based on past facts, but a recognition of present circumstances and future possibilities. As indicated above, a comprehensive approach is taken in mediation. Mediators maintain a fully open mind and heart – a 360 degree orientation. We have seen the humanistic focus that respects the person as a whole. We have also seen that all actual circumstances are considered. This openness and comprehensiveness – living people given a forum for genuine encounter in a living world – is major. Law can have its black and white, and also grey. Mediation is in living color.

This living color includes not just the parties to the action, but other affected parties and the broader circumstances as well. Workplace disputes can involve recognition of the broader hierarchy. For example, in addressing a harassment claim against a manager, discussion of that manager's objectives and pressures can, at times, build understanding. When negotiating a settlement with a claim involving insurance, the various levels of authorization above the representative adjuster can be better understood and, possibly, given a human face. Family pressures, social and community pressures – all can be acknowledged in mediation.

The law also bears the weight of the broader society. The need for precedent, *stare decisis*, the compromises that go into the drafting of a governing statute influence the creation of laws that impinge on the parties to a particular dispute. A great difference between the way broader society is here seen as operating in law and in mediation, is that with law, the concerns might have nothing to do with the parties. The parties bear their weight. In mediation, understanding the broader circumstances, social or otherwise, offers illumination and lightens the load. It creates opportunities for greater understanding, acknowledgment, and voluntary acceptance of the social reality. It also, in identifying these surrounding others, can, at times, reveal ways to change the circumstances – arguments, offers, or adjustments that can be made to or for these others to make a resolution possible.

Relationship Preservation or Enhancement; I And Thou

In his seminal work, <u>I And Thou</u>, Martin Buber makes the revolutionary point that there are two fundamental modes of being for each of us. These are represented by two word pairs for relationships in which we stand and that define our core selves: I-Thou and I-It. For Buber, all of science, economics, business, aesthetics, law and the rest are in the realm of "I-It" to the extent by which we reduce any living reality to a subset of a field of

knowledge for classification and manipulation. Taking the stance of the scientist, economist, philosopher, engineer, accountant, lawyer, judge, businessman, and the like limits not only the "object" of one's examination, but limits the examiner himself (or herself) to the type of "I" that apprehends the "it." By contrast, full encounter with another who is recognized as "You" in his or her living wholeness – person to person – blows away all classifications and manipulations. This is the realm of love, of full appreciation and recognition, of genuine, engaged understanding. As with the "it" pair, so the "Thou" pair defines not just the other, but also oneself, opening a subjectively realized world of infinite, transcendent yet actualizing value. This is an "I" in relation which has a quality of wholeness that obliterates the subject-object distinction.

A beautiful description, but what does it have to do with commercial mediation? For Buber, true humanity is realized only in the I-Thou relationship, but it is the melancholy of our fate that we continually lapse from I-Thou to I-It. Moreover, we need "it" to survive. As we enter commercial mediations, on the domestic or international front, the more participants are capable of relating to each other as full human beings, the more we can break through strategic and positional bargaining and come to deeper understanding that generates a richer deal. There are recorded times in major negotiations where person to person recognition, genuine dialogue, provided an essential break through.

Taken down a notch, there is nearly universal recognition that mediation can create an atmosphere that increases the chance for parties to address and repair their relationships. It is difficult enough, at times, to bridge cultural divides in international business transactions, let alone in transactions that have gone sour. A process that fosters safe communication on all the multiple levels in which we engage and react is certainly one to be recommended. If, as Joe McLaughlin's Chinese minister understood, there is more value in continuing relations than in winning a particular legal battle, then the process that best fosters that understanding should be enthusiastically embraced for cross cultural dispute resolution, let alone by cultures that value relationships and harmony or our own domestic scene. Even in the so-called individualistic, autonomy loving West, there is a recognition that relationships matter. . Witness the JPMorgan Chase "relationship managers," the vast customer relations industry, and or praise of "networking."

Enhanced Communications and Problem Solving

Use of active listening, "looping" [FN] in the understanding based model, reflecting back in the transformative model [FN], and generally setting a tone induces the parties to engage in constructive conversation is yet another feature of mediation that provides a qualitative basis that should make it attractive. If one has the choice of entering a process in which one can speak and possibly be understood as opposed to a discussion in which words are weapons in a battle, which process would most people choose? If one sees an opportunity to grow in understanding and has a choice of that route or a route that keeps one frozen in one's own, limited perspective, which route would one choose?

The same questions can apply to the problem solving dimensions of mediation. The Fisher/Ury model developed in Getting to Yes and its progeny, presents a way for negotiators (and participants in mediation) to shift from being hard on the people to being hard on the problem. These negotiation theorists suggest that as we focus on the parties' interests and needs, we can develop options that can meet these needs and promote mutual gain. They suggest that this cooperative effort, which requires candid disclosures and flourishes with creative brainstorming and clear comparison of deal proposals against the parties' present alternatives (including anticipated outcomes of any pending or potential litigation), produces outcomes that are superior to the win/lose outcomes of litigation or the rough, and harsh, compromises achieved through hardball positional bargaining. Decent, supportive communication, rather than provocative use of threats and *ad homina*, increase the likelihood that parties will take the risk to engage in this brainstorming, disclose interests and assessments, and generate the options that lead to mutually satisfying deals. Mediation provides a forum and process designed to overcome the chicken and egg problem of generating the trust necessary to lead disputing parties to essay this joint, mutual gains problem solving approach. Given this possibility, would the autonomous, aware user choose the battles of litigation, arbitration and positional bargaining, or the possibility of integrative gains and civil process offered by mediation?

Bridging Cross Cultural Differences

While not the focus of this piece, it is widely recognized that mediation is an excellent forum for bridging misunderstandings that are rooted in cross cultural differences. There are cultural differences in approaches to time. A culturally sensitive mediator in a matter with German and Syrian parties might be better able to handle the German indignation when the Syrian negotiators appear a half an hour late to the mediation. Cultures communicate with varying degrees of directness. Culturally sensitive mediators can aid American or Israeli negotiators, *e.g.*, in understanding, accepting and learning to work with, what might appear to be elliptical, non-committal, or fuzzy communications and bargaining by Chinese or Japanese counterparties who come from high context cultures that also have high regard for "face."

In short, behaviors and communications which are natural in culture can be so greatly misunderstood by members of another culture that potential deals can be gutted. Given the chance to enter a process that can make transparent the cultural source of some of these differences and eliminate the misunderstanding, would the rational user prefer a process that preserves ignorance, abreactions, severed relationships and lost opportunities, or one which limits this misunderstanding?

In sum, there are a host of qualitative features of mediation, beyond savings in time and cost, which should be the chief reason for parties to select the mediation option. It is the responsibility of the ADR community, as well as sophisticated counsel, to present these qualities with the clarity required to transform skeptics into users.

IV. Mediation As Forum for the Integration of the Norms of Justice and Harmony.

A. Examination of Justice

In this piece I would like briefly to introduce an idea that could form the basis of a book. Putting aside the question of time and cost, why choose litigation or mediation as dispute resolution process? As mentioned in Section II, above, pursuit of justice might be identified as a reason to prefer litigation. In our noble judicial system, or in a well conducted arbitration run by experts in the substantive field at issue, parties, with the help of counsel, present the facts to decision makers in a process designed to subject assertions of fact to the harsh light of cross examination and doubt. The judicial or arbitral decision makers apply what are believed to be community standards, represented by the law or norms and customs of commercial practices, to produce an outcome which that community believes is fair. Indeed, justice theorists like Rawls assert that the very heart of justice is fairness. We seek a fair process and a fair outcome.

This ideal of justice is great and profound. It produces order in society. It unsettles corrupt orders. It saves the weak from oppression and rights wrongs. Fern Bomchill, in her inaugural speech when she assumed her position as President of the Federal Bar Association, aptly said: "justice saves, so we should save justice." Our Judaeo-Christian traditions reinforce our sense of the great importance of justice: "justice, justice shall thou pursue." [FN: Isaiah or Jeremiah] The ideal of justice likewise finds concrete expression in the *shariah* of Islam.

Our justice ideals are imbued with the notion of truth. We seek the "real facts." We seek to apply the correct law. Our system works with this dualism of universal ideal (law, or community value) and particular (fact). This approach has its roots in Plato, Aristotle, and the ancient Greeks. They struggled to define the "good." We have long lived with these and other dualisms: essence and existence, ideal and actual. As we look more closely at the justice system, which is aided by these distinctions, we should keep in mind that exposure of flaws and shortcomings do not require us to throw out the baby with the bath water. Nevertheless, recognition of flaws and shortcomings may open us to another possibility – one which is found in mediation.

What are some of these shortcomings? Joe McLaughlin cites the recent study underscoring the unpredictability of judicial outcomes. Our concept of justice contains the ideal that there is a single right answer to the question of what should be done in any case. Our judges and juries apply the dialectical Aristotelian either/or to judge the truth or falsity of each assertion of fact, to arrive at the correct picture of the material past, to select the proper standard or set of standards to be applied to those facts (and that picture), and properly to apply those standards to produce the correct outcome. We narrow and further narrow down the various possibilities of fact and law to the single right choice, excluding all the rest. This image of the development of justice in a single case is like that of a pyramid, finally reaching the correct apex.

Unfortunately, there are many ways in which we fall short of the ideal. Key facts might be omitted or dismissed from consideration as the result of ignorance, poor memory, lack of witnesses, lack of documentary support, exclusionary rules of evidence, ineffective presentation by advocates and parties, and even confusion of judge, arbitrator or jury.

Key standards can also be missed. Rife are the instances of appeal for failure of the court to select or properly apply the law. In arbitration, the standards applied by the arbitrators are often unstated or unknown. Both with arbitrators and with juries, it is not always clear whether the decision makers themselves are fully conscious of the values, assumptions and core myths that motivate their decision making process. To the extent that decisions are appealed, who is to say that appellate courts actually get them right?

Beyond this, we can examine the source and nature of standards themselves. An Illinois legislator, who predated Bismarck,[11] observed that there are two procedures it is best not to watch: the making of sausages and legislation. Our laws can reflect compromises between different interest groups that can produce something short of the Platonic ideal. Moreover, the interests of society in forming a given law or rule might not be entirely aligned and appropriate for the parties to a particular dispute. We might need to develop statutes of repose, in light of the tendency of witnesses to forget or disappear and the reliance that forms by parties against whom an otherwise rightful claim might be brought. Nevertheless, there might be instances where, even absent a formal tolling agreement, ongoing discussions or other factors would lead to a conclusion that the more just result is to afford a remedy for the claim. Examination of any body of substantive law – *e.g*., laws affecting the environment, healthcare, commerce, securities, intellectual property, and the like – will produce instances of seeing greater possibilities for justice in individual cases than the law will permit. Moreover, there are significant instances of parties with competing interests in these cases which, with integrity, might assert that diametrically opposite results are the just and superior outcome.

In this postmodern era, we live with a large dose of doubt. Multiculturalism brings with it recognition that any single culture is limited in its right to make absolute truth claims that can be imposed on all others. Relativism abounds. Yet relativism itself is subject to the critique that its own claim to absoluteness is relative. In a postmodern era, in the wake of Freud, logical positivists, radical empiricists, Wittgenstein,[12] and phenomenologists,[13] we are more skeptical about asserting the existence of ideals, and can see these as human constructs, projections, or, more simply phenomena. Phenomenology recognizes the interplay and mutual dependence of "fact" and mind. We live in a tangled, interwoven real of subject and object, unable to know the "*ding an sich.*"[14]

[11] *See*, http://en.wikiquote.org/wiki/Talk:Otto_von_Bismarck.
[12] The meaning of a word is in its use in the language. Wittgenstain, L., Philosophical Investigations, 43.
[13] This includes Husserl, Heidegger, Merleau-Ponty, *et al.*
[14] *Compare* Berkeley 's idealism with Kant's *Critique of Pure Reason* expressing the view that we may develop and utilize categories of understanding, but cannot know the thing-in-itself.

Nevertheless, somehow we muddle through. The good news is that postmodernism can produce a refreshed outlook. We are a bit clearer on the limits of knowledge and of truth claims. We are aware of our living embeddedness in actuality. Truth, value and meaning are the waters in which we swim, interpenetrating phenomena. Basically, we can go easy on ourselves and one another. We do our best, living rich meaningful lives permitting, but not being crippled by, doubt.[15] We promote respect for and acceptance of other cultures in a multicultural world. Perhaps we learn better the dignified humility that is a precondition for the arising of truth.

Returning to justice, the judicial system, and the legislative system in which it is, in part, embedded, we observe again, that the purposes of a legal system, while of tremendous importance, are not always consonant with pure justice for individual parties. Tort laws make society a safer place. We need, as a society to send messages that set a standard of care to manufacturers, distributors, retailers, professionals, and Boards. Nevertheless, confidential settlement of individual claims might, in a given instance produce a greater good than the legal outcome in that case. It might keep an otherwise valuable producer of pharmaceuticals out of bankruptcy. It might allow certain businesses to continue supporting the families and charities that would suffer from their collapse. It might produce a business reorganization whereas a judgment in an accounting proceeding might simply kill the goose that lays the golden egg. It might preserve a relationship or set of relationships that would otherwise be severed.

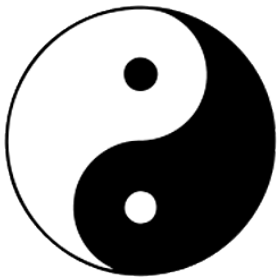
This leads us now to look at another cultural value: that of harmony.

B. Consideration of Harmony

As mentioned in the Introduction, the norm of harmony has been highly valued in different ways in the Taoist and Confucian traditions. Again, while books could be written exploring this topic, here we touch just the tip of this normative iceberg. One simple and direct introduction to this topic may be found in considering the widely recognized *yin-yang* symbol[16] depicted below.

[15] 20th Century Protestant and Buddhist theologians have used the phrase "the faith to doubt" to capture this sensibility. *See, e.g.*, Hartshorne, M. Holmes, The Faith to Doubt – A Protestant Response to Criticisms of Religion (Prentice-Hall 1963); Tillich, Paul, The Courage to Be; Batchelor, S., The Faith to Doubt – Glimpses of Buddhist Uncertainty (Parallax Press 1990).

[16] Thousands of publications have been written on the *yin-yang* symbol. One very helpful piece, in the context of the comparative study of religion, is a chapter on this symbol in Wilfred Cantwell Smith's book, The Faith of Other Men (Harper & Row, 1972). Also illuminating are various descriptions and texts included in Chan, Wing-tsit, A Source Book in Chinese Philosophy (Princeton University Press 1969), *e.g.*, Chapter 11, pp. 244 *et seq*.



In contradistinction to the Aristotelian "either/or," *yin* and *yang* are depicted as mutually dependent and co-arising, complementary opposites. Each opposite supports the other. Indeed, as depicted above, the seed of *yang* (portrayed as a white circle) is found within *yin* and vice versa. Traditionally, *yin* is seen as representing feminine, receptive, passive, weak, destructive, and negative, while *yang* represents masculine, active, strong, constructive and positive aspects of reality.[17] These opposites are seen linguistically, conceptually and ontologically as having no independent existence, being dependent upon each other and forming a whole. They are constantly in flux, each shifting into the other, and further represent a constantly readjusting function of balance.

A core takeaway is that rather than reject opposites, we need to recognize that all are an interrelated, interdependent part of the whole.[18] We should seek to blend opposing forces. As noted by Joe McLaughin, the Analects of Confucius, recommend harmony in the five social relations.[19] The *Tao te Ching*, perhaps the major classic of the Taoist tradition, expresses a profound appreciation of harmony.[20] The Taoist sage does not compete with others.[21] He sees the world as his body.[22] He, like the Tao, nurtures all

[17] Chan, *supra*, at 244. Despite the above suggestion that the masculine is procreative or constructive and the feminine is destructive, it should be observed that in a note to his translation of the *Tao te Ching*, which draws heavily on the imagery and theoretical foundation of *yin* and *yang*, the same scholar-translator cites Yu Yueh's description of the feminine, *yin*, "spirit of the valley," is a source of fecundity. *See*, Chan, Wing-tsit, The Way of Lao Tzu (*Tao-te* Ching)(Bobbs-Merrill 1963)(hereinafter "*Tao te Ching*"), Chapter 6, note 1.

[18] A good example of a listing of complementary opposites and their implications for ethical action can be seen in Chapter 2 of the *Tao te Ching*. ("When all the people of the world know beauty as beauty, There arises the recognition of ugliness. When they all know the good as good, There arises the recognition of evil. Therefore: Being and non-being produce each other; Difficult and easy complete each other; Long and short contrast each other; High and low distinguish each other; Sound and voice harmonize each other; Front and behind accompany each other. Therefore the sage manages affairs without action And spreads doctrines without words. All things arise, and he does not turn away from them. He produces them but does not take possession of them. He acts but does not rely on his own ability. He accomplishes his task but does not claim credit for it. It is precisely because he does not claim credit that his accomplishment remains with him.")

[19] *See* note 2, *supra*, and related text.

[20] *See, e.g.*, Chan, *Tao te Ching*, Chapter 55 ("…his (natural) harmony is perfect. To know harmony means to be in accord with the eternal. To be in accord with the eternal means to be enlightened.")

[21] Chan, *Tao te Ching*, Chapter 8 ("The best (man) is like water. Water is good; it benefits all things and does not compete with them.").

[22] Chan, *Tao te Ching*, Chapter 13 ("What does it mean to regard great trouble as seriously as you regard your body? The reason why I have great trouble is that I have a body (and am attached to it). If I have no body, What trouble could I have? Therefore he who values the world as his body may be entrusted with the empire. He who loves the world as his body may be entrusted with the empire.")

things.[23] The sage, like water, a major image in the text, is said to benefit all.[24] He takes the needs and interests of all people as his own. The sage is good to the good and to the bad, in this way the good is accomplished. He trusts the trustworthy and the untrustworthy, in this way is trust developed.[25] The good man is the teacher of the bad and the bad is the charge of the good.[26] The sage does not compete. He does not strive to be ahead, and for this reason is at the forefront.[27] Over and over again, the *Tao te Ching* sends the message of collaboration. We are all in this world together. Rather than isolate and condemn those who do not embody our vision of the ideal, let us find a way to make the best use of their skills and inclinations so that nothing and no one goes to waste.[28] This organic view of an interrelated society expresses early roots of the collectivism found in China over the centuries, up to today.

This spirit of inclusiveness applies not just to ethical relations with other people but to acceptance of circumstances, as well. The *Tao te Ching* and its progeny, such as the *Chuan tzu*, are permeated with a spirit of adjustment and accommodation. The sage is fluid as water, flexible as bamboo, receptive as a valley, rejecting nothing. The Taoist ideal of *wu wei*, or taking no (unnatural) action[29] is a natural extension of this world view. [30] Each being has its place in the whole and moves and adjusts in a dance in harmonious interrelationship with all. This can generate great power, just as a skillful surfer learns to ride the mighty wave. Significantly, *wu wei* means not using force. Non-coercion is a central theme of the *Tao te Ching*.

C. Implications of Justice and Harmony

As noted in the last section, values of accommodation, collaboration and even avoidance of conflict pervade Taoist thought. By contrast, in litigation, as in hardball positional bargaining, a different mode of conflict resolution – competition – comes to the fore. Interestingly, these, along with compromise, consist of the five modes or styles of approaching conflict identified in negotiation literature.[31]

[23] Chan, *Tao te Ching*, Chapter 51.
[24] Chan, *Tao te Ching*, Chapter 8.
[25] Chan, *Tao te Ching*, Chapter 49.
[26] Chan, *Tao te Ching*, Chapter 27.
[27] Chan, *Tao te Ching*, Chapter 7.
[28] Chan, *Tao te Ching*, Chapter 62 ("Tao is the storehouse of all things. It is the good man's treasure and the bad man's refuge. Fine words can buy honour, And fine deeds can gain respect from others. Even if a man is bad, when has (Tao) rejected him?")
[29] *See, e.g.*, Chan, *Tao te Ching*, Chapters 2 ("the sage manages affairs without action"); 37 ("Tao invariably takes no action, and yet there is nothing left undone."); 38 ("The man of superior virtue takes no action, but has no ulterior motive to do so."); 43 ("The softest things in the world overcome the hardest things in the world. Non-being penetrates that in which there is no space. Through this I know the advantage of taking no action. Few in the world can understand the teaching without words and the advantage of taking no action."); 47, 48; 57; 63 ("Act without action"); 64.
[30] *See, e.g.*, Chan, *Tao te Ching*, Chapter 30 ("He who assists the ruler with Tao does not dominate the world with force. The use of force usually bring requital."); Chapters 38, 55,
[31] *See, e.g.*, the Thomas-Kilmann Conflict Mode Instrument (Tuxedo NY: Xicom, 1974), identifying five conflict modes or styles: competing, compromising, collaborating, avoiding and accommodating.

Beyond their application in negotiation, it is intriguing to see these modes applied in connection with the norms of justice and harmony. Justice makes straight the crooked. With force and the authority of the right, we can take strong action to make the actual conform to the ideal. Harmony, by contrast, involves ones own adjustment, or the group's adjustment, to the actual. The ideal is found in this mode of adjustment, which embodies and actualizes peace, and, perhaps, love.[32]

There can be little doubt that we need a justice norm and the courageous and caring action that expresses it. Without justice, pure accommodation is appeasement, which, when applied to Nazis is, at the very least, controversial. Yet, there are times when it is less than perfectly clear what justice dictates. There are instances, all the more available in cross cultural contexts, when each party is assured that he or it is in the right. And, as noted in subsection "A." above, there are times when the notion of justice dictated by a particular legal system carries out a general societal purpose but does not necessarily create individualized or maximal justice for the actual parties – and in light of the actual circumstances – involved.

Beyond this – and now we may fairly return to the pragmatic considerations initially voiced by Joe McLaughlin – there is a fair degree of unpredictability to the legal outcome of a given case. Moreover, time and expense incurred in pursuit of this goal of legal justice may outweigh the value of the dollars ultimately awarded at the end of the case. This is all the more so when one factors in the opportunity cost of delay, time in depositions, discovery and trial, water cooler gossip, and relationship loss – with loss of future business – between the warring parties. Where the cost of justice exceeds the value of justice received, is that justice?

The norm of harmony has a counterpart within the Judaeo-Christian tradition. Again, recognizing the limits of this paper, we will only point to a couple of them here. Love and forgiveness are major teachings not only in the Christian tradition, but in the Jewish tradition as well. Theologians and religious leaders in each tradition have, for centuries, coupled the norms of justice and mercy. Indeed, Portia's speech on the "quality of mercy"[33] is anti-Semitic to the extent it implies that Shylock represents the core value of his tradition in requiring a pound of flesh, rather than valuing human life and this superior, unstrained[34] quality of mercy. In the Kabbalistic tradition, Mercy is seen as a higher divine attribute than Justice.[35] As Rabbi Adam Berner points out,

[32] Chan, *Tao te Ching*, Chapter 67 ("I have three treasures. Guard and keep them: The first is *deep love*, The second is frugality, And the third is not to dare to be ahead of the world. Because of deep love, one is courageous. Because of frugality, one is generous. Because of not daring to be ahead of the world, one becomes the leader of the world.").
[33] Shakespeare, W., *The Merchant Of Venice*, Act 4, scene 1, 180–187.
[34] The notion of being unstrained, or unforced, is notably consistent with *wu wei*.
[35] *See, e.g.*, Scholem, G., On the Mystical Shape of the Godhead, (Schocken Books 1991), p. 44, displaying a classic image of the "ten *Sephirot*" or divine emanations of the kabbalistic tradition, with *hesed* or mercy shown as the fourth and *din* or judgment (justice; also called *geburah* or strength) as the fifth. One example of this ordering can be found in the *Tomer Deborah* of R. Moses Cordovero (1522-1570).

psharah or compromised, voluntary settlement is preferred over resort to the religious court, the *Bet Din*, as a mode of resolution within the classic Talmudic tradition.[36]

At the very least, making room for harmony does not run contrary to major theistic traditions. More boldly put, harmony and mercy are values that might represent a higher mode of civilization. These values do not make the adverse party into an "other" upon whom one imposes punishment or extracts compensation by use of legal force. Rather, they recognize the humanity of, and affinity with, this other, taking the full person and all his or her circumstances into account – warts and all. When developing dispute resolution processes on the domestic or international front, a process that can foster the application of not only the norm of justice, but also the norms of harmony (or mercy), is a process that maximizes the possibility of richer and greater outcomes. These are outcomes that do not ignore justice, but contemplate multiple views of what is just, and the wide range of values and principles held by the parties. In addition, these outcome contemplate the person not simply as a subset of a category of particular tortfeasor or contract breacher in a particular legal grid, but as a whole and complete living person with a complex and multivalenced context and series of relationships, limitations, needs, tendencies and obligations.

D. What Mediation Offers

Values, as ideals, are too large and general to be limited to any particular model, system or process. Similarly, mediation, like life, is far too open a process to be defined by any two values, even ones as great as justice and harmony. Drawing on the *Tao te Ching*, which uses the word "*Tao*" often translated as Way, with overtones of ultimate truth or ultimate reality: "the Tao (Way) that can be "*taoed*" (*i.e.,* "wayed", laid out, expressed, defined) is not the eternal *Tao*."[37] It is important to keep in mind the indeterminate, and open, nature of mediation as a process as we enter the next discussion.

Consistent with the inclusive model of *yin* and *yang*, mediation offers an open forum in which not only the value of harmony but also the value of justice (and other values)[38] may play themselves out in the parties' negotiations. We see the justice norm at work when parties and counsel begin opening statements with projections of legal outcome, when offers are coupled with messages of case strengths, and when parties and

[36] Berner, *supra* ("The Torah mandates us "to do that which is right and good in the sight of the Lord."[8] Rashi comments that this refers to *psharah*, looking beyond the letter of the law. In fact, the *halachah* establishes that it is a *mitzvah* to encourage disputing parties to pursue *psharah* over the adjudication and application of *din* (strict law)[9]. Capturing the essence of the benefits of mediation, the Talmud states that only *psharah*, not *din*, constitutes the ideal justice of *mishpat shalom* and *mishpat tzedek* -- judgment of peace and judgment of righteousness. No modern formulation has so elegantly expressed the uniqueness of mediation, in its ability to provide an integrated justice balancing the values of fairness, peacefulness and compassion.[10]")

[37] Chan, *Tao te Ching*, Chapter 1 ("The Tao that can be told of is not the eternal Tao; The name that can be named is not the eternal name.").

[38] There is a wide range of values that can be considered and influence decision making in mediation, including: efficiency, economy, closure, appropriateness, feasibility, consideration, compassion, diligence, duty, loyalty, practicality, etc. All of these can be made transparent and treated with sensitivity, clarity, impartiality, and respect in this process.

counsel engage with the mediator in risk and transaction cost analysis. We see harmony operating as parties consider their relationship with one another. We see it in accommodations that take into consideration not only legal outcomes but also the ability to pay, the value of ongoing business relationships, industry realities and challenges, the feasibility of particular deal terms or proposals, and even another party's need for recognition, appreciation, or acknowledgment in the form of an apology.

We further see harmony or, even more broadly, the applicability of teachings from the *Tao te Ching*, in the conduct of the mediator him (or her) self. Mediators are at their finest when they can be deeply receptive; when they listen profoundly; when they demonstrate flexibility; when, like water, they benefit all; when they build trust by showing trust; when they do not coerce, but instead act with *wu wei*. They are at their best when they do not compete and when they take the needs and interests of all parties, without discrimination, as their own. They come to the forefront by being background players, understanding that their role is to facilitate the parties' negotiation, not to run or steer it to the mediator's preconceptions of what is good, right, true, just or even harmonious. Indeed, while harmony is a beautiful thing, the mediation process includes the openness to present discordant feelings, views, goals and expressions. In this way, the discordant, when expressed, accepted and explored, can transform into resolution. This is a way of harmony.

The interplay of justice and harmony in mediation is doubly beautiful. Justice seeks to change and harmony adjusts – it is like watching the interplay of active and passive, *yang* and *yin*. Beyond this justice within a mediation forum is not limited to predicting the court outcome. As discussed above, each of the parties might have views of fairness based on principles and expectations that could differ from the way a legal analysis might run. Working flexibly with the parties to meet their needs and provide a process that they find satisfying (itself an adjustment by the mediator consistent with the fluid quality of harmony), includes fostering clarifying and constructive discussion that identifies, develops, and explores principles and values the parties might choose as most applicable in providing guidance for the resolution of their issues. For example, in a family estate matter, all siblings might choose the principle of equal distribution as a governing family value. Alternatively, they might conclude that the *kibbutznik* norm of "from each according to his abilities, to each according to his needs" represents their familiy value and cultures, and should be adopted in this matter.

Whether considering possible legal outcomes or independent principles and values, one characteristic of this mediation process is that the parties act out of freedom. They are not coerced by the mediator. No outcome is imposed upon them. The process itself can be adjusted to reflect their identities, values, goals, inclinations, concerns and leanings. Choosing one's brand of justice, rather than fighting and have it imposed by a third party, raises the quality of the interaction in mediation to a higher, more humane, more mature phase in the development of civilization. Consistent with this advance is the parties willingness to explore values and recognize that each merits respectful, sensitive attention. Bringing in the postmodern perspective, mediation permits exploration and

adoption of many values that result in freely adopted individualized justice tailored to the parties.

The discussion of harmony in Section IV.B. notes the coupling of justice with mercy in the Judaeo-Christian traditions. Along with the freedom to choose what seems most just for all parties comes the freedom to forgive. Much has been written on forgiveness[39] and the value of apologies[40] in mediation. This too is a way of restoring harmony between parties.

In sum, mediation is a wonderful process, full of rich potential, and based in party freedom and creativity. It permits parties to work out their disputes in a manner that balances property, rights, principle and obligation based norms of justice with relational norms of harmony, developing a life affirming mutual adjustment of the ideal and the actual, and of the individual and the collective. It

As shown above in the description of the mediation process, parties do negotiate in the shadow of the law, particularly in commercial matters, as well as in matters, such as employment discrimination, which have legal BATNAs affected by a statutory scheme. One major difference in mediation is that this legal shadow is but one of a wide range of realities considered. As discussed in Section II, above, mediation is a process in which parties can address a wide range of human realities: feelings, perceptions, values, principles held by each person; a host of interests: personal, familial, business, cultural, hierarchical; the gamut of surrounding circumstances affecting negotiators, including economic conditions and limitations, long and short term business goals, reputation, and

[39] *See, e.g.*, Sandlin, J.W., *Forgiving in Mediation: What Role?* (Advanced Solutions Mediation & Conflict Management Services, Charleston, South Carolina 29402) http://www.apmec.unisa.edu.au/apmf/2003/papers/sandlin.pdf; Braskov, S. & Neumann, A., *On Guilt, Reconciliation And Forgiveness - A Case Story About Mediation, Dilemmas And Interventions In A Conflict Among Colleagues* (Lipscomb University Institute for Conflict Management), http://www.mediate.com/articles/BraskovNeumann1.cfm; Schmidt, J. P., *Mediation and the Healing Journey Toward Forgiveness*, Conciliation Quarterly, 14:3 (Summer 1995), pp.2-4; Della Noce, D. J., *Communication Insight*, ConflictInzicht, Issue 1, February 2009; Luskin, F, Forgive for Good: A Proven Prescription for Health and Happiness (HarperCollins 2002), used in trainings on forgiveness in mediation, *see, e.g., http://danacurtismediation.com/dcm/forgivenessyrslater.html*; and Waldman, E. & Luskin, F., *Unforgiven: Anger and Forgiveness*, The Negotiator's Fieldbook: The Desk Reference for the Experienced Negotiator (Kupfer Schneider, A., and Honeyman, C. editors, ABA Section of Dispute Resolution 2006)(hereinafter "Negotiator's Fieldbook") pp. 435 – 443.

[40] *See, e.g.*, Gerarda Brown, J. & Robbennolt, J.K., *Apology in Negotiation*, Negotiator's Fieldbook, pp. 425-434; Schneider, C.D., *"I'm Sorry": The Power of Apology in Mediation*, (Association for Conflict Resolution Oct. 1999), http://www.mediate.com/articles/apology.cfm; Kichaven, J., *Apology in Mediation: Sorry To Say, It's Much Overrated*, (International Risk Management Institute Sept. 2005), http://www.mediate.com/articles/kichavenJ2.cfm; *and also see*, Garzilli, J.B., Bibliography of articles on apology in mediation, http://www.garzillimediation.com/pg247.cfm.

even the quality of the relationship of the parties themselves and their relationships to others.

The norm of harmony takes life as parties work out their various needs and interests, make adjustments for one another's realities, modulate the tone and depth of their communication, and adapt to the realities of life in which they find themselves embedded. Justice may be seen as imposition of a particular concept of the ideal upon the actual – changing circumstances and people to make things right. Harmony involves adapting ones behavior and inner reality to actual circumstances, finding the natural way to fit – for the individual or the group, in a manner the takes on the qualities of wholeness, beauty and grace. This interplay of active forces seeking to effect change and more passive adjustment to realities, the needs of others, and actual circumstances is a frequent occurrence in mediation.

Norms of justice and harmony can be both descriptive and prescriptive. With them we see patterns in the mediation arena. We also can use them to help mediators gain awareness of possibilities in the process. On the justice side, mediators, particularly in court annexed matters or large cases heading toward arbitration, will find that parties and counsel who attend the mediation expect to discuss legal issues, risks facing other parties if the matter is not resolved. This suggests that, to satisfy this component of the justice norm, mediators should be adept at fostering constructive consideration of the legal BATNA. It might be helpful, along these lines, for the mediator to aid parties and counsel in developing information and engaging in a risk and transaction cost analysis. Of course, this is just one aspect of justice. As discussed above, each of the parties might have views of fairness based on principles and expectations that could differ from the way a legal analysis might run. Working flexibly with the parties to meet their needs and provide a process that they find satisfying (itself an adjustment by the mediator consistent with the fluid quality of harmony), includes fostering clarifying and constructive discussion that identifies, develops, and explores principles and values the parties might choose as most applicable in providing guidance for the resolution of their issues. For example, in a family estate matter, all siblings might choose the principle of equal distribution as a governing family value. Alternatively, they might conclude that the *kibbutznik* norm of "from each according to his abilities, to each according to his needs" represents their familiy value and cultures, and should be adopted in this matter.

Whether considering possible legal outcomes or independent principles and values, one characteristic of this mediation process is that the parties act out of freedom. They are not coerced by the mediator. No outcome is imposed upon them. The process itself can be adjusted to reflect their identities, values, goals, inclinations, concerns and leanings. Flexibility in the mediator, and *wu wei*, are traits and modes that reflect an orientation that conforms to the harmony norm. Thus, acting harmoniously engenders free choice to engage in self-determination that recognizes and seeks justice in one or another of these forms.

That participants freely choose their brand of justice, rather than fight and have it imposed upon them, raises the quality of the interaction in mediation to a higher, more

humane, more mature phase in the development of civilization. Consistent with this advance is the parties willingness to explore values and recognize that each merits respectful, sensitive attention.

Forgiveness:

forgiveness. …generate the apology that might prompt forgiveness.

{WORK INTO NEXT TIME JUSTICE & HARMONY THEME RETURNS: For years, coming from a background in the comparative study of religion, and in the shadow of postmodernism, I struggled with the question of how to extract the best of what we have to offer in the US system of justice with what insights drawn from the Taoist, Buddhist and Confucian traditions. Western justice – and by this I mean the notion of an ideal of justice rather than Doc Holiday style rough justice – has much to offer. Our system promotes the worth and rights of each individual and freedom, while maintaining a recognition of broader social responsibility and utopian possibilities. Of course, our justice system has its limitations as well. As Joe pointed out, it presents parties with great cost, risk and delay. Engagement in the legal system can isolate and alienate parties from each other, augmenting the rift in their relationship. It can involve negative publicity and reputational damage. In some instances, the fracture of the individual conflict can expand to the broader social conflict in families (*e.g.*, estate battles), businesses, and wider communities. Sometimes, as in the case of early Civil Rights litigation, the rift was essential to repairing an existing social disease. The bones of the body politic needed breaking before they could be reset and heal properly. Many other times, however, the benefit of the fight to deeper social integration is less apparent. In these instances, we might benefit from the application of another norm – that of harmony.}

Ethics

Melvin A. Rubin

ETHICAL CONUNDRUMS FOR THE 21ST CENTURY LAWYER/MEDIATOR "TOTO, WE'RE NOT IN KANSAS ANY MORE"

The cyclonic winds which whisked Dorothy off to The Land of Oz are still spiraling. Now in the cone of danger – mediators who also are licensed attorneys. However, the ultimate land to which the at-risk lawyer/mediator may be transported has no yellow brick road. Instead, it is characterized by conundrums. The lawyer/mediator, like many tragic historic and mythical characters, is trapped between the Scylla of one of mediation's bedrock principles (confidentiality) and the Charybdis of the lawyer's whistle-blowing obligation, an ethical rule widely unknown or often observed in the breach. We question whether it is fundamentally unfair for the mediation participants' expectations of confidentiality to be frustrated because the mediator happens to be a lawyer, a question we address again at the end of this article.

Why this article should be read by every lawyer/mediator[1]

The lawyer/mediator knows that litigation is intruding into the mediation process, often resulting in court challenges to mediated settlements and attempts to invade the confidentiality of the process. Stated differently, it has become not uncommon for parties to settle and sue, seeking to set aside mediated settlement agreements on various grounds, ranging from fraud in the inducement to duress. Consequently, what is said and done during the mediation process is increasingly the subject of pretrial discovery and, ultimately, trial testimony. While the initial target is the opposing party, the lawyer/mediator is in the line of fire.

For example, take the classic case of counsel advising the client that the defendant's settlement offer is the best offer which the client could ever reasonably expect and recommending that it be accepted immediately and without condition. Not infrequently, the

[1] The article should not be misinterpreted as any disregard to or disrespect of the many other dual profession mediators, including mental health professionals and others.

By Melvin A. Rubin

client has no idea of the value of the claim asserted and necessarily relies completely on counsel's advice. The client's vulnerability may be exacerbated by a multitude of after-settlement maladies (otherwise known as "buyer's remorse"), *e.g.* diminished mental or physical capacity (either from advanced age, hypoglycemia, or as a consequence of the defendant's alleged wrongful conduct at issue in the lawsuit) or language barriers (as where the client's native language is not English). This paradigmatic client may very well have permitted or invited counsel's over-reaching, gross negligence and, in some instances, borderline fraud. On such occasions, the lawyer/mediator may be all that stands between the vulnerable client and the unethical or incompetent lawyer. Assuming the lawyer/mediator concludes that counsel's conduct is incompetent, the lawyer/mediator may be obligated to report the unethical conduct to the appropriate professional authority regulating lawyers. Of course, any lawyer/mediator who does so will, to borrow a phrase made famous in Hollywood, "never work in this town again." On the other hand, failing to "blow the whistle" on the unethical lawyer may render the lawyer/mediator subject to discipline by the professional authority regulating lawyers and may increase the risk of being joined as a defendant in a subsequent civil suit by the disgruntled party who entered into a mediation settlement agreement.[2] This article hopes to provide awareness of and guidance for the lawyer/mediator caught in this conflict. To be clear, this "conflict" is not merely hypothetical. To borrow a phrase used in other contexts, the lawyer/mediator is faced

[2] In effect, the lawyer/mediator may be deemed a knowing abettor, especially where selected by that incompetent counsel or because of the expertise of the lawyer/mediator in a particular field of law. To the unsophisticated party participating in the mediation, the lawyer/mediator may be viewed as a target to be joined as a defendant in a lawsuit as another "apparent" lawyer who provided advice upon which the party relied, even though the advice was solicited.

with a "clear and present danger," as evidence by a recent Advisory Opinion of Florida's Mediator Ethics Advisory Committee, discussed in detail below.[3]

This article begins by surveying the applicable provisions of the Model Standards of Conduct for Mediators (the "Model Mediator Standards"),[4] and the American Bar Association's (the "ABA") Model Rules of Professional Conduct (the "Model Lawyer Rules").[5] We will then offer a possible protected path through this ethical labyrinth. Before concluding, we offer numerous caveats, so readers appreciate the issues we have not addressed but which are worthy of consideration and further discussion by the practicing lawyer/mediator as well as academics. In conclusion, we recommend changes to the applicable ethical standards and rules to eliminate, or at least minimize, the ethical conundrums in which the lawyer/mediator now finds herself.

I. Introduction

21st Century civil mediation is increasingly dominated by lawyers escaping from private trial/commercial litigation practice. While these refugees, in fact, may leave behind the stress, strain, and aggravation of practicing law (*i.e.* judges, opposing counsel, clients, and partners), they also may be engaged in self-deception, believing the mediation side of the fence is greener

---

[3] Mediator Ethics Advisory Opinion ("MEAC") Advisory Opinion 2006-005 (March 10, 2008).

[4] For a copy of the Model Mediator Standards *see* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf. To trace the genealogical development of the Model Mediator Standards *see* http://www.abanet.org/dispute/webpolicy.html.

[5] The Model Lawyer Rules may be found on line at the ABA's web site: http://www.abanet.org/cpr/mrpc/mrpc_toc.html. An alphabetical list of states which have adopted the Model Lawyer Rules in some form is found on the ABA's web site at http://www.abanet.org/cpr/mrpc/alpha_states.html. No lawyer/mediator's ethics library is complete without three books published by the ABA's Center of Professional Responsibility: A LEGISLATIVE HISTORY – THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 (2006); ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (6th ed. 2007); and LAWYER LAW – COMPARING THE ABA MODEL RULES OF PROFESSIONAL CONDUCT WITH THE ALI RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2005).

and carefree when that is far from the truth. That is because most mediators, either by choice or as a condition of mediator certification, maintain their licenses to practice law. Consequently, the lawyer/mediator's conduct is now guided and constrained by two sets of professional standards, those governing mediators and others regulating lawyers.[6]

The purpose of this article is not to pass judgment on the increasing growth of these rules and regulations. Rather, we examine the dynamic relationship, and in many instances the tension, between the mediator standards and lawyer ethical rules, specifically what happens when the confidentiality and the sanctity of the mediation session is challenged by the obligation of disclosure under a bar requirement.[7] In offering possible answers to this question, we begin by identifying the source of the conflict and then review some provisions of the Model Mediator Standards and the Model Lawyer Rules which form the basis for our discussion.

II. The Source of the Conflict

A conundrum may be defined as a paradoxical, insoluble, or difficult problem.[8] The lawyer/mediator encounters ethical conundrums because of conflicts between the Model Mediator Standards and the Model Lawyer Rules. These conflicts are recognized by the

---

[6] Added to the disciplinary/regulatory mix are statutory mediation schemes, discussion of which is beyond the scope of this article. For example, any treatment of statutory mediation schemes is incomplete without reference to the Uniform Mediation Act. *See* http://www.pon.harvard.edu /guests/uma/. The genealogical development of the Uniform Mediation Act may be found on the web site of the ABA's Section of Dispute Resolution (hereinafter the "Section") at http://www.abanet.org/dispute/webpolicy.html.

[7] This issue was first recognized more than a decade ago. *See* Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715 (1977).

[8] *See* Conundrum, Dictionary.com, http://dictionary.reference.com/browse/conundrum ((quoting *The American Heritage® Dictionary of the English Language* (4th ed. Houghton Mifflin Co. 2004)).

Preamble to the Model Mediator Standards and Comment [2] to Rule 2.4 of the Model Lawyer Rules. The provisions, in pertinent part, state as follows:

> **Preamble**
>
> Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. *These sources **may** create conflicts with, and **may** take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.*

Rule 2.4[9] Comment [2]

> The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. *Lawyer-neutrals **may** also be subject to various codes of ethics, such as . . . the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.* (footnotes, bold and italics added).

---

[9] Rule 2.4 was added to the Model Lawyer Rules by the ABA as a recommendation of the Ethics 2000 Commission. *See* http://www.abanet.org/cpr/e2k/home.html.

Rule 2.4 provides as follows:

> Rule 2.4 Lawyer Serving As Third-Party Neutral
>
> (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
>
> (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

The italicized language does not clearly identify the trump suit, for its circular logic renders the lawyer/mediator a dog chasing his or her own tail: the Model Lawyer Rules announce that the lawyer/mediator ***may*** be subject to the Model Mediator Standards, and the Model Mediator Standards prescribe that professional rules (like the Model Lawyer Rules) ***may*** take precedence in the event of a conflict. One such conflict arises between the mediator's duty of confidentiality and the lawyer's duty to report another lawyer's unethical conduct when the person conducting the mediator is wearing two professional hats (mediator and lawyer), and subject to two sets of professional rules.

III. Confidentiality

Confidentiality is addressed in Standard V of the Model Mediator Standards, which states as follows:

> A. *A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, **unless otherwise agreed to by the parties or required by applicable law**.*
>
> > 1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
> > 2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution. . . .
>
> B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.
>
> C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

> D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

The "unless otherwise required by applicable law" clause is the gaping hole and disclaimer umbrella of mediation confidentiality. We turn now to the reporting requirement of Model Lawyer Rule 8.3.

IV. Whistle Blowing

Rule 8.3 of the Model Lawyer Rules contains what many refer to as a whistle blowing requirement. The rule, entitled "Reporting Professional Misconduct" states, in pertinent part, as follows:

> (a) *A lawyer who **knows**[10] that another lawyer has committed a violation of the Rules of Professional Conduct that raises a **substantial**[11] question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority. . . .*
>
> (c) ***This Rule does not require disclosure of information otherwise protected by Rule 1.6***[12] or information gained by a lawyer or judge while participating in an approved lawyers assistance program. (footnotes, italics and bold added).

---

[10] Rule 1.0(f) of the Model Lawyer Rules defines "knows" as "actual knowledge of the fact in question," but adds that "knowledge may be inferred from circumstances."

[11] Rule 1.0(l) of the Model Lawyer Rules defines "substantial" "when used in reference to degree or extent [as] denot[ing] a material matter of clear and weighty importance."

[12] Rule 1.6 of the Model Lawyer Rules, entitled "Confidentiality Of Information," provides in subparagraph (a) as follows:

> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Because the lawyer/mediator is not acquiring information "relating to the [lawyer/mediator's] representation of a client," Rule 8.3(c) does not alleviate the lawyer/mediator's reporting obligations under Rule 8.3(a).

Comment [2] to Rule 8.3 makes clear that a "report about misconduct is not required where it would involve violation of Rule 1.6."

A lawyer/mediator's reporting obligation under Rule 8.3 is not diminished by the absence of an attorney-client relationship.[13] Hence, the issue for our consideration under Rule 8.3 is whether a lawyer/mediator is obligated to report the conduct of another lawyer in the mediation which violates the Model Lawyer Rules notwithstanding the confidentiality or privilege accorded mediation communications.

VI. The Lawyer/Mediator's Conundrum In Action

Lawyers have been called "workers in the mill of deceit."[14] From a client's perspective, however, "departure from truthfulness" is not a failing but often deemed "essential to the lawyer's task," as illustrated by the following:

> Lawyer: Well, if you want my honest opinion –
> Client: No, no. I want your professional advice.[15]

Mediators may have become more skeptical since the ABA Standing Committee On Ethics and Professional Responsibility issued Formal Opinion 06-439.[16] But the ethical conundrum for the

---

[13] *See* Charles B. Plattsmier, *Self Regulation and the Duty to Report Misconduct: Myth or Mainstay?*, THE PROF. LAW. Nov. 2007, at 41-45; Mary T. Robinson, *A Lawyer's Duty to Report Another Lawyer's Misconduct. The Illinois Experience*, THE PROF. LAW. Nov. 2007, at 47-54; and Patricia A. Sallen, *Combating Himmel Angst*, THE PROF. LAW. Nov. 2007, at 55-63. *See generally* A.B.A.'S CENTER OF PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 569-574 (6th ed. 2007) (citing Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 Geo. J. Legal Ethics 259 (2003), Ott & Newton, *A Current Look at Model Rule 8.3: How It is Used and What Are CourtsDoing About It?*, 16 Geo. J. Legal Ethics 747 (2003); Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 Geo. J. Legal Ethics 175 (1999)).

[14] MARC GALANTER, LOWERING THE BAR * LAWYER JOKES & LEGAL CULTURE 36 (2005).

[15] *Id.* at 36 & n. 32.

lawyer/mediator is not subtle or nuanced, turning on whether a statement is one of material fact or contextually viewed as mere puffery. To the contrary, the conflict between the lawyer/mediator's duty of confidentiality and the duty to report unethical conduct can arise in a variety of settings, such as:

- when a party is incapable of making an informed decision - either because of age, mental incapacity, insufficient education, life experience, or lack of sophistication - and the party's lawyer is effectively making decisions for the client, contrary to the requirements of Model Lawyer Rules 1.2(a) and 1.14;

- when a lawyer fails to explain a matter to the extent reasonably necessary to permit the client/party to make informed decisions regarding the representation and otherwise represents the client/party in an incompetent manner, contrary to the requirements of Model Lawyer Rules 1.1 and 1.4; or

- when a lawyer suffers from a conflict of interest and advises the client/party in a manner obviously designed to advance the lawyer's own personal interests (financial or otherwise) at the expense of the client/party, contrary to the requirements of Model Lawyer Rules 1.7 or 1.8.

By hypotheses, each situation involves a party's lawyer violating a clear, unambiguous rule of professional conduct which raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer. Model Lawyer Rule 8.3(a) would ***not*** obligate a lawyer for another party in this situation to report the other lawyer's ethical misconduct to the appropriate professional authority because the information would be deemed confidential under Model Lawyer Rule 1.6 and, under Model Lawyer Rule 8.3(c), not subject to disclosure without

---

[16] The summary paragraph of this opinion states:

> Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," ordinarily are not considered "false statements of material fact" within the meaning of the Model Rules.

Interestingly, Formal Opinion 06-439 takes no position on the "validity" of the competing views of "deception synergy" (a phrase that may defy any clear definition) and "consensual deception," both of which are acknowledged as intrinsic to the mediation process.

the affected client's informed consent. In contrast, Model Lawyer Rule 8.3(a) ***would*** require the lawyer/mediator to report the unethical lawyer's misconduct to the appropriate professional authority because Model Lawyer Rule 8.3(c) is not applicable. Moreover, Reporter's Note 7 to Section 6 of the Uniform Mediation Act, quoted above, makes clear that the reporting requirements of Model Rule 8.3(a) operate independently of the mediation privilege and exceptions contained in the Act.

For a moment, we move from the hypothetical to the actual, a real life situation recently addressed in MEAC Advisory Opinion 2006-005.[17] The Florida Mediator Ethics Advisory Committee ("MEAC" or the "Committee") had the following question posed to it by a Certified Family Mediator:[18]

> I have been recently involved in a mediation and during the mediation it was learned that there was an expenditure from funds held in escrow by one of the attorneys representing a party to the litigation.
>
> The information about the expenditure from the escrow was made by the attorney responsible for preserving the escrowed funds while in private session with the mediator.
>
> The mediator, in private session with the other party explained that certain monies were paid from the escrowed funds. It is not anticipated that either party will complain about the mediator.
>
> The question is whether the confidentiality required during mediation prohibits a grievance being filed with the Bar relating to the attorney who released the funds from escrow. . . .

The question posed was answered, in summary, as follows:

> The filing of a grievance with The Florida Bar is not necessarily precluded by statutory and rule confidentiality requirements. However, based on the facts of this question, the filing of a grievance with The Florida Bar is prohibited.

---

[17] *See* note 3, *supra*.

[18] The Florida Supreme Court certifies county court, family, circuit court and dependency mediators. *See* Fla. R. Certified and Court-Appointed Mediators 10.100(a).

> **Whether any other persons may report the attorney litigant's action to The Florida Bar is beyond the scope of the Committee's function since it would involve an interpretation of the attorney ethics code.** (emphasis added)

In explaining this summary answer, the Committee noted that the revelation that funds had been expended from escrow was deemed a "mediation communication" within the statutory definition.[19]However, the communication was deemed not to fit with the statutory exception to mediation confidentiality under which it is permissible to "offer" a mediation communication "to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.[20] The Committee concluded that "[s]ince the misconduct which would be the subject of the report, the escrow violation, did not occur during the mediation, the misconduct statutory exception does not apply."[21] The Committee also wrote that:

> The Committee notes that while the statutory exceptions to confidentiality apply to all mediation participants, mediators are additionally governed by the Florida Rules for Certified and Court-Appointed Mediators. Accordingly, mediators have the obligation to maintain confidentiality (rule 10.360) and impartiality (rule 10.330), along with their more general obligations to the process (rule 10.400) and profession (rule 10.600). The Committee emphasizes that mediators are not *obligated* to report statutory exceptions by virtue of either the Mediation Confidentiality and Privilege Act, section 44.405(4)(a), Florida Statutes, or the Florida Rules for Certified and Court-Appointed Mediators. The only statutory exception requiring reporting is abuse and neglect of children and vulnerable adults, which exists by virtue of separate mandatory reporting statutes.

---

[19] *See* FLA. STAT. § 44.403(1) ("Mediation communication" means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation. The commission of a crime during a mediation is not a mediation communication.)

[20] FLA. STAT. § 44.405(a)(6).

[21] One should note that under Florida law, *see* FLA. STAT. § 44.404(1)(a), a "court-ordered mediation begins when an order is issued by the court." Hence, if the escrow violation occurred after entry of the order requiring mediation, the violation occurred "during the mediation." In that instance, its revelation in a "mediation communication" falls squarely within the confidentiality exception codified in FLA. STAT. § 44.405(4)(a)(6), arguably leading to a conclusion opposite to that reached in MEAC Opinion 2006-005

> Section 44.405(4)(a)3, Florida Statutes. **Mediators subject to other ethical codes, must, of course, guide themselves based on their concurrent codes of conduct. (emphasis added)**
>
> As to the issue of whether the referenced communication is *required* to be reported to The Florida Bar by an attorney mediator, the Committee notes that rule 10.650 provides that in the course of providing mediation services, mediation rules control over conflicting ethical standards. **Given that the mediation communication does not appear to fit into any of the specified exceptions, the attorney mediator would be prohibited from making the disclosure to The Florida Bar.** (emphasis added, footnote omitted).

The footnote omitted from the preceding quotation states: "See also 4-1.12 Comments, Rules Regulating The Florida Bar, "A Florida Bar member who is a certified mediator is governed by the applicable law and rules relating to certified mediators."

What MEAC Opinion 2006-005 does not address or even acknowledge is the conflict which appears to exist between the conclusion it reaches and the express lawyer reporting requirements of R. Regulating Fla. Bar 4-8.3(a), which provides:

> (a) Reporting Misconduct of Other Lawyers. A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.

Simply stated, MEAC Opinion 2006-005 prohibits the lawyer/mediator from reporting misuse of escrowed funds by counsel for one of the parties to the mediation whereas the lawyer/mediator may be subject to discipline for "misconduct" for failing to report as required by Rule 4-8.3(a). This brings us to the recommended course of conduct – both prophylactic and remedial – for the lawyer/mediator.

VII. What The Lawyer/Mediator Should Do

In recognition of this ethical conundrum, we recommend that the lawyer/mediator clearly inform all participants of the rules of confidentiality under which the mediation will be

conducted.[22] Among the exceptions to such confidentiality, one of the most overlooked by mediators is the lawyer/mediator's possible obligation to report another lawyer's substantial violation of the Model Lawyer Rules.[23] The mediator's obligation to clearly inform all participants can be done in the mediator's engagement letter[24] or in any mediation confidentiality agreement which the mediation participants are asked to sign.[25] If despite these prophylactic measures a lawyer/mediator is confronted with a situation in which the obligation to report under Model Rule 8.3(a) arises, the lawyer/mediator should remonstrate privately with the subject lawyer, outside the presence of the lawyer's client, to explain the lawyer/mediator's concerns, to ask the subject lawyer to take all steps necessary to rectify the ethical violations, and to advise that, at a minimum, the lawyer/mediator must and will withdraw from serving as mediator unless the subject lawyer "does the right thing." Should the errant lawyer demur, the question becomes whether the lawyer/mediator must withdraw from the mediation. As to whether the lawyer/mediator in fact reports the unethical lawyer to the appropriate professional authorities, the lawyer/mediator should consider whether failing to do so potentially subjects the lawyer/mediator to charges of unethical misconduct (under Model Lawyer Rule 8.4(a))[26] or

---

[22] See Standard V of the Model Mediator Standards C and D, *supra*.

[23] The type of misconduct for which an obligation to report does not include the characterization of an opposing party's negotiations being in "bad faith."

[24] In doing so, mediator engagement letters may begin to resemble the now typical multi-page retainer letters used by lawyers.

[25] Readers should note that we have not recommended this issue be covered in the mediator's opening statement. Using the opening statement for this disclosure almost certainly will have a chilling effect on communication and diminish the likelihood of achieving a mediated settlement. Hopefully, such a comment should not have a chilling effect on the attorney's candor in the mediation process. *See* note 16, *supra*.

[26] Rule 8.4(a) of the Model Lawyer Rules provides that it is "professional misconduct" for a lawyer to "(a) violate or attempt to violate the Rules of Professional Conduct, ***knowingly assist***

potential civil liability for aiding and abetting the subject lawyer's breach of fiduciary duties owed to a client, or breach of other duties owed to non-clients.[27]

VIII. Caveats

Before recommending rule and statutory changes which potentially eliminate the ethical conundrum of mediation confidentiality versus lawyer reporting obligations, we believe it appropriate to identify issues which we have not addressed above. We do so because these issues

---

or induce ***another*** to do so, or do so through the acts of another . . . ." The issue for a lawyer/mediator presented by Rule 8.4(a) is whether failing to withdraw from a mediation or failing to report the professional misconduct of a lawyer representing a party in the mediation constitutes "knowing assistance" of a ethical rule violation, thereby subjecting the lawyer/mediator to discipline. The Model Lawyer Rules provide no guidance on what it means to "knowingly assist" another lawyer to violate the Rules of Professional Conduct, at least as that term is used in Rule 8.4(a).

[27] *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 876, which provides:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

See generally James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006); Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81 (2003). Under Florida law, a mediator conducting a court ordered mediation "shall have judicial immunity in the same manner and to the same extent as a judge." Fla. Stat. § 44.107(1). A person serving as a mediator in any noncourt-ordered mediation has immunity under Fla. Stat. § 44.107(2) under prescribed conditions and no immunity "if he or she acts in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."

are worthy of consideration by the lawyer/mediator but simply beyond our ability to cover competently in this article.[28]

In pre-suit mediations involving multiple parties residing in different jurisdiction - unlike court ordered mediations where an action in a particular jurisdiction has been commenced - the dispute may pose conflict of law issues, *e.g.* what professional rules govern mediation privilege, confidentiality, and other relevant ethical standards. If the participants themselves cannot agree, the lawyer/mediator (or any mediator) should select clear rules, standards, and ethical guidelines to govern the process and make the participants aware of same (preferably in writing).

We have not addressed how the issues discussed above would play out in those states with lawyer reporting requirements similar to Model Lawyer Rule 8.3 but which do not have clearly defined statutes or rules providing for mediator certification and the confidentiality of mediations. Our hope is that this article will serve as a catalyst for action in such states. Nor does this article express any opinion as to a foreign jurisdiction holding the lawyer/mediator to the rules governing attorneys in their state, especially if that state considers mediation the practice of law.

Last, but not least, and perhaps most troubling, this article merely touches upon the potential professional liability of the mediator for a civil suit for damages for breaches of conduct or giving legal advice when trapped between Scylla and Charybdis. While immunity may exist in some states,[29] a cause of action may be pled by invoking an exception under the

---

[28] It bears repeating that this article focuses on the lawyer/mediator and does not address similar problems encountered by other professionals acting in the role of a mediator.

[29] *See, e.g.* FLA. STAT. §44.107, which provides:

> 44.107 Immunity for arbitrators, mediators, and mediator trainees.--
> (1) . . . [M]ediators serving under s. 44.102 [Court-ordered mediation] . . . shall have judicial immunity in the same manner and to the same extent as a judge.

immunity statute or by the creative plaintiff's attorney recharacterizing the mediator's conduct as attorney negligence. When the "settle and sue" situation arises, the allegations of the complaint filed against the mediator will characterize the lawyer/mediator as an "expert" attorney chosen to mediate the case for precisely that reason. Moreover, the party suing the mediator will likely allege something along the lines of the following: "I thought he was my attorney, since he told me he was an expert in the field and felt I should follow his 'advise, opinion, and experience'." This is the very language that can result in liability attaching when none was expected. Unfortunately, mediators create such potential exposure by marketing themselves with substantial expertise and knowledge to mediate cases in the areas of the mediator's prior experience and expertise as a lawyer.

IX. Recommendations

Lawyer/mediator ethical conundrums can possibly be eliminated, in large part, by one change to the Model Mediator Standard's Preamble, one addition to Rule 8.3(c) of the Model Lawyer Rules, and one revision to the Uniform Mediation Act,

We recommend that the Preamble to the Model Mediator Standards be changed as follows:

---

(2) A person serving as a mediator in any noncourt-ordered mediation shall have immunity from liability arising from the performance of that person's duties while acting within the scope of the mediation function if such mediation is:
(a) Required by statute or agency rule or order;
(b) Conducted under ss. 44.401-44.406 by express agreement of the mediation parties; or
(c) Facilitated by a mediator certified by the Supreme Court, unless the mediation parties expressly agree not to be bound by ss. 44.401-44.406.
The mediator does not have immunity if he or she acts in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

> Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources. Moreover, in the course of performing mediation services, these Standards prevail over any conflicting ethical standards to which a mediator may otherwise be bound. (double underlined words added).

This addition would have the Model Mediator Standards trump only conflicting ***ethical standards*** to which the lawyer/mediator may otherwise be bound. To the extent conflicts do not exist between the Model Mediator Standards and "applicable law, court rules, regulations, . . . mediation rules to which the parties have agreed and other agreements of the parties," the Model Mediator Standards are trumped, occupying a subordinate role. In effect, therefore, the lawyer/mediator would not be obligated to report another lawyer's ethical misconduct to the appropriate authorities, but, would be available to testify, as required by law.

This proposal is in part based on Rule 10.650 of the Florida Rules for Certified & Court-Appointed Mediators dealing with current standards. That rule provides:

> Other ethical standards to which a mediator may be professionally bound are not abrogated by these rules. In the course of performing mediation services, however, these rules prevail over any conflicting ethical standards to which a mediator may otherwise be bound.

In fairness to the mediation process and participants, clarity is required to extricate the dual professional mediator from this conflict. Contrary to the Model Mediator Standards, Florida's mediation rules take the clear, unequivocal position that mediator rules trump all other conflicting ethical standards to which the lawyer/mediator is bound. There can be only one reason for doing so - the recognition that the empowerment bestowed by mediation is more important than the rationale underlying lawyer rules of professional conduct designed to govern

litigation and transactional paradigms. Morever, a comment to Rule 4-1.12 of Florida's Rules of Professional Conduct states that: "A Florida Bar member who is a certified mediator is governed by the applicable law and rules relating to certified mediators." However, this comment does not address: (a) conflicts which may exist between Florida's certified mediator rules and the Rules of Professional Conduct governing lawyers; and (b) lawyers who are members of The Florida Bar who mediate cases but are not certified mediators under the standards prescribed by the Florida Supreme Court.

Interestingly, and perhaps paradoxically, Florida's Mediator Ethics Advisory Committee has opined that the filing of a bar grievance is not prohibited by the confidentiality requirements imposed by statute and rule.[30] By statute, Florida recognizes an exception to the confidentiality accorded mediation communications where a communication is "offered to report, prove or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct."[31] On the issue of whether the lawyer/mediator is **required** to "blow the whistle" this opinion states:

> As to the question of whether the referenced communication is required to be reported to The Florida Bar by an attorney mediator, the Committee must defer to The Florida Bar and the provisions of rule 4-8.3, Rules Regulating the Florida Bar, which deals with the requirement of reporting such matters. While rule 10.650 provides that in the course of providing mediation services, mediation rules control over conflicting ethical standards, the rule also specifically states that other ethical standards to which the mediator is subject are not abrogated. Therefore, as seems to be the case in your situation, concurrent non-conflicting rules would be operative.[32]

---

[30] MEAC Advisory Opinion 2006-005 (September 21, 2006).

[31] FLA. STAT. § 44.405(4)(a)6 (2007).

[32] MEAC Advisory Opinion 2006-00 at 3 (footnote omitted).

To provide a clear, unequivocal answer to this question, we recommend that Model Lawyer Rule 8.3(c) be amended as follows:

> (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 ~~or~~, information gained by a lawyer or judge while participating in an approved lawyers assistance program, or information gained by a lawyer while serving as a third-party neutral where such information is deemed privileged or nfid ti l b lic le l w f ru r l l ti r h r r f si nal rules. (deletions stricken and double underlined words added).

We also recommend that an additional comment be added to Model Lawyer Rule 8.3, to be denominated as comment [6], to read as follows:

> [6] Information gained by a lawyer while serving as a third-party neutral, especially as a mediator, is typically deemed privileged or confidential. Where information gained by a lawyer serving as a third-party neutral is accorded such privileged or confidential treatment, the lawyer/third-party neutral is excused from Rule 8.3(a)'s disclosure and reporting requirements. As existing alternative dispute resolution mechanisms evolve and new procedures develop, it is contemplated that law, forum rules, regulations, professional rules, and agreements among participants can and must address the extent to which information gained by the lawyer serving as a third-party neutral should be deemed privileged or confidential as necessary to promote efficacy of the process.

The law favors settlements, whether mediated or achieved via direct lawyer or party negotiations. Mediated settlements, through the efforts of the third party neutral (the mediator), enhances and protects self-determination while simultaneously promoting empowerment. To achieve these goals, the mediator must be able to represent that the mediation process is confidential, and the participants must be able to rely on such confidentiality. This expectation of confidentiality, created by the process, is shared equally by the parties, their attorneys and the mediator. In the absence of such assured confidentiality, the mediation process is significantly impaired, if not totally compromised.

Clearly, as a matter of public policy, there should be and are limited exceptions to mediation confidentiality. In many instances, those exceptions are codified by statute. Such

statutory exceptions reflect the delicate balance between confidentiality and necessary disclosures. Hence, we believe it is fundamentally unfair for the parties' expectations of confidentiality to be frustrated because the mediator happens to be a lawyer.

We believe mediator and lawyer ethical standards/rules should permit lawyer/mediators to be, first and foremost, mediators when acting as a mediator. Therefore, in striking a balance between competing interests, we believe the lawyer/mediator should not be the catalyst for a bar grievance but should be available to testify. Any other position imperils the lawyer/mediator's impartiality and impairs his or her effectiveness in helping the parties achieve the common ground of a settlement. Our recommendations are designed to minimize lawyer/mediator ethical dilemmas while empowering parties to make informed, voluntary decisions without a chilling effect not only on the participants but on the attorneys as well. This, of course, is the prime objective of mediation.

The ability of the mediator and the mediation process to assure the users of confidentiality continues the effectiveness of this very empowering and successful settlement process. At the same time it is essential that the mediator be able to perform the mediator's functions without the fear or uncertainty of being caught between two different and conflicting sets of standards and ethics. The mediator while being under the duty to properly mediate should be held accountable only for those responsibilities and not those of another profession.

X. Closing Observation

This article is clearly the result of the dual profession lawyer/mediator. The ethical issues which arise from wearing two professional hats will one day, we hope, become moot when the professional mediator is truly born!

\\server05\productn\S\SAN\42-5\SAN301.txt unknown Seq: 1 2-MAY-08 7:50

Articles

The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation

By Susan Nauss Exon*

Introduction

MEDIATOR STYLES—sometimes referred to as mediation models—are terms used to describe a neutral's approach or conduct during mediation. Many scholars have categorized mediator styles using a variety of terms and concepts. Few have examined mediator styles in conjunction with impartiality provisions of newly developing ethical standards of conduct. Tension has developed because mediators are guided by written definitions and ethical standards, yet their actual roles may be dictated by their own personal style, values, and commercial needs in conjunction with the participants' particular needs.

This Article examines current laws, policies, and procedures that define and attempt to regulate the mediation field. Specifically, this Article concentrates on three inter-related aspects of mediation: (1) definitions of the term "mediation" to highlight the prominent role of mediator impartiality in the mediation process; (2) impartiality requirements found in ethical standards of conduct; and (3) mediator styles and mediation models. The objective is to illustrate the tension created by requirements of mediator neutrality and impartiality when

* Susan Nauss Exon, Professor of Law, University of La Verne College of Law; J.D., University of Wyoming; LL.M. in Dispute Resolution, Pepperdine University. I am grateful to the University of La Verne College of Law which provided a research grant to help fund the preparation of this Article. I appreciate the comments of Professor Ellen Waldman regarding an earlier draft, and am indebted to the outstanding research assistance of David Nielsen who updated the research regarding mediation standards of conduct available in all of the fifty United States. All errors are my own.

\\server05\productn\S\SAN\42-5\SAN501.txt unknown Seq: 2 8-MAY-08 7:50

applied to various mediator styles and mediation models and to propose possible solutions to alleviate the tension.

As a side note, this Author acknowledges that scholars and practitioners have been debating the appropriateness of evaluative and facilitative mediator styles for more than a decade. This Article does not seek to participate in such a debate. Rather, this Author describes various styles employed by mediators and summarizes some of the criticisms to the extent they relate to mediator neutrality and impartiality.

The Article is divided into several main sections. Part I examines definitions of "mediation." Although no universally accepted definition exists, most definitions include key terms and provisions such as a neutral third party, mediator impartiality, and party self-determination. Part II summarizes some of the impartiality provisions found in various ethical standards of conduct designed to regulate the mediation field with respect to civil disputes.[1] Part III examines mediator styles and mediation models (hereinafter referred to collectively as mediator styles, unless otherwise specified). Part IV provides an in-depth analysis of the mediator's dilemma: How can a mediator be neutral and impartial when engaged in any and all mediation styles?

This Author concludes that mediator styles can and do affect the mediator's ability to remain neutral and impartial. Part V, therefore, poses recommendations to help alleviate the tension between mediator styles and impartiality requirements. In turn, these recommendations can be used to initiate a dialogue about the regulation of the mediation field, including the appropriateness of mediation definitions. The conclusion is set forth in Part VI.

I. Defining the Nature of Mediation

From the earliest development of mediation, scholars, practicing mediators, regulators, and legislators have attempted to define the term "mediation." Most agree that mediation involves a neutral and impartial third party who assists others in resolving a dispute. Simply put, mediation is facilitated negotiation because the mediator has no decision-making authority.[2] The various definitions include other key terms and many acknowledge varying styles, techniques, and orientations of mediation. The conventional definitions of mediation are significant as ethical standards develop, evolve, and indeed begin to

1. This Article is limited to a discussion of general civil mediation standards of conduct and does not address specific subject areas such as the regulation of family law and divorce mediation, which are often regulated by separate rules and procedures.

2. *See infra* Part I.A.

\\server05\productn\S\SAN\42-5\SAN501.txt unknown Seq: 3 2-MAY-08 7:50

impinge on mediator styles. As Professor Joseph Stulberg wrote over two decades ago: "[P]aradoxically, while the use of mediation has expanded, a common understanding as to what constitutes mediation has weakened . . . . It is important . . . to identify and clarify the principles and dynamics which together constitute mediation as a dispute settlement procedure."[3] The natural starting point is to examine and recognize definitions of mediation before addressing other aspects of this Article.

A. Various Definitions of "Mediation"

The term "mediation" does not have one established definition, although it includes many universally-accepted components. Among representative examples, mediation has been defined as:

"[F]acilitated negotiation."[4]

"[A]n informal process in which a neutral third party with no power to impose a resolution helps the disputing parties to try to reach a mutually acceptable settlement."[5]

"Third party dispute settlement technique integrally related to the negotiation process whereby a skilled, disinterested neutral assists parties in changing their minds over conflicting needs mainly through the noncompulsory applicants of various forms of persuasion in order to reach a viable agreement on terms at issue."[6]

"[T]he intervention into a dispute or negotiation by an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute."[7]

"[A] process involving a neutral third party in a purely facilitative, process-director's role, who makes no substantive contribution to the parties' struggle with the dispute."[8]

"A process in which the disputing parties select a neutral third party to assist them in reaching a settlement of the dispute. The pro-

3. Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 85 (1981).

4. STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION 201 (2001).

5. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 2 (1994).

6. DICTIONARY OF CONFLICT RESOLUTION 275 (Douglas H. Yarn ed., 1999).

7. *Id.* at 277.

8. DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS § 10 (1996) [hereinafter GOLANN, MEDIATING LEGAL DISPUTES] (Marjorie Corman Aaron, contributing author) (offering a definition of mediation that essentially precludes mediator evaluation).

\\server05\productn\S\SAN\42-5\SAN501.txt unknown Seq: 4 2-MAY-08 7:50

cess is private, voluntary, informal and nonbinding. The mediator has no power to impose a settlement."[9]

"[A]n impartial third party helps others negotiate to resolve a dispute or plan a transaction. Unlike a judge or arbitrator, the mediator lacks authority to impose a solution."[10]

"A voluntary process in which an impartial mediator actively assists disputants in identifying and clarifying issues of concern and in designing and agreeing to solutions for those issues."[11]

The foregoing definitions highlight the consensual and informal process inherent in mediations. Requirements of fairness and just result are noticeably absent from the definitions. Most definitions, however, include key provisions, such as the mediator's ability to be neutral and impartial and the parties' ability to negotiate a resolution of their own choosing—party self-determination. The following section examines the meaning of "neutrality," "impartiality," and "party self-determination" as applied to mediations. Understanding these key terms is a prerequisite to the study of various mediator styles.

B. Key Provisions

1. The Significance of Mediator Neutrality

Neutrality means the refusal to ally with, support, or favor any side in a dispute; "belonging to neither side nor party."[12] A mediator's neutrality is her ability to be objective while facilitating communication among negotiating parties.[13] Neutrality can be both transparent and opaque: "[T]ransparent because it operates on the basis of widely held assumptions about power and conflict, and opaque because it is exceedingly difficult to raise questions about the nature and practice of neutrality from *within* this consensus."[14]

9. DICTIONARY OF CONFLICT RESOLUTION, *supra* note 6, at 277. In a similar definition, Dwight Golann adds that the following definition does not preclude a mediator from providing some evaluation: "a process in which disputing parties are assisted by a neutral third party to negotiate a resolution of their dispute, where the neutral third party is not given the power to impose a resolution upon them." GOLANN, MEDIATING LEGAL DISPUTES, *supra* note 8, § 10.

10. LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 313 (2d ed. 2003).

11. DICTIONARY OF CONFLICT RESOLUTION, *supra* note 6, at 278.

12. THE AMERICAN HERITAGE DICTIONARY 460 (1983).

13. *See* JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 12 (2001).

14. *Id.* at 169 (quoting Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 1991 LAW & SOC. INQUIRY 37).

2. The Significance of Mediator Impartiality

"Impartiality means freedom from favoritism and bias in word, action and appearance."[15] The key to this requirement is the mediator's ability to serve all participants concurrently.[16] A mediator must not exhibit any partiality or bias based on any party's background, personal characteristics, or performance during the mediation.[17] The role of impartiality should apply to all aspects of the mediation, including communication (both spoken and unspoken), the way questions are asked and positions and interests are reframed, the use and arrangement of furniture, seating arrangements, and methods to greet the participants as they arrive for the mediation.[18] Impartiality also has been applied to relational issues such as conflict of interest concerns between the mediator and any of the participants.

Based on the principle of "impartiality," many scholars debate whether mediators should report to an appropriate authority regarding a participant's "bad faith" behavior and whether such reports infringe on a mediator's impartiality.[19] Mediator reporting also may affect procedural fairness in a mediation and lower the parties' sense of expectation and empowerment.[20] A mediator must realize that not only is her actual impartiality at stake, but also the appearance of impartiality.

When mediation professionals compare the concepts of neutrality and impartiality, some equate neutrality to the mediation process, including its outcome. Others equate impartiality to the relationship between the mediator and participants. Still others refer to the two terms interchangeably.[21] For purposes of this Article, the terms are used interchangeably unless otherwise designated.

---

15. DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 68 (Phyllis Bernard & Bryant Garth eds., 2002) [hereinafter DISPUTE RESOLUTION ETHICS] (citing GUIDELINES FOR HAWAII MEDIATORS III.1 (Haw. Comm'n on Mediation Standards 2002), *available at* http://www.courts.state.hi.us/attachment/3D52C4AB783B29B7FC64289CC8/guidelines.pdf).

16. *Id.*

17. *Id.*

18. *See* Karen A. Zerhusen, *Reflections on the Role of the Neutral Lawyer: The Lawyer as Mediator*, 81 KY. L.J. 1165, 1169–70 (1993) (noting that a mediator's impartiality applies to all aspects of the mediation process, from the arrangement of furniture to the way the mediator poses positioning statements).

19. *See* Carol L. Izumi & Homer C. La Rue, *Prohibiting "Good Faith" Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent*, 2003 J. DISP. RESOL. 67 (discussing the pros and cons of a mediator's authority to report "bad faith" behavior to outside sources such as courts and administrative agencies).

20. *Id.* at 74.

21. *See id.* at 83–87 (using the terms "neutrality" and "impartiality" interchangeably as the authors discuss the standard of conduct for mediator impartiality).

3. The Requirement of Party Self-Determination

Party self-determination is considered the "fundamental principle of mediation."[22] Party autonomy is evidenced not only by references to the word "self-determination" but also by a mediator's responsibility to help parties reach a voluntary and informed decision.[23] To achieve party autonomy, a mediator may provide information to the parties regarding the mediation process, raise issues, and help parties explore various options.[24] The mediator must be cautious not to jeopardize her neutrality and impartiality. Likewise, she must be careful to the extent she is directive because many ethical standards of conduct specifically preclude a mediator from coercing parties to settle or otherwise exert undue influence.[25]

A mediator can jeopardize party self-determination by raising issues or suggesting options, especially when done after the parties have agreed to a settlement, albeit one that appears unfair or one-sided. These concerns also affect the mediator's duty of neutrality and impartiality because a simple question or suggestion may appear to advance only one party's interests. Party self-determination is thus directly related to, and affected by, the mediator's duties of neutrality and impartiality. Even though this Article focuses on the concepts of mediator neutrality and impartiality, discussions of party self-determination are included to the extent the concepts intricately interface with one another.

II. Impartiality Requirements in Ethical Standards of Conduct

During the last two decades, many governmental entities and professional organizations have begun to develop ethical standards of conduct for mediators ("Standards"). This Author has conducted extensive research regarding Standards,[26] having examined the Model

22. Dispute Resolution Ethics, *supra* note 15, at 73.

23. *Id.*

24. *Id.*

25. *Id.* at 73–74.

26. *See* Susan Nauss Exon, *How Can a Mediator Be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators*, 2006 J. Disp. Resol. 387 [hereinafter Exon, *Why Ethical Standards Create Chaos*]; Susan Nauss Exon, The Fallacy of a "One Size Fits All" Mediator in Terms of Neutrality and Impartiality: A Study that Compares Mediator Styles with Ethical Standards of Conduct (Apr. 10, 2006) (unpublished LL.M. thesis, Pepperdine University School of Law) (on file with author).

Standards of Conduct for Mediators including its 2005 revision[27] ("Model Standards"), the Uniform Mediation Act[28] ("UMA"), and state-wide Standards found in thirty-six states, including twenty-seven court-connected Standards and thirteen Standards promulgated by professional organizations.[29]

Although Standards are varied in form and content, all those examined require mediator impartiality.[30] Nevertheless, the impartiality provisions are far from uniform in scope. Some Standards have extensive definitions of impartiality, some have virtually nothing other than a statement that a mediator shall maintain impartiality, and others fall somewhere in between. Some impartiality provisions address conflict of interest concerns between the mediator and participants rather than addressing mediator behavior. All of these aspects of impartiality are discussed in this Part.

A. The Model Standards of Conduct

The Model Standards define impartiality as "freedom from favoritism, bias or prejudice," avoiding even the appearance of partiality.[31] Additional comments instruct a mediator to maintain impartiality in respect to the participants' "personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason."[32] The Model Standards provide fairly straightforward guidance, yet leave room for interpretation, thereby acknowledging the flexible nature of the mediation process.

B. The Uniform Mediation Act

Technically the UMA is not an ethical code of conduct. It focuses primarily on confidentiality and privilege issues, leaving ethical Standards to the expertise of professional organizations such as the American Bar Association ("ABA"), the American Arbitration Association

27. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

28. UNIF. MEDIATION ACT (2003), *available at* http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf.

29. *See* Exon, *Why Ethical Standards Create Chaos*, *supra* note 26, at app. A. Some states have both court-connected standards and standards promulgated by a professional organization. As a result, this Author examined forty sets of Standards for the thirty-six states.

30. *See id.* at 295–96.

31. MODEL STANDARDS OF CONDUCT FOR MEDIATORS II.A, B.

32. *Id.* at II.B.1.

\\server05\productn\S\SAN\42-5\SAN511.txt unknown Seq: 8 2-MAY-05 7:50

("AAA"), and the Association for Conflict Resolution ("ACR").[33] One exception exists regarding mediator impartiality,[34] and that portion of the UMA is summarized in this Part.

The ACR intended that both the mediator and the process be neutral;[35] therefore, it urged the drafters of the UMA to include mediator impartiality as part of the definition of "mediator."[36] The drafters of the UMA refused.[37]

Instead, section 9 of the UMA addresses the principle of impartiality as it relates to conflict of interest concerns.[38] A mediator must disclose facts that might affect a mediator's impartiality, including financial, personal interest in the outcome, and existing or past relationships.[39] If any conflict of interest exists, the participants may waive it by agreeing to allow the mediator to proceed.[40] Otherwise, section 9 simply states that a "mediator must be impartial."[41]

Although not specifically referring to "impartiality," section 7 of the UMA aligns with the notion of mediator impartiality because it prohibits mediators from reporting to outside authorities such as courts and administrative agencies.[42] This non-reporting principle is consistent with the separate confidentiality principle,[43] and fosters public confidence in a neutral mediator and neutral process.[44]

C. Various State Standards

1. Standards that Define Impartiality

Some Standards provide helpful definitions of impartiality. Many Standards include definitions of impartiality similar to the Model Standards. For example, the Minnesota Code of Ethics for Neutrals and the Montana Mediation Association Standards of Practice Ethical

33. David A. Hoffman, *Symposium: Introduction*, 2003 J. Disp. Resol. 61, 64–65 (acknowledging the ethical standards already developed by the ABA, AAA, and ACR).

34. *Id.* at 65.

35. Monica Rausch, *The Uniform Mediation Act*, 18 Ohio St. J. on Disp. Resol. 603, 614 (2003).

36. The UMA defines "mediator" as "an individual who conducts a mediation." Unif. Mediation Act § 2(3) (2003), *available at* http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf.

37. Rausch, *supra* note 35, at 614.

38. Unif. Mediation Act § 9.

39. *Id.* § 9(a).

40. *Id.* § 9(g).

41. *Id.*

42. *Id.* § 7.

43. *Id.* § 8.

44. *Id.* § 7 cmt. 1.

Guidelines for Full Members both define impartiality as "freedom from favoritism or bias either by word or action, and a commitment to serve all parties as opposed to a single party."[45] Massachusetts simply defines "impartiality" as "freedom from favoritism and bias in conduct as well as appearance."[46] Twelve other states incorporate similar definitions into their Standards.[47]

45. MINN. R. GEN. PRAC. 114 app. I cmt. 1, *available at* http://www.mncourts.gov/ruledocs/general/GRuleII.htm; STANDARDS OF PRACTICE: ETHICAL GUIDELINES FOR FULL MEMBERS 4 (Mont. Mediation Ass'n 1998), *available at* http://mtmediation.org/doc/Full%20Ethics%20&%20Quals.pdf.

46. MASS. SUP. CT. R. 1:18, UNIF. RULES ON DISPUTE RESOLUTION 9(b), *available at* http://www.mass.gov/courts/admin/legal/newadrbook.pdf.

47. ALABAMA CODE OF ETHICS FOR MEDIATORS 5(a) (Ala. Ctr. for Dispute Resolution 1997), *available at* http://www.alabamaadr.org/index.php?option=com_content&task=view&id=24&Itemid=6 (defining impartiality as "freedom from favoritism or bias in work, action, and appearance, impartiality implies a commitment to aid all parties, as opposed to one or more specific parties, in moving toward agreement"); REQUIREMENTS FOR THE CONDUCT OF MEDIATION & MEDIATORS III.5.A (Ark. Alternative Dispute Resolution Comm'n 2001), *available at* http://courts.state.ar.us/pdf/0516_conduct.pdf ("Impartiality means freedom from favoritism or bias in work, action, and appearance. Impartiality implies a commitment to aid all parties, as opposed to one or more specific parties, in moving toward agreement."); FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.330(a), *available at* http://www.flcourts.org/gen_public/adr/bin/RulesForMediators.pdf (defining mediator impartiality as "freedom from favoritism or bias in word, action, or appearance" and instructing the mediator to assist all parties rather than any one person); GUIDELINES FOR HAWAII MEDIATORS III.1 (Haw. Comm. on Mediation Standards 2002), *available at* http://www.courts.state.hi.us/attachment/3D52C4AB783B29B7EC64289CC8/guidelines.pdf ("Impartiality means freedom from favoritism and bias in word, action, and appearance. Impartiality implies a commitment to aid all participants, as opposed to a single individual in reaching a mutually satisfactory agreement."); MARYLAND STANDARDS OF CONDUCT FOR MEDIATORS II.A, B (Md. Program for Mediator Excellence 2006), *available at* http://www.courts.state.md.us/macro/approvedstandardsofconduct12006.pdf (defining impartiality as "freedom from favoritism, bias or prejudice"); MANUAL OF STANDARDS & ETHICS FOR COURT MEDIATORS, DIRS. & STAFF III.A.1 (Neb. Office of Dispute Resolution 2001), *available at* http://www.supremecourt.ne.gov/mediation/pdf/Standards-Ethics-Manual-June-2001-version.pdf ("A mediator should strive to maintain impartiality towards all parties and be free of favoritism or bias in appearance, word, and action. A mediator is committed to aiding all parties, as opposed to a single party, in exploring the possibilities for resolution."); CODE OF ETHICAL CONDUCT 4.B (N.M. Mediation Ass'n 1995), *available at* http://cio.state.nm.us/content/guidelinesStds/archive/adr/NMMACodeofEthics.pdf ("Impartiality, in word or action means: i) freedom from bias or favoritism. ii) A commitment to aid all parties equally in reaching a mutually satisfactory agreement. iii) That a mediator will not play an adversarial role in the process of dispute resolution."); NORTH CAROLINA STANDARDS OF PROF'L CONDUCT FOR MEDIATORS II.A (N.C. Dispute Resolution Comm'n 2006), *available at* http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/standardsofconduct.pdf (defining impartiality as the "absence of prejudice or bias in word and action. . . . [and] a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution"); TENN. SUP. CT. R. app. A § 6(a), *available at* http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/TNRulesOfCourt/06supct25_end.htm#31 ("Impartiality means freedom from favoritism or bias in word, action, and appearance. Impartiality implies a commitment to aid all parties, as opposed to an individual party

Server05\productn\S\SAN\42-5\SAN501.txt unknown Seq: 10 2-MAY-08 7:50

Some Standards caution mediators to avoid partiality, including the appearance of partiality,[48] or require a mediator to "avoid any conduct that gives the appearance of either favoring or disfavoring any party."[49] Like the Model Standards, some state Standards warn mediators about prejudice or partiality based on "any party's personal characteristics, background, or behavior during the mediation."[50]

In conjunction with impartiality provisions, a mediator may raise questions to enable the parties to consider the "fairness, equity, and feasibility" of proposed settlement options and may withdraw from the mediation if she believes she can no longer maintain impartiality.[51] A

conducting Rule 31 ADR processes."); TEXAS ETHICAL GUIDELINES FOR MEDIATORS 9 cmt. (Tex. Advisory Comm. on Court-Annexed Mediations 2005), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/05/05910700.pdf ("Impartiality means freedom from favoritism or bias in word, action, and appearance; it implies a commitment to aid all parties in reaching a settlement."); UTAH R. OF CT.-ANNEXED ALTERNATIVE DISPUTE RESOLUTION 104, Canon III(a)(1), *available at* http://www.utcourts.gov/resources/rules/adr/104.htm (defining impartial as "free from favoritism or bias in word, action or appearance, and includes a commitment to assist all participants as opposed to any one individual"); VIRGINIA STANDARDS OF ETHICS & PROF'L RESPONSIBILITY FOR CERTIFIED MEDIATORS G.1 (Judicial Council of Va. 2002), *available at* http://www.nvms.us/PDFs/Ethics.pdf ("Impartiality means freedom from favoritism or bias in word, action, and appearance. Impartiality implies a commitment to aid all parties in moving toward an agreement.").

48. *See, e.g.*, CA. SUP. CT. ALTERNATIVE DISPUTE RESOLUTION R. app. C, ch. 1.A.III.A, *available at* http://godr.org/pdfs/APPENDIX%20C,%20Chap%201,%2011-21-07.pdf ("A mediator must demonstrate impartiality in word and deed. A mediator must scrupulously avoid any appearance of partiality."); IND. R. OF CT., RULES FOR ALTERNATIVE DISPUTE RESOLUTION 7.4(C), (D), *available at* http://www.in.gov/judiciary/rules/adr/adr.pdf ("A neutral shall be impartial and . . . shall avoid the appearance of impropriety . . . ."); MARYLAND STANDARDS OF CONDUCT FOR MEDIATORS II.B (Md. Program for Mediator Excellence 2006), *available at* http://www.courts.state.md.us/macro/approvedstandardsofconduct42006.pdf ("A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.").

49. NEW JERSEY STANDARDS OF CONDUCT FOR MEDIATORS IN COURT-CONNECTED PROGRAMS II.A (N.J. Ass'n of Prof'l Mediators 2000), *available at* http://njcourts.judiciary.state.nj.us/web0/notices/reports/MediatorStandards.pdf.

50. *Id.* at II.B; *see* MARYLAND STANDARDS OF CONDUCT FOR MEDIATORS II.B.1 ("A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason."); UTAH R. OF CT.-ANNEXED ALTERNATIVE DISPUTE RESOLUTION 104, Canon III(a)(2), *available at* http://www.utcourts.gov/resources/rules/adr/104.htm ("ADR providers should guard against bias or partiality based on the participants' personal characteristics, background or performance at the proceeding.").

51. ALABAMA CODE OF ETHICS FOR MEDIATORS 5(a) (Ala. Ctr. for Dispute Resolution 1997), *available at* http://www.alabamaadr.org/index.php?option=com_content&task=view&id=24&Itemid=6; *see, e.g.*, REQUIREMENTS FOR THE CONDUCT OF MEDIATION & MEDIATORS III.5.A (Ark. Alternative Dispute Resolution Comm'n 2001), *available at* http://courts.state.ar.us/pdf/0516_conduct.pdf; GUIDELINES FOR HAWAII MEDIATORS III.1 (Haw. Comm. on Mediation Standards 2002), *available at* http://www.courts.state.hi.us/attachment/3D52C4AB783B29B7EC64289CC8/guidelines.pdf; TENN. SUP. CT. R. app. A, § 6(a)(1), *available at*

mediator may withdraw either based on her personal opinion regarding impartiality or based on a party's request.[52]

2. Standards that Refer to Impartiality Without Defining It

Other Standards provide less guidance because they prohibit impartial behavior without defining what it means. For example, several states refer to impartiality by simply requiring a mediator to be "impartial and evenhanded."[53] Michigan's impartiality provision states:

> A mediator shall conduct the mediation in an impartial manner. The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which it is possible to remain impartial and even-handed. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.[54]

Like the Michigan impartiality provision, some states have vague descriptions of impartiality because they may require a mediator to maintain impartiality or conduct the mediation in an impartial manner.[55] One example requires mediators to "approach the mediation

http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/TNRulesOfCourt/06supct25_end.htm#31.

52. *See, e.g.*, TEXAS ETHICAL GUIDELINES FOR MEDIATORS 9 cmt. (Tex. Advisory Comm'n on Court-Annexed Mediations 2005), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/05/05910700.pdf; UTAH R. OF CT.-ANNEXED ALTERNATIVE DISPUTE RESOLUTION 104, Canons II(c), (f), *available at* http://www.utcourts.gov/resources/rules/adr/104.htm.

53. MISS. CT. ANNEXED MEDIATION R. FOR CIVIL LITIG. XV.B, *available at* http://www.mssc.state.ms.us/rules/msrulesofcourt/court_annexed_mediation.pdf. Utah also requires a mediator to conduct proceedings in an "evenhanded manner," but is much more specific than Mississippi. UTAH R. OF CT.-ANNEXED ALTERNATIVE DISPUTE RESOLUTION 104, Canon III(a). Utah goes on to require a mediator to "treat all parties with equality and fairness at all stages of the proceedings," *id.*, and then specifically defines "impartial," *id.* at Canon III(a)(1).

54. STANDARDS OF CONDUCT FOR MEDIATORS 3 (Mich. Sup. Ct. 2001), *available at* http://courts.michigan.gov/scao/resources/standards/odr/conduct.pdf; *see* S.C. CT. ANNEXED ALTERNATIVE DISPUTE RESOLUTION R. app. B.II, *available at* http://www.scbar.org/public/files/docs/ADRrules.pdf.

55. CAL. R. CT. 3.855(a), *available at* http://www.courtinfo.ca.gov/rules/documents/pdfFiles/title_3.pdf (specifying that a "mediator must maintain impartiality toward all participants in the mediation process at all times"); COLORADO MODEL STANDARDS OF CONDUCT FOR MEDIATORS II.B (Colo. Council of Mediators 1995), *available at* http://www.courts.state.co.us/chs/court/mediation/modelstandards.pdf ("The mediator shall conduct the mediation in an impartial manner and should avoid conduct that gives the appearance of partiality."); IND. R. CT., RULES FOR ALTERNATIVE DISPUTE RESOLUTION 7.4(C), *available at* http://www.in.gov/judiciary/rules/adr/index.html#r7 ("A neutral shall be impartial and shall utilize an effective system to identify potential conflicts of interest at the time of appointment."); OKLA. STAT. ANN. tit. 12, ch. 37 app. A (2005) (Code of Prof'l Conduct for Mediators) (requiring a mediator to "maintain impartiality at all times").

process in an impartial manner. If at any time . . . [mediators] are unable to do so . . . [they should] withdraw from the mediation process."[56] These state Standards do not specifically define impartiality, choosing to focus on conflict of interest concerns rather than mediator behavior.

3. Standards that Treat Impartiality as a Conflict of Interest Consideration

Standards that focus on conflict of interest issues may prohibit a mediator from taking part in a mediation where she is related to, or employed by, one of the parties,[57] or may require the mediator to disclose dealings or relationships that may raise questions about impartiality.[58] Some Standards are more specific because they require a mediator to disclose whether she provided prior services to any of the participants[59] or simply has had a personal or professional relationship with one of the parties.[60] In some instances, a mediator is precluded from having an interest in the outcome of the dispute[61] or precluded from having a financial interest in the outcome other than a fee arrangement.[62] Without defining "impartiality," several Standards require mediators to disclose prior or existing affiliations with any party and preclude any financial or other interest in the outcome of the mediation.[63]

Finally, some Standards take a more thorough approach and do not commingle mediator impartiality with conflicts of interest. These Standards set forth separate provisions for impartiality and conflicts of interest.[64]

---

56. Wisconsin Ethical Guidelines for the Practice of Mediation 4.1 (Wis. Ass'n of Mediators 1997), *available at* http://wamediators.org/pubs/ethicalquidelines.html.

57. Ind. R. Ct., Rules for Alternative Dispute Resolution 7.4(E).

58. Colorado Model Standards of Conduct for Mediators II.A; Wisconsin Ethical Guidelines for the Practice of Mediation 4.2.

59. Standards of Practice for Idaho Mediators III.1 (Idaho Mediation Ass'n 2005), *available at* http://www.idahomediation.org/sop.pdf.

60. Cal. R. Ct. 3.855(b).

61. Ind. R. Ct., Rules for Alternative Dispute Resolution 7.4(E).

62. Standards of Practice for Idaho Mediators III.4; *see* Cal. R. Ct. 3.855(b) (noting that a mediator must inform participants about matters that may raise questions of impartiality, including those of a "financial nature").

63. Colorado Model Standards of Conduct for Mediators II; Standards of Practice for Idaho Mediators III.1, 4.

64. *See, e.g.*, Maryland Standards of Conduct for Mediators II, III (Md. Program for Mediator Excellence 2006), *available at* http://www.courts.state.md.us/macro/approvedstandardsofconduct42006.pdf; Miss. Ct. Annexed Mediation R. for Civ. Litig. XV.B, C, *available at* http://www.mssc.state.ms.us/rules/AllRulesText.asp?IDNum=37; New

\\server05\productn\S\SAN\42-2\SAN203.txt unknown Seq: 35 2-MAY-08 7:50

As exemplified from this sampling of Standards, principles of impartiality are not standardized. Some Standards define impartiality as it relates to mediator conduct while others relate it more to conflict of interest concerns. Still other Standards simply require a mediator to be impartial, providing no guidance as to what constitutes impartiality and allowing a great deal of room for individual interpretation. On one hand, while a workable definition of impartiality is necessary, the definition must take into account that mediation is a flexible, fluid process. Nonetheless, the lack of clarity in many impartiality provisions may encourage mediators to supply their own interpretations of impartiality, which could undermine the integrity and credibility of the mediation practice.

III. Mediator Styles and Mediation Models

A mediator's orientation or approach to mediation may dictate the style she uses. Style refers to the mediator's activities—her interpersonal communications with, and behavior towards, all mediation participants.[65] A mediator may adopt one or a combination of several styles of mediation, and in fact, most mediators mix their styles and techniques in individual mediations.[66]

Many scholars have used descriptive words and phrases to define mediator styles and mediation models. The three most common styles are: "evaluative" and "facilitative," coined by Professor Leonard L. Ris-

JERSEY STANDARDS OF CONDUCT FOR MEDIATORS IN COURT-CONNECTED PROGRAMS II, III (N.J. Ass'n of Prof'l Mediators 2000), *available at* http://njcourts.judiciary.state.nj.us/web0/notices/reports/MediatorStandards.pdf; S.C. CT. ANNEXED ALTERNATIVE DISPUTE RESOLUTION R. app. B.II, III, *available at* http://www.scbar.org/pdf/ADR/ADRrules.pdf; VIRGINIA STANDARDS OF ETHICS & PROF'L RESPONSIBILITY FOR CERTIFIED MEDIATORS G, H (Judicial Council of Va. 2005), *available at* http://www.nvms.us/PDFs/Ethics.pdf.

65. *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 17 (1996) [hereinafter Riskin, *Grid for the Perplexed*] (explaining that the vertical continuum of Riskin's mediation grid relates to a mediator's activities, also known as her individual style).

66. *See* Dwight Golann, *Variations in Mediation: How and Why Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41, 61 [hereinafter Golann, *Variations in Mediation*] (concluding that mediators employ more than one style during any single mediation and that part of the reason for the change may be due to the participants' personalities and approaches); John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 321 [hereinafter Lande, *Sophisticated Mediation Theory*] (noting that mediators appropriately and beneficially mix facilitative and evaluative techniques in the same mediation); Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process*, 2000 J. DISP. RESOL. 295, 297 (noting that mediators constantly move between "facilitative-broad" and "evaluative-narrow" styles in one mediation session).

\\server05\productn\S\SAN42-3\SAN301.txt unknown Seq: 14 2-MAY-08 7:20

kin,[67] and "transformative," coined by Professors Robert Baruch Bush and Joseph Folger.[68]

Professor Riskin acknowledges inherent problems with his scholarship—problems that have created confusion and misunderstanding of what he wanted to accomplish. As a result, he has proposed changing the words "evaluative" and "facilitative" to "directive" and "elicitive," respectively.[69] Professor Riskin's newer research emphasizes mediator influences as well as influences by participants.[70] For purposes of this Article, however, references will continue to be made to evaluative and facilitative styles since these terms are widely adopted and used throughout the mediation field.

Professor Riskin and others acknowledge that many dynamics may affect a mediator's style, including personal beliefs (predispositions), timing, participant influences, and the subject matter of the mediation.[71] A mediator may be more evaluative in an employment case and more facilitative in a neighborhood dispute. A mediator may begin a mediation using facilitative techniques, and at the end of a long day, urge the participants toward settlement using evaluative techniques. A mediator may combine both styles by proposing several alternatives in an evaluative style and then fostering communication in a facilitative manner so that participants may discuss the proposal.

67. *See* Riskin, *Grid for the Perplexed*, *supra* note 65; Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111 (1994). Professor Riskin developed a grid based on two continuums. The horizontal continuum, categorized as the Problem Definition Continuum, recognizes the goals of the mediation. One end represents a narrow view of the parties' goals, such as how much money to pay to a party. The other end relates to a broad view of the goals. The broad view recognizes the economic goal, but goes further by assessing underlying interests and how the parties may use their interests creatively to transform the dispute. Riskin, *Grid for the Perplexed*, *supra* note 65, at 17. The vertical continuum relates to the mediator's activities or her individual style; one end signifies an evaluative mediator while the other relates to a facilitative mediator. *Id.*

68. *See infra* notes 89–97 and accompanying text.

69. Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003–2004) [hereinafter Riskin, *Decisionmaking in Mediation*]. Professor Riskin believes that the new terminology more closely aligns with his goal for the role-of-the-mediator continuum, which relates to the mediator's effect on party self-determination. *Id.* at 30. Furthermore, he believes that "directive" is more descriptive than "evaluative" because the former is more general and abstract, and therefore, may cover a wider range of mediator activities. *Id.*

70. *Id.* at 34–51.

71. ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION 375–431 (3d ed. 2002); Riskin, *Decisionmaking in Mediation*, *supra* note 69, at 34–41.

Furthermore, mediator styles may relate to substantive issues as well as process issues.[72]

In addition to the main mediator styles known as facilitative, evaluative, and transformative, other scholars refer to mediator styles and mediation models based on personal behavior, commercial needs, and legal or social norms. One must understand mediator behavior or the type of mediation being conducted to be able to comprehend how styles and models interact with impartiality requirements. The following sections summarize many of the styles and models.

A. Facilitative Mediator Style

A facilitative mediation style emphasizes party interests and may be referred to as interest-based mediation.[73] The facilitative mediator is viewed as a third-party educator or facilitator; she seeks to emphasize the parties' own problem solving, creativity, and personal evaluations.[74] The mediator encourages party attendance, facilitates communication, poses questions to uncover the parties' underlying needs and interests, helps educate the parties by assisting them to understand the other's needs and interests, and otherwise attempts to provide a comfortable forum in which the parties can develop their own creative solutions to a problem.[75]

Facilitative mediation may seem therapeutic due to the process by which it reaches an outcome—an emphasis on information and understanding to reach an agreement rather than through a mediator's influence or coercion.[76] This mediation style is much more "touchy-feely" than evaluative mediation. Hence, facilitative mediators may be referred to as "'soft,' 'touchy-feely,' 'therapeutic,' 'potted plant,' or 'new age-y.'"[77]

72. Riskin, *Decisionmaking in Mediation*, *supra* note 69, at 34–35.

73. Kenneth Fox, *What Private Mediators Can Learn from the Peace Builders*, 7 CARDOZO J. CONFLICT RESOL. 237, 239 (2006).

74. Lande, *Sophisticated Mediation Theory*, *supra* note 66, at 321, 325; Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 944–45 (1997).

75. Lande, *Sophisticated Mediation Theory*, *supra* note 66, at 321, 322 ("Mediators using a facilitative style focus on eliciting the principals' opinions and refrain from pressing their own opinions about preferable settlement options."); Riskin, *Grid for the Perplexed*, *supra* note 65, at 29–30, 32–34.

76. Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 268 (2001).

77. John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 850 (1997) [hereinafter Lande, *Lawyering and Mediation Transformation*].

A "productive-facilitative mediator" may have more expertise in the general process of mediation rather than subject matter expertise, though expertise regarding substantive issues may be another valuable asset.[78] As a facilitative mediator approaches the narrow end of Riskin's continuum, she may help the parties evaluate their proposals through her questioning.[79] Sometimes, the mediator may encourage participants to brainstorm possible solutions.[80]

The facilitative mediator's goal is to avoid a directive approach while concentrating on party empowerment and self-determination. A facilitative mediator may act in a directive capacity to the extent the mediator decides which questions to pose, which solutions to emphasize, and how she engages the participants. Nevertheless, the facilitative mediator should be capable of maintaining neutrality and impartiality as long as she does not require participants to accept her suggestions.

B. Evaluative Mediator Style

Margaret Shaw provides an insightful assessment of evaluative mediators; they use a "continuum of behaviors" that include questioning regarding strengths and weaknesses of a case, providing information, offering procedural or substantive advice, predicting possible outcomes by a court adjudication, and suggesting ways to resolve a dispute.[81] Despite Shaw's assessment, scholars interpret an evaluative style in diverse ways.

Some prefer that a mediator evaluate issue by issue.[82] Others use "less intrusive techniques" by recommending a "range of fair outcomes."[83] Under the latter method, an evaluative mediator predicts how she thinks a fair and reasonable person might settle. Others prefer the Socratic method of questioning. By posing questions in a way to educate the parties, the mediator offers a reality check.[84] An evaluative mediator may go so far as to advocate for a particular settlement

78. Levin, *supra* note 76, at 268.

79. Riskin, *Grid for the Perplexed*, *supra* note 65, at 29.

80. Alternative Dispute Resolution: Mediation, http://www.dwyersmith.com/mediation.htm (last visited Sept. 28, 2007).

81. James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator*, 38 S. Tex. L. Rev. 769, 774 (1997) (citing Margaret L. Shaw, Evaluation Continuum, Prepared for Meeting of CPR Ethics Commission (May 6–7, 1996) (on file with author)).

82. Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 479, 493 (2000).

83. *Id.*

84. *Id.* at 493–94.

\\server05\productn\S\SAN\42-3\SAN301.txt unknown Seq: 17 2-MAY-08 7:50

proposal. Irrespective of the various interpretations, an evaluative mediator becomes directive in her approach, no matter what aspect of the mediation she emphasizes.[85]

Scholars refer to evaluative mediators as more directive in their approach, coining such names as "'muscle mediators,' 'Rambo mediators,' [and] 'Attila the mediator(s).'"[86] In many instances, a mediator engages in an evaluative style for court-connected cases and cases in which the parties are represented by counsel. The mediator may attempt to influence the participants to adopt her opinion,[87] which may compromise her neutrality and impartiality. Many view these types of mediations as akin to a settlement conference.[88]

C. Transformative Mediator Style

Over a decade ago, Professors Bush and Folger pioneered the concept of a transformative mediator.[89] While most mediations focus on problem-solving outcomes, the transformative mediator offers a different approach. She helps parties focus on their relationship through their conflict interactions.[90] In doing so, the transformative mediator helps the parties focus their communication on their conflict and how productive changes may affect the conflict.[91]

The shift is away from a problem-solving outcome and toward a more open communication style; parties achieve "moral growth" by emphasizing individual "empowerment and recognition."[92] In other words, "the emphasis is on shifts in parties' interaction, shifts from relative weakness to greater strength (the empowerment dimension) and movement from self-absorption to openness (the recognition dimension)."[93] Recognition applies to a person's ability to empathize and begin to understand the other party's perspectives and points of view, not receiving recognition from another.[94]

85. Riskin, *Grid for the Perplexed*, *supra* note 65, at 27.
86. Lande, *Lawyering and Mediation Transformation*, *supra* note 77, at 850.
87. Lande, *Sophisticated Mediation Theory*, *supra* note 66, at 322–23.
88. Levin, *supra* note 76, at 269.
89. Bush & Folger, *supra* note 5.
90. *Id.* at 82–83.
91. Joseph P. Folger, *Mediation Research: Studying Transformative Effects*, 18 Hofstra Lab. & Emp. L.J. 385, 393 (2001).
92. Bush & Folger, *supra* note 5, at 2–12. The authors define "empowerment" as "the restoration to individuals of a sense of their own value and strength and their own capacity to handle life's problems." *Id.* at 2. "Recognition" is "the evocation in individuals of acknowledgment and empathy for the situation and problems of others." *Id.*
93. Folger, *supra* note 91, at 393.
94. Bush & Folger, *supra* note 5, at 96.

The transformative mediator encourages parties to define issues and decide the terms of settlement themselves by helping them understand the other party's perspective. Through this style of mediation, the parties may grow, develop, and change their own perspectives to become better human beings.[95] Ultimately, transformative mediation can transform the character of the individual disputants as well as society in general.[96]

Although transformative mediation does not accentuate problem-solving, parties may settle an underlying dispute as part of their relational transformation. Hence, the transformative mediation style is not mutually exclusive from the problem-solving approach seen in facilitative and evaluative mediations.[97]

D. Additional Mediation Styles and Models

As the mediation practice develops, some scholars venture out to coin new terms to define a mediator's style or a mediation model. This section summarizes some of the less commonly known terms. Notwithstanding the varied terminology, most are analogous to either facilitative or evaluative mediator styles.

1. "Trickster," "Magician," and "Prime Negotiator"

Robert D. Benjamin, a mediation practitioner and scholar, opines that a mediator can be viewed as a "trickster" because she manages and survives conflict rather than trying to defeat or stop it.[98] The "trickster-mediator" accomplishes this task by offering a "third perspective that shares traits of both sides of the dichotomy, thereby transforming a conflicted dyad into a more harmonious triad."[99] The purpose behind the trickster-mediator seems appropriate because the mediator reframes the conflict into an impartial third perspective. Yet, the term "trickster" itself is offensive on its face when referring to a mediator, and appears to conflict with a neutral third party's goal of helping others reach peace and resolve conflict.

95. *Id.* at 2–12.

96. *Id.* at 20.

97. *Id.* at 11–12.

98. Robert D. Benjamin, *Managing the Natural Energy of Conflict: Mediators, Tricksters and the Constructive Uses of Deception*, in BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF A MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION 79, 80 (Daniel Bowling & David Hoffman eds., 2003). Benjamin writes: "[P]ersonality traits that best serve mediators may not be the most obvious or commonly presented. They are as follows: (1) confused, (2) voyeuristic, (3) compulsive, and (4) marginal." *Id.* at 84.

99. *Id.* at 95.

\\server05\productn\S\SAN\42-3\SAN301.txt unknown Seq: 19 2-MAY-08 7:50

Others have softened the trickster phraseology. Professor John W. Cooley refers to mediators as "magicians."[100] James C. Freund refers to mediators as "prime negotiator[s]" because he believes mediators become an integral part of the negotiations that transpire during mediations.[101]

These scholars are correct on one hand because they refer to the creativity and ingenuity necessary for mediators to reframe issues, add an impartial third story, pose alternative solutions, and otherwise think outside the box. On the other hand, the scholars may go too far by emphasizing a third-party perspective that takes on a shape of its own or the mediator's personal orientation. Irrespective of the label given to the mediator's style, the mediator's directive approach may infringe on the parties' rights of self-determination, which in turn may affect the mediator's neutrality and impartiality.

2. Dictates of Commercial Needs

The commercial nature of the mediator's role may influence her neutrality and impartiality, especially in light of whom she considers to be her client. If a mediator considers attorney-advocates to be her clients, she may assert a directive style that she thinks the attorneys desire, in hopes of securing future business with them. A particular style or technique may be important to the mediator who wants more business and plans to sell her services based on her settlement record.

Business requirements also may be important to the party who is searching for the type of mediator who will provide the best service under the facts of a case. For example, in a highly specialized situation such as a construction defect case involving many participants, the parties and their attorneys may want an attorney-mediator or a retired judge who has the expertise to provide a highly evaluative mediation. Even when attorneys are not involved in the mediation, a mediator may continue to exhibit the directive or evaluative style, although she may be more amenable to a facilitative style by focusing on the parties' underlying interests.

100. John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1 (1997).

101. JAMES C. FREUND, THE NEUTRAL NEGOTIATOR: WHY AND HOW MEDIATION CAN WORK TO RESOLVE DOLLAR DISPUTES 12–15 (1994) (noting that a mediation is really a negotiation in which the mediator becomes the "prime negotiator").

\\server05\productn\S\SAN\42-5\SAN511.txt unknown Seq: 20 24-MAY-08 7:50

In each situation, the mediator may attempt to appease clients to obtain future referrals rather than focus on the process.[102] If the mediator exhibits favoritism toward a participant, she may jeopardize her neutrality. The end result is that a client's commercial needs may dictate the mediator's behavior in spite of the neutral approach set forth in ethical Standards.[103] Commercial mediators' willingness to go beyond ethical guidelines is proof that the Standards, while well meant, are not always followed.

Professor Bush addresses commercialism by examining a mediator's ability to sell her services and the corresponding need of the client to know what he or she is getting when searching for a mediator.[104] Rather than differentiate between evaluative and facilitative mediators, Bush emphasizes mediator goals and describes mediators as "'settlors,' 'fixers,' 'protectors,' 'reconcilors,' and 'empowerors.'"[105]

The settlor's job is to settle as many mediations as quickly as possible.[106] If this is the case, arguably a mediator will be directive in her approach and may even cross the line to coerce the parties, knowing the primary purpose is to settle the dispute.

The fixer mediator emphasizes problem solving through solutions. Her goal is to relieve the parties of their problem while finding a solution that is best for everyone.[107] This type of mediator needs to be creative and knowledgeable; more than likely, this mediator will use a facilitative approach. The fixer mediator should be able to maintain neutrality and impartiality as long as she does not adopt the alternatives that she proposes.

The remaining types of mediators are "variants of the general 'fixer' species."[108] Protectors strive to create a fair process, especially for the weaker of the parties. They attempt to ensure that no one is

102. During the 2004 Annual Conference of the Association for Conflict Resolution, a comment was made in one session that the mediator would do whatever was necessary for the money.

103. *See* DEBORAH M. KOLB & KENNETH KRESSEL, THE REALITIES OF MAKING TALK WORK, WHEN TALK WORKS: PROFILES OF MEDIATORS 461 (2001) (noting that mediators' needs to sell themselves may result in them exerting "pressure tactics and arm twisting" which ultimately jeopardizes their neutrality).

104. *See* Lande, *Lawyering and Mediation Transformation*, *supra* note 77, at 851 (citing Robert A. Baruch Bush, Ethical Dilemmas in Mediation 17–18 (1989) (unpublished manuscript)).

105. *Id.*

106. *Id.* at 852.

107. *Id.*

108. *Id.*

\\server05\productn\N\SAN\42-3\SAN303.txt unknown Seq: 21 2-MAY08 7:50

hurt or taken advantage of through the mediation process. Sometimes protectors go so far as to ensure that the final outcome is fair.[109] In an attempt to help the weaker of the parties and ensure substantive fairness of the outcome, observably the mediator steps out of her neutral and impartial role. For as soon as a mediator begins to assist one party to the disadvantage of the other party, a mediator is no longer neutral and impartial.

Two final mediator types may conform to neutrality and impartiality values. The reconcilor helps the parties concentrate on understanding each other and focuses on the quality of the mediation rather than attempting a final settlement. Reconcilors are sometimes referred to as "therapeutic" or "sensitive."[110] Finally, some mediators are empowerors because their goal is party self-determination. Empowerors mediators may generate options but remain detached from them so that the parties may settle voluntarily. Some refer to this type of mediator as a fixer who does not take a directive approach.[111] Clearly, reconcilor and empowerors styles do not run afoul of neutrality and impartiality.

3. "Michigan Mediation"

The Michigan style of mediation resembles arbitration because a neutral third party renders a decision. In this type of mediation, court rules require a neutral evaluation. Normally the court selects three evaluators from a panel of attorneys. After reviewing written briefs and hearing some argument from counsel, the panel makes an "award."[112] Although the award is not binding, the rejecting party will be sanctioned if it fails to obtain a better result at trial.[113]

In 2000, the Michigan Supreme Court revised its Court Rules regarding Alternative Dispute Resolution primarily to change terminology.[114] What was known as the "Michigan Mediation" pursuant to Michigan Court Rule 2.403 changed when the term "mediation" was changed to "case evaluation."[115] A new court rule, Rule 2.411, was added to describe mediation using generally recognized principles con-

109. *Id.*

110. *Id.* at 853.

111. Lande, *Lawyering and Mediation Transformation*, *supra* note 77, at 853.

112. *See* Laurence D. Connor, *How to Combine Facilitation with Evaluation*, 14 ALTERNATIVES TO HIGH COST LITIG. 15 (1996) (explaining the "Michigan Mediation" procedure).

113. *Id.*

114. *See* MICH. CT. R. 2.411 cmt.; *see also id.* at 2.403.

115. *See* MICH. CT. R. 2.411 cmt.; *see also id.* at 2.403.

\\server05\productn\S\SAN\42-3\SAN301.txt unknown Seq: 22 2-MAY-08 7:20

sistent with the definitions of mediation provided in Part II of this Article.[116]

Other variations of the traditional "Michigan Mediation" continue to exist. Florida has a statute that regulates Campus Master Plans and Campus Development Agreements.[117] It requires that parties mediate disputes that arise while implementing executed campus development agreements.[118] Pursuant to this mandate, each party selects a mediator, and the two mediators in turn select a neutral third mediator. The panel of three mediators issues a recommendation to resolve the dispute.[119]

Attorney Laurence D. Connor uses a hybrid evaluation-facilitation type of mediation similar to the "Michigan Mediation."[120] He refers to himself as a "special" mediator.[121] First he evaluates the mediation in a similar manner to the "Michigan Mediation," although he does not disclose his recommended award.[122] Then he begins the second phase of the mediation using a facilitative style.[123] During the facilitative phase, Connor uses both joint sessions and private caucuses and relies extensively on party involvement.[124] If the parties cannot settle the matter, Connor terminates the mediation and discloses his award, including the reasons for it.[125] Often, on the eve of trial, the parties may rely on Connor's recommended award to settle the matter between them.[126] By disclosing his "award," Connor becomes highly evaluative. Some believe such conduct impinges on mediator impartiality.[127] On the other hand, he may be able to maintain impartiality by simply divulging his opinion in the form of an "award" without forcing the parties to accept it.

4. The Effect of Social Norms on Mediation

Societal roles may affect a mediator's style. Professor Ellen Waldman theorizes that mediations can be classified into "three separate

116. *See* Mich. Ct. R. 2.411 cmt.; *see also id.* at 2.403.
117. Fla. Stat. § 240.155 (1998).
118. *Id.*
119. *Id.* Typically, however, Florida prohibits mediators of civil court cases from offering an opinion regarding a final court outcome.
120. Connor, *supra* note 112.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *See infra* notes 153–67 and accompanying text.

models."[128] First, the "norm-generating" model is seen as a traditional mediation model that includes the typical stages of introduction, storytelling, exchange of party views, generation and selection of options, and agreement writing.[129] The mediator reframes issues and helps the parties manage their conflict. The parties establish their own norms, so to speak, by creating solutions based on their personal needs rather than social norms.[130]

The second model is termed the "norm-educating" model.[131] It is basically the same as the norm-generating model except that the mediator goes farther by referring to "relevant social and legal norms."[132] The parties maintain autonomy by deciding whether or not their final resolution conforms to the social or legal norms. This style of mediator looks like a broad facilitator under Riskin's grid. For example, in a divorce mediation involving children, a mediator might refer to relevant psychological studies concerning childrens' needs as well as legal standards for the division of property.[133] The "norm-educating" mediator must be careful not to step over the line of neutrality and impartiality. One can visualize a mediator doing so when helping to educate the least powerful party. Thus, the mediator should carefully provide the same information to all parties in her attempt to maintain neutrality and impartiality.

The third model identified by Professor Waldman is the "norm-advocating" model.[134] Using the same basic stages and techniques of the first two models, explains Professor Waldman, this mediator not only educates the parties about relevant legal and ethical norms but also mandates that these norms be incorporated into a final settlement.[135] Realizing that the norm-advocating model contradicts the traditional vision of mediation, Professor Waldman cautions that the model should be limited to situations in which one party is not capable of waiving certain rights or where the dispute affects society in general.[136] Although seldom used, the norm-advocating model is best suited for mediations involving bioethical, zoning, environmental,

128. Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 707 (1997).
129. *Id.* at 713.
130. *Id.* at 713–18.
131. *Id.* at 731–32.
132. *Id.* at 730.
133. *Id.* at 730, 731.
134. *Id.* at 742.
135. *Id.* at 745.
136. *Id.* at 753–54.

and some discrimination disputes.[137] This mediator style can be classified as a narrow evaluator under Riskin's grid. As long as the norm-advocating mediator reinforces norms without regard to the particular needs of any one party, the mediator may be able to maintain her impartiality.

IV. Analysis of the Tension Between Mediator Styles and Impartiality Requirements

A. A Summary of the Problem Posed by the Research

Mediators are guided by written definitions and Standards, yet their actual roles may be dictated by their own personal style, values, and commercial needs in conjunction with the practical needs (or at least the perceived practical needs) of the participants. A mediator's style, or the model she employs in mediation, can affect the outcome of the mediation.

Little empirical research exists to measure the effect of a mediator's style, although many scholars hypothesize about such effects. One research project measured the extent to which evaluative and facilitative mediators' styles affected party satisfaction and the amount of money obtained by a mediated settlement.[138] That research project was limited to a study of evaluative versus facilitative mediator styles in the context of the Equal Employment Opportunity Commission's ("EEOC") mediation program.[139] Another more generic study focused on four neutrals who worked on one simulated dispute.[140] The study illustrated that mediators employ various styles within a single mediation and that the final outcome of the mediation may be due in part to a mediator's style combined with the disputants' personalities and approaches.[141] A third study concluded that a mediator's style in community mediations did not affect the final outcome.[142]

137. *Id.* at 746.

138. E. Patrick McDermott & Ruth Obar, *"What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit*, 9 HARV. NEGOT. L. REV. 75, 75 (2004).

139. *Id.* The authors' study focused on 645 employment law cases that were mediated at the EEOC from March 1 to July 31, 2000. *Id.* at 75, 90. The study compared the results of mediations conducted by evaluative and facilitative mediators and found, among other findings, that the participants were most satisfied with a facilitated mediation and obtained more monetary relief in an evaluative mediation in which the claimant was represented by counsel. *Id.* at 95–105.

140. *Id.*

141. *See* Golann, *Variations in Mediation*, *supra* note 66, at 61.

142. *See* Lela P. Love & James B. Boskey, *Should Mediators Evaluate? A Debate Between Lela P. Love and James B. Boskey*, 1 CARDOZO ONLINE J. CONFLICT RESOL. 1, ¶¶ 41, 96 (1997)

As illustrated in Part II, many definitions of mediation include a key provision that requires the mediator to serve as a neutral and impartial third party. More impressive is the fact that every set of Standards requires mediator impartiality. Nevertheless, specific mediator styles and the commercial needs of the participants (whether attorney advocates or disputing parties) actually can force a mediator out of her neutral and impartial role.

The resulting dilemma is whether mediator impartiality requirements can and should apply to all types of mediator styles. The following Part IV.B examines how mediator styles can impact a mediator's duties of impartiality and neutrality.

B. The Effect that Styles Have on a Mediator's Neutrality and Impartiality

A mediator's involvement in the mediation readily can be seen when comparing different mediator styles. Irrespective of the differences in styles,[143] mediators may interpret the same styles differently.

Some who say that they are facilitative mediators actually may engage in evaluative techniques and vice versa. Some mediators may confuse style with strategies or tactics when referring to their approach. When describing a particular style such as facilitative or evaluative, the mediator should be cognizant of whether that style applies to the process, the substance, or both. Some mediators who espouse an evaluative mediation style may overstep their bounds by interjecting their personal opinions and values to the same extent that a settlement judge exhibits during a mandatory settlement conference. These variances in interpretation need to be considered when examining the effect that styles have on a mediator's neutrality and impartiality. Furthermore, a mediator's impartiality cannot exist in a vacuum; it affects other mediation values, most notably party self-determination. This section is divided into subparts aligned with the three main mediator styles, including analogous counterparts.

1. Facilitative Style

The facilitative category of mediators includes Riskin's classification of a facilitative mediator as well as others classified as fixer,[144]

(citing Daniel McGillis, U.S. Dep't of Justice, Community Mediation Programs: Developments and Challenges (1997)), http://www.cojcr.org/vol1no1/article01.html.

143. *See supra* Part III.

144. *See supra* note 107 and accompanying text.

%server05%production%SAN%42-3%SAN301.txt unknown Seq: 26 2-MAY-08 7:50

reconcilor,[145] empoweror,[146] norm-generating,[147] and norm-educating.[148] A facilitative mediator emphasizes the needs and interests of the parties and reinforces the concept of self-empowerment. The facilitative mediator should be able to perform this task while maintaining her neutrality and impartiality, especially when the mediator is seen as a "process person" who does not contribute substantive information[149] and the ultimate goal is problem-solving rather than settlement of issues.

Some scholars criticize the facilitative mediator because her passivity may lead to an uneven balance of power between the participants.[150] Professor Jeffrey Stempel is concerned that a facilitative mediator passively allows the stronger party to control the weaker party.[151] Such a scenario can occur in mediations where the mediator is serving in a purely facilitative manner and the parties have divergent levels of power. Yet, if the mediator attempts to balance the power between the participants, certainly she will assume a partial role and violate impartiality requirements.

Another criticism can be raised: If a mediator fails to balance the parties' relative power, she may violate some Standards that require her to do so.[152] The problem becomes one in which a facilitative mediator's style may infringe on requirements in Standards, creating the mediator's dilemma.

A possible solution might be that the facilitative mediator concentrate on a specific problem by empowering both participants rather than attempting to balance the parties' relative power. This solution might work for some facilitative mediators, but not necessarily all of them. The mediator's dilemma may persist for these other mediators, especially due to the passive imbalance of power.

145. *See supra* note 110 and accompanying text.

146. *See supra* note 111 and accompanying text.

147. *See supra* notes 129–30 and accompanying text.

148. *See supra* notes 131–33 and accompanying text.

149. *See* Love & Boskey, *supra* note 142, para. 41 (reflecting on James Boskey's summarization of Lela Love's writings that a mediator is "purely a process person and does not contribute substantive information to the process other than agenda structuring," and noting his disagreement with Love's position).

150. Lande, *Sophisticated Mediation Theory*, *supra* note 66, at 326.

151. *Id.*

152. *See* Exon, *Why Ethical Standards Create Chaos*, *supra* note 26, at app A. Appendix A includes a list of those Standards that require a mediator to balance the power between the disputants. *Id.*

\\server05\productn\S\SAN\42-3\SAN301.txt unknown Seq: 27 2-MAY-08 7:50

2. Evaluative Style

a. General Criticisms of the Evaluator Style

An ongoing debate exists regarding evaluative mediators. Many scholars criticize the evaluative mediator for crossing the neutral/impartial threshold. Professors Kimberlee Kovach and Lela Love refer to evaluative mediation as an "oxymoron."[153] They advocate for mediator regulation rather than "unfettered evaluations and assessments" of a case.[154] They argue that a mediator's evaluative style jeopardizes her neutrality because any assessment will, in all likelihood, favor one party to the detriment of the other.[155] Once neutrality is jeopardized, so is a party's trust in the mediator. The disfavored party may withdraw from the mediation or actually feel as though the mediation environment has become antagonistic because the disfavored party becomes angry, hurt, or alienated.[156]

Some critics argue that evaluative mediators may engage in unethical conduct.[157] Some argue that by evaluating the substance of the mediation, the mediator interferes with party self-determination.[158] Others counter that the mediator's evaluation actually enhances party self-determination by helping parties change the way they think.[159]

153. *See* Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996) [hereinafter Kovach & Love, *"Evaluative" Mediation is an Oxymoron*].

154. *See* Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. L. REV. 1, 28–29 (2001) (citing Kovach & Love, *"Evaluative" Mediation is an Oxymoron*, *supra* note 153).

155. *Id.* at 31.

156. Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 101 (1998) [hereinafter Kovach & Love, *Mapping Mediation*] (advocating that mediators should not use an evaluative style); Love, *supra* note 74, at 937, 940, 945 (contending that evaluative mediators promote "adversarial behaviors" such as positioning and polarization and can actually stop the negotiation process). *Contra* Lande, *Lawyering and Mediation Transformation*, *supra* note 77, at 874–76 (explaining that an evaluative mediator does not necessarily impair his or her impartiality).

157. Brian Wessner, *A Uniform National System of Mediation in the United States: Requiring National Training Standards and Guidelines for Mediators and State Mediation Programs*, 4 CARDOZO ONLINE J. CONFLICT RESOL. 1 ¶ 44 (2002), http://www.cojcr.org/vol4no1/notes01.html (noting that a mediator will engage in unethical and immoral conduct if she evaluates and has no legal background).

158. Lela P. Love & John W. Cooley, *The Intersection of Evaluation by* MEDIATORS and Informed Consent: Warning the Unwary, 21 OHIO ST. J. ON DISP. RESOL. 45, 58 (2005) (acknowledging that party self-determination may be impacted to the extent the parties adhere to the mediator's evaluation).

159. *See* Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. 669, 675 (1997) (noting that "protections against violating principles of self-determination and impartiality are sufficient to protect the parties").

Some critics contend that an evaluative mediator engages in the unauthorized practice of law.[160] Still others contend that an evaluation can lead to an adverse effect in the way the mediator delivers an evaluation. For example, if an evaluation is given in a joint session, the party on the losing end may "resist" the evaluation and stop listening in an effort to save face.[161]

Another criticism is that evaluative mediators may inhibit parties from engaging in their own problem-solving methods.[162] The mediator may re-orient the dispute towards her preferences rather than the participants' creativity.[163] Opponents contend that rather than provide an evaluative assessment, the mediator should encourage the parties to understand each other, become creative, and seek to solve their own problems.[164] Nevertheless, even some proponents caution that a mediator's evaluation should be used to assist the facilitative process rather than serve as the sole source of the mediation style.[165]

Professor Riskin acknowledges that as a mediator becomes more directive in her approach, she may become biased and appear incapable of maintaining her neutrality.[166] Proponents, however, argue that a mediator has to include some element of evaluation in her style. Although the debate continues, some scholars believe that we must examine what really occurs during a mediation, as opposed to what should occur.[167]

b. Effects of Related Evaluative Styles

Often a mediator's style affects her ability to maintain impartiality, no matter how the style is coined. Whether termed evaluative,[168] directive,[169] trickster,[170] magician,[171] prime negotiator,[172] settlor,[173]

---

160. McDermott & Obar, *supra* note 158, at 77.

161. *See* Marjorie Corman Aaron, *ADR Toolbox: The Highwire Art of Evaluation*, 14 ALTERNATIVES TO HIGH COST LITIG. 62 (1996) (advocating that a mediator provide an evaluation in private sessions to maintain neutrality and help the losing party from losing face).

162. Kovach & Love, *Mapping Mediation*, *supra* note 156, at 103 (noting that "[j]udging blocks the imagination").

163. *Id.* at 103–04.

164. Kovach & Love, *"Evaluative" Mediation is an Oxymoron*, *supra* note 153, at 31.

165. *See* Love & Boskey, *supra* note 142, at para. 51 (articulating Boskey's feelings of discomfort at the idea that a mediator's sole tool will be evaluative techniques).

166. Riskin, *Grid for the Perplexed*, *supra* note 65, at 47–48; *see* Aaron, *supra* note 161, at 62 (noting that when a mediator evaluates a case, the party on the losing side may perceive the mediator's lack of neutrality and begin to view the mediator more as an adversary).

167. McDermott & Obar, *supra* note 158, at 77–78.

168. *See supra* notes 81–88 and accompanying text.

169. *See supra* note 69 and accompanying text.

170. *See supra* notes 98–99 and accompanying text.

\\server05\productn\W\SAN\42-2\SAN201.txt unknown Seq: 29 2-MAY-08 7:50

protector,[174] norm-advocating,[175] or Michigan Mediation,[176] these types of mediators easily can exceed their neutral and impartial responsibility.

In each case, these types of mediators may influence parties to adopt a position that the mediator thinks is rational or best for everyone involved in the mediation. At the very least, when a mediator evaluates the dispute, her opinion usually favors one party over the other, which arguably jeopardizes her impartiality.[177] In some instances, and most notably with the protector mediator, a mediator may attempt to ensure a fair result. To the extent that a mediator inserts herself into the dispute, she begins to advocate for the benefit of one party rather than for all parties, which jeopardizes her impartiality. The traditional Michigan Mediation is an extreme example. It clearly obstructs party empowerment since a panel of three attorneys renders an opinion, and the parties are required to take it or leave it. Once the panel renders an opinion in favor of one party, it compromises the principles of neutrality and impartiality by taking sides.

c. Effects of Attempts to Balance Power

The late Professor James Boskey argued that a mediator might want to use evaluative techniques to help "level the playing field" where oppression is apparent, such as when a power imbalance exists in the process.[178] He contended that the parties cannot enter into a "truly voluntary" agreement if one or both have some factual misunderstanding.[179] He also acknowledged that a mediator can avoid the appearance of partiality if she offers an evaluation in a joint session rather than a private caucus.[180] Despite Boskey's well-reasoned opinion, his scenario is a specific example of a mediator exceeding her neutral and impartial role by attempting to assist the weaker, or at least the perceived weaker, of the parties.

171. *See supra* note 100 and accompanying text.

172. *See supra* note 101 and accompanying text.

173. *See supra* note 106 and accompanying text.

174. *See supra* notes 108–09 and accompanying text.

175. *See supra* notes 134–37 and accompanying text.

176. *See supra* notes 112–16 and accompanying text.

177. *See* Love & Boskey, *supra* note 142, at para. 21 (noting Love's position that mediators should not evaluate because they jeopardize their neutrality).

178. *Id.* at para. 60.

179. Stark, *supra* note 81, at 792 (citing to James Boskey, *The Proper Role of the Mediator: Rational Assessment, Not Pressure*, 1994 NEGOTIATION J. 367, 370).

180. Love & Boskey, *supra* note 142, at para. 92.

source:03/production/SANM2-3/SAN501.txt unknown Seq: 30 2-MAY-08 7:50

Other scholars also are concerned about the mediator's involvement in the participants' power balance.[181] As previously discussed, Professor Jeffrey Stempel is concerned that a facilitative mediator passively allows the stronger party to control the weaker party.[182] Professor John Lande acknowledges Stempel's fear, yet believes that a mediator can equally side with the stronger party, aggravating the distribution of power problems which are at the heart of Stempel's apprehension.[183] Regardless, once the mediator attempts to equalize the parties' power, she loses her ability to maintain neutrality and impartiality.

d. Informed Decision-Making and a Final Outcome

As an evaluative mediator becomes an "activist"—one who takes control of the mediation by advising parties how to proceed[184]—her impartiality begins to wane.[185] Such a scenario does not bother Professor James Stark because he believes in the mediator's ability to disclose information, even at the risk of appearing biased, to ensure the parties are making an informed decision.[186] He does not believe that the mediator's impartiality is at issue.[187]

Professor Susskind, on the other hand, suggests that while the "activist" mediator is not neutral, she remains "nonpartisan" as to the outcome.[188] In other words, the activist mediator advocates for the best "possible outcome" while remaining disinterested in the individual parties.[189] By taking a personal interest only in the outcome of the mediation, the mediator guides and controls or otherwise trains the parties on how to focus on alternative solutions to advance their respective interests. Professor Maureen Laflin has added her own criticisms to the mix:

181. Lande, *Sophisticated Mediation Theory*, *supra* note 66, at 326.

182. *See supra* note 151 and accompanying text.

183. Lande, *Sophisticated Mediation Theory*, *supra* note 66, at 326.

184. *See* Laflin, *supra* note 82, at 491 (noting that the "[a]ctivist, evaluative ADR" takes control of the outcome of the mediation process and this should not be connoted as mediation because it is more "akin to neutral evaluation").

185. The panel's award in the Michigan Mediation constitutes an extreme activist mediator. *See supra* notes 112–16 and accompanying text.

186. Stark, *supra* note 81, at 796 (noting that the dilemma between party informed consent and the appearance of mediator bias is not the same thing as a conflict between competing values of informed consent and mediator impartiality).

187. *Id.* at 796–97 (advocating that the mediator provide enough information to the parties to be "reasonably informed," not necessarily fully informed).

188. Laflin, *supra* note 82, at 498.

189. *Id.*

\\server05\productn\S\SAN\42-3\SAN301.txt unknown Seq: 51 2-MAY-08 7:50

> Yet mediators who see their role as one of training the parties, no matter how impartial they may be, are paternalistic. And mediators who approach the process as "advocates of a good solution" are necessarily adopting an attitude of power and control over the outcome, an attitude which cannot but compromise the principles of self-determination and impartiality.[190]

Both Professors Susskind and Laflin make credible, yet flawed, arguments. First, by taking an interest in the substantive outcome of the mediation, a mediator may affect party self-determination. The problem is not solved by simple semantics such as using the terms "guide," "control," or "train" to describe the methods used to get parties to focus on their own interests in creating a workable solution. Any attempt to guide, control, or train parties can lead the parties to pursue the mediator's interest rather than their own.

Second, Professor Laflin goes too far in her argument because she contends that a mediator's ability to "advocate . . . a good solution" always compromises self-determination and impartiality.[191] This is not always the case. A mediator must remain neutral and impartial to both the parties' interests and the outcome of the mediation. If a mediator crafts her words carefully, she may offer solutions or advice without compromising the parties' problem-solving abilities or her own neutrality and impartiality.

A related criticism relates to an evaluative mediator's substantive advice and how that advice affects the final outcome of a mediation. The advice can pose particular problems if the mediator believes that the law dictates the standard of fairness in mediations. As a result, an evaluative mediator may seek to promote fairness by attempting to predict a legal outcome.[192] Some scholars contend that an evaluative mediator's emphasis on the legal outcome implies that a legal solution is the best outcome for the dispute.[193] Professor Lande contends that "this presumes that the legal rules provide firm results, the rules are reasonably clear, judges and juries consistently follow the rules, and mediators can accurately assess the likely results."[194] Lande makes a sound argument that often cases go to mediation because the law is not clear, and the ability to predict a likely litigation outcome is diffi-

190. *Id.*

191. *Id.*

192. Lande, *Sophisticated Mediation Theory*, *supra* note 66, at 326.

193. *See* Levin, *supra* note 76, at 271 ("Evaluation turns the process away from problem solving toward an adversarial contest—sharing turns to posturing. . . . Moreover, too much emphasis on a likely legal outcome overlooks the possibility that the legal solution is not necessarily the best solution.").

194. Lande, *Sophisticated Mediation Theory*, *supra* note 66, at 326.

\\server05\productn\S\SAN\42-5\SAN501.txt unknown Seq: 22 2-MAY-08 7:50

cult.[195] The evaluative mediator, therefore, may create a social injustice by providing an incorrect prediction.[196]

e. The Overly Zealous Evaluator

Mediation can reach an extreme level when the mediator strives to establish a settlement agreement using fear or pressure to the extent that it constitutes undue influence[197] or coercion.[198] Professors Nancy A. Welsh and Carrie Menkel-Meadow are wary about a mediator's overly-zealous conduct.[199]

One can visualize how a mediator might begin to assert undue influence by comparing the traditional judicial settlement conference with mediation. In the former, the parties are presented with a potential settlement arrangement and are given an opportunity to passively accept or reject it. With mediation, the concept of party self-determination means that the parties dominate the dispute resolution process by creating options and solutions, controlling the substantive discussions, and deciding on a final settlement.[200] Even though mediation is based on party empowerment, it also requires active mediator participation in the process. As a mediator becomes more directive or aggressive, she may try to influence the parties, thus affecting party control.

Examples of coercive conduct include scenarios where the mediator forces the parties to remain in session well into the evening hours without adequate food, strong-arming the parties to continue mediat-

195. *Id.*

196. *Id.*

197. "Undue influence" is defined as "unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare." RESTATEMENT (SECOND) OF CONTRACTS § 177(1) (2003).

198. "Coercion" has been described as a higher form of pressure than "undue influence" because it "works on mental, moral, or emotional weakness." Odorizzi v. Bloomfield Sch. Dist., 54 Cal. Rptr. 533, 539 (Ct. App. 1966). The two terms also have been distinguished because "undue influence" is based on some type of "confidential relationship" whereas such a relationship is not necessary in a coercive situation. *Id.* at 540; *see* Lonnie Chunn, Note, *Duress and Undue Influence—A Comparative Analysis*, 22 BAYLOR L. REV. 572, 576–77 (1970).

199. *See* Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 411–12 (1997) ("One of the most troubling of our ethical dilemmas in ADR [is determining] when is a solution suggested . . . by a third party neutral too coercive on the parties."); Welsh, *supra* note 154, at 7, 15 (referring to the "thinning vision of party self-determination in court-connected mediation" and noting that the principle of party self-determination is different in mediation as opposed to a traditional judicial settlement conference).

200. *See* Welsh, *supra* note 154, at 16–18.

\\server05\productn\S\SAN\42-3\SAN301.txt unknown Seq: 39 3-MAY-08 7:50

ing until a final settlement is reached, failing to provide sufficient time for the parties to reflect on the adequacy of a final agreement, or emphasizing the mediator's opinion regarding the legal outcome if the case went to litigation.[201]

f. Current Suggestions for the Evaluative Mediators

A long-standing debate has focused on how a mediator should evaluate a dispute. Scholars have suggested many solutions to help ease the tension created by the foregoing criticisms. The evaluative mediator can maintain neutrality and impartiality by providing the same assessment to all disputing parties. The mediator must act without coercion. A mediator can accomplish these goals by offering her assessment in a joint session, after the parties request the evaluation.[202] Alternatively, if a mediator renders opinions in separate caucuses, she also can maintain neutrality and impartiality by simply providing an invited assessment without pushing any party to adopt a specific course of conduct. Arguably, a neutral and impartial mediator can evaluate a case by rendering a personal opinion based on her particular expertise but at the same time not force it on any party. Professor Riskin goes so far as to contend that if a lawyer mediator discusses legal ramifications with the parties in a neutral manner, this may actually diffuse advocacy because parties may not feel the need to bring in their own lawyers.[203] Another approach is for the mediator to distance herself from the parties when offering advice; she can do this by predicting what an individual lawyer, judge, or jury might advise in a particular situation,[204] or by calling in a "specialist."[205]

---

201. *See supra* notes 162–65 and accompanying text.

202. *See* Lande, *Lawyering and Mediation Transformation*, *supra* note 77, at 874–76 (contending that a mediator does not affect her impartiality when she expresses an opinion about a likely court outcome or typical resolutions of similar disputes, especially when the opinion or evaluation is invited by the parties).

203. Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 Ariz. L. Rev. 329, 335 (1984) [hereafter Riskin, *Toward New Standards*] (noting that a neutral lawyer who serves as a mediator may provide legal information in such a way that the parties will not feel the need to hire independent counsel who may influence the process, which results in the parties' ability to reach their own agreement without relying on the lawyers' perspectives).

204. *Id.* at 336; Golann, Mediating Legal Disputes, *supra* note 8, § 10.6.9 (noting that a mediator can predict what a judge or jury might find in terms of damages and liability rather than make a personal statement such as, "I think there should be a liability finding here").

205. Golann, Mediating Legal Disputes, *supra* note 8, § 10.3.3. To maintain her credibility and rapport with the participants, the mediator may call in a "specialist" to render a formal evaluation. This method prevents any perceived association with one party, avoids

Scholars like Dwight Golann and Marjorie Corman Aaron have written extensively on the subject of how an evaluative mediator can remain neutral, offering a variety of suggestions.[206] First and foremost, they caution that a mediator should not comment on the substance of the mediation; she should remain passive.[207] In addition to the foregoing discussion, they contend that a mediator can remain neutral by using a Socratic method of questioning,[208] carefully selecting phraseology that is devoid of her point of view,[209] evaluating the merits of a "no agreement" alternative,[210] paying attention to the timing in which the evaluation is rendered,[211] and considering the dynamics of evaluating in a joint session or in a private caucus.[212]

The current suggestions provide guidance to evaluative mediators, but fall short of practical solutions. The suggestions are limited solely to evaluative mediators. They fail to consider the tensions that are developing as new Standards are created, especially when the Standards include fairness provisions such as balancing

antagonism by the perceived loser, and equalizes the playing field from the mediator's perspective. *Id.*

206. GOLANN, MEDIATING LEGAL DISPUTES, *supra* note 8.

207. *Id.* § 10.1.

208. *Id.* § 10.2. By leading the parties through a process to evaluate their own case, the mediator helps them formulate their own evaluation of the case while maintaining her neutrality. *Id.*

209. *Id.* § 10.5. To maintain a level of credibility—the trust and rapport that a mediator may engender during the mediation—she needs to cautiously pose questions. The mediator should carefully select the phraseology so that she does not reveal her point of view. A good way to do this is to pose questions in a joint session and direct them to all parties equally. *Id.*

210. *Id.* § 10.4. A mediator may provide a neutral evaluation regarding the value and merits of a "no-agreement" alternative. The mediator does not interfere with the participants' creativity, ability to generate options, and responsibility to formulate their own resolution of a dispute because the no-agreement alternative evaluation does not seek to resolve the dispute. *Id.*

211. *Id.* § 10.5. A mediator has a better chance of maintaining neutrality if she waits longer to express her evaluation. As a result, she can: learn more about the parties, facts, and case; gain a better understanding of the attorneys' positions; and build trust and rapport with the participants. *Id.*

212. *Id.* § 10.6.1. Some scholars advocate for mediator evaluation in a joint session so that all participants hear the same thing. Sometimes if an evaluation is presented in a joint session, the losing party will lose face and focus on the evaluation without moving forward in the mediation process, believing that the mediator's neutrality may be jeopardized. *Id.* Others believe the best way to evaluate a case is during private sessions because the mediator may need to present her evaluation differently to suit participants' personalities and corporate cultures. Also, the mediator can alleviate potential animosity by presenting her evaluation in private caucuses. *Id.* Both positions—evaluating in private caucuses or in a joint session—are valid and show how the timing and logistics of delivering an evaluation impact a mediator's neutrality.

\\server02\productn\S\SAN\42-3\SAN301.txt unknown Seq: 35 2-MAY-08 7:50

power, ensuring informed decision-making, and ensuring a substantively fair outcome. Quite simply, the current solutions exacerbate the mediator's dilemma because they are limited to one mediator style, restricted in scope by applying only to methods to provide a neutral evaluation. The current solutions do not address the impact that developing Standards have on mediator styles or the interrelated nature of many of the various mediation values set forth in Standards.

3. Transformative Style

A transformative approach to mediation means that the mediator is less likely to be directive in terms of solving a problem because she does not influence the final outcome. Rather, the mediator may be directive in terms of communication as she enables the parties to control the decisions regarding their outcome. In this regard, a transformative mediator easily can remain impartial because she does not influence the outcome, as so often happens in a problem-solving approach.[213]

V. Recommendations to Alleviate the Tension Between Mediator Styles and Impartiality Requirements

It is readily apparent that all types of mediators cannot conform to impartiality requirements in Standards. Conversely impartiality requirements found in Standards cannot apply uniformly to all mediator styles. The majority of the analysis and recommendations relate to facilitative and evaluative mediator styles and their related counterparts because a transformative mediator always can remain impartial.

The current debate regarding suitable mediator conduct needs to continue, albeit with a new focus. Rather than limit the discussion to methods of proper evaluation in mediation, scholars, mediators, regulators, and legislators need to focus the current debate towards appropriate compliance with impartiality provisions and the simultaneous use of practical mediator styles and conduct. The following four alternatives address the mediator's dilemma—how can a mediator be neutral and impartial when engaged in certain mediation styles?

A. Alternative 1: The No-Action Approach to Developing Impartiality Requirements

Currently, thirteen states do not have Standards even though most of these jurisdictions recognize and embrace the benefits of me-

213. Bush & Folger, *supra* note 5, at 104–06.

diation.[214] Common reasons for not developing ethical Standards are that: (1) the mediation industry is prematurely developed in a particular state; and (2) the tension between mediation values and traditional mediator styles is too great to enable the development of a set of Standards with the clarity necessary to be instructive to the practicing mediator.[215] The absence of Standards means that a jurisdiction may have no rules regarding impartiality.

Consequently, the first alternative is the no-action alternative, which means that states that currently lack ethical Standards should not yet develop them. Even though a state may lack a set of Standards, Alternative 1 may be superfluous if a state statute or court rule defines mediation by incorporating impartiality requirements.

Before enacting comprehensive Standards, the states should thoroughly analyze the mediator's dilemma—the conflict between mediator styles and the ability to simultaneously maintain mediator impartiality. While developing Standards, states should take into account the various mediator styles and how each may affect mediator impartiality. The states may want to consider Alternatives 2, 3, or 4 as they develop their own ethical Standards.

Alternative 1 should not apply to states that already have enacted Standards because these states have spent years working on the best possible set of ethical guidelines. They would suffer an extreme disservice if they were told to cancel everything and start anew. States that already have Standards should consider Alternatives 2, 3, or 4.

B. Alternative 2: Redefine Mediation to Remove the Requirement of Mediator Impartiality

Several scholars theorize that a mediator cannot be impartial. Robert D. Benjamin contends that rather than being objective and neutral, mediators should be "balanced" in their communications with parties to protect both parties rather than either one.[216] Benjamin theorizes that a mediator cannot be neutral since she becomes part of the system,[217] yet his proposition seems extreme.

214. This Author is unable to locate general civil Standards, whether court-connected or by a professional organization, for the following states: Alaska, Arizona, Connecticut, Delaware, Kentucky, Louisiana, Maine, Missouri, Nevada, North Dakota, Ohio, Rhode Island, and South Dakota.

215. Exon, *Why Ethical Standards Create Chaos*, *supra* note 26, at 418.

216. ROBERT D. BENJAMIN, *Understanding "Operative Mythology,"* in THE EFFECTIVE NEGOTIATION AND MEDIATION OF CONFLICT: APPLIED THEORY AND PRACTICE HANDBOOK 2.3 (9th ed. 2003).

217. *Id.*

Although Benjamin makes an interesting argument that the mediator becomes part of the system, conceivably the mediator can continue to be neutral as long as she does not offer alternatives or advice that benefit only one party. For example, a mediator who, with the participants' approval, offers an opinion regarding the merits of the case and a probable outcome, may not lose her impartiality as long as she does not urge the parties to adopt this position.[218] Benjamin's approach seems to apply to evaluative mediators, implying that facilitative mediators can be impartial.

Semantics aside, whether a mediator employs balancing or evaluative techniques, the dilemma persists. Can the mediator conduct the mediation pursuant to impartiality requirements and simultaneously maintain any mediator style?

Professor John Lande believes in the eclectic nature of mediation.[219] He makes a sensible argument that existing mediation values, such as confidentiality and neutrality, may not be absolutely necessary.[220]

Another problem is that mediators may use an evaluative style unconsciously. An ethical rule that completely prohibits such techniques could create an "unfair ethical [trap] for unwary parties and mediators."[221]

Despite the traditional definitions of mediation which rely on key values such as party self-determination and mediator impartiality, industry standards and commercial dictates appear to be driving the profession in a new direction. Ethical Standards illustrate a new trend toward a fair result and related fairness concepts, such as ensuring informed decisions and balancing power—aspirational concepts that are not part of the traditional definitions of mediation.[222] Promoting fairness under any style or model of mediation creates tension with mediator impartiality.

---

218. Lande makes a similar observation. *See, e.g.*, Lande, *Lawyering and Mediation Transformation*, *supra* note 77, at 876.

219. Lande, *Sophisticated Mediation Theory*, *supra* note 66, at 333 (agreeing with Jeffrey Stempel's "preference for eclectic approaches by mediators").

220. *Id.* at 332–33 (acknowledging that many effective mediators have some ties to the disputing participants, such as mediators who are members of organizations, tribes, and communities connected to the participants, Postal Service mediators involved in employment cases, and ombuds who are employed by a participating organization).

221. Carl T. Hahn, *Using Evaluative Techniques: The Virginia Approach*, 16 Alternatives to High Cost Litig. 149 (1998).

222. Exon, *Why Ethical Standards Create Chaos*, *supra* note 26, at 419.

The tendency to embrace fairness concepts means that the mediation field is changing. The definition of mediation should change accordingly. Other than potential conflicts of interest, why should a mediator remain neutral and impartial?

The answer lies with Alternative 2: the definition of mediation should be broadened to refer to a conciliatory process of using a third party to assist disputants to reach a desired goal. The new definition of mediation is generic enough to apply to many different mediator styles. The reference to a "desired goal" is adequately flexible to apply to issue deciding, problem solving, and relational objectives—goals indicative of evaluative, facilitative, and transformative mediators or any variation of these main mediator styles.

The new, simplified definition of mediation also removes requirements of mediator impartiality other than conflict of interest concerns. Concurrently, existing Standards would need to be modified to delete the requirements of mediator impartiality. By removing impartiality requirements from corresponding Standards, regulators would enable any and all types of mediator styles and mediation models to comply simultaneously with the broader definition of mediation and the simplified Standards. All mediator styles, therefore, could stand side-by-side with ethical Standards that have deleted requirements of mediator impartiality.

Some scholars may contend that Alternative 2 is impractical and severe because it appears to push the mediation field backward rather than allow it to progress forward. They may argue that mediation is flexible enough to sustain existing definitions of mediation or that ethical opinions can fill the chasms left open by the inadequacies or inconsistencies of Standards.[223]

Professor Michael Moffitt might criticize the broadened definition of mediation, arguing it is not helpful if a descriptive definition lacks the dual components of structure and behavior.[224] According to Professor Moffitt, defining mediators as "third parties, not otherwise involved in a controversy, who assist disputing parties in their negotiations," provides a structural component which identifies the mediator yet fails to limit the broad, sweeping nature of the description to the

223. *See* Paula M. Young, *Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: ABA, ACR, and AAA Adopt Revised Model Standards of Conduct for Mediators*, 5 APPAL. J.L. 195, 197–98, 200 (2006) (acknowledging that the revised Model Standards provide guidance and serve as a foundational framework for states that do not yet have mediation standards and advocating reliance on advisory or ethics opinions for more detailed assistance).

224. Michael Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69, 89 (2005).

\\server05\productn\S\SAN\42-3\SAN301.txt unknown Seq: 30 2-MAY-08 7:50

mediation field.[225] Furthermore, he contends such a definition says "little."[226]

Professor Moffitt's potential criticism fails to take into account that current definitions of mediator—such as "distributive mediator," "facilitative mediator," "community mediator," "family law mediator," and so forth—are qualified. Each qualifying word enhances the behavioral component that may appear lacking in the simplified definition of mediation offered in Alternative 2. Additionally, the definition of "mediator" signifies its limited scope to the mediation field.

Professor Moffitt's concern that a broadened definition of mediation arguably extends to anyone who attempts to resolve a controversy fails to acknowledge other practical difficulties. Without a mandate for mediator licensing, anyone may fit the third party characterization of the simplified definition of mediation. Standards become a critical component to help qualify the special goals and values of mediation. A definition, standing alone, cannot serve as the all-encompassing guide for the mediation practice. It can, however, serve as a flexible point of beginning that does not collide with impartiality requirements.

Additionally, none of the potential criticisms takes into account that most jurisdictions lack enforcement mechanisms. A few states, such as Florida, Georgia, and North Carolina, have specific mechanisms in place to enforce ethical obligations of mediators and address consumer complaints about mediator conduct.[227] Until standardized enforcement mechanisms are commonplace, ethical Standards must be adequate to specifically address the mediator's dilemma regarding mediator style and impartiality.

C. Alternative 3: Redefine Mediation to Suit Mediator Styles—The Contract Approach

Another approach is to differentiate between the two main mediator styles—evaluative and facilitative—and redefine them as separate and independent processes. Rather than broaden the definition of mediation to encompass all types of mediator styles, Alternative 3 proposes the creation of two distinct types of mediation, each with its own narrowed definition.

225. *Id.* at 88–89.

226. *Id.* at 89.

227. *See* Young, *supra* note 223, at n.240.

\\server05\productn\S\SAN\42-5\SAN501.txt unknown Seq: 40 2-MAY-08 7:50

A facilitative as well as transformative mediation could remain as the conventional definition of mediation. It would include the traditional values of party self-determination and mediator impartiality.

Evaluative mediation could be redesignated as its own process called a "Mediated Settlement Conference." The evaluative mediator would not need to behave in a neutral and impartial demeanor. She could engage in all types of evaluative techniques except for coercive conduct.

In conjunction with the modified definitions of mediation, the parties could be presented with a menu of mediator behaviors that they would embrace. This is where mediator styles come into play. Presented with a brief description of evaluative, directive, facilitative, elicitive, empowerer, fixer, and norm-educating styles, compartmentalized within either definition, the parties could assert true control over the process by defining how they want *their* mediator to act and *their* process to be conducted.

Alternative 3 provides both clarity and uniformity in the mediation process because it will satisfy the disputing parties' needs and interests, the mediator's personal values and commercial needs, and the guiding principles set forth in written definitions and Standards. By allowing the participants to handle such preliminary matters before the mediation session begins, participants in essence enter into a contract to select the mediator style and the process.[228] In turn, the parties truly determine the outcome of the mediation from both a procedural and substantive perspective.

To allow parties an opportunity to select the process of their choice, it is necessary to educate them before they engage in the mediation process. The parties need to know what a mediator can and should do. The parties need to understand the concept of mediator styles[229] along with the corresponding processes of either mediation or Mediated Settlement Conference.

228. This is not a new idea. Dwight Golann has devised a set of prescriptions to help evaluative mediators maintain neutrality. Foremost in his suggestions is to allow participants to enter into a contract before beginning the mediation whereby they authorize the mediator to employ a certain style. *See* GOLANN, MEDIATING LEGAL DISPUTES, *supra* note 8, § 10.1.

229. John Bickerman, an attorney-mediator, advocates for this position. John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO HIGH COST LITIG. 70 (1996). He contends that parties should have the independence to select the type of mediator who they think will provide the best mediation service for their kind of dispute, or at least allow the mediator to use a variety of styles as dictated by market forces. *Id.* at 70. Mr. Bickerman also points out that a mediator does not exceed her role of neutrality when she provides

Rather than allow the mediator to educate the parties, as is most often done at the beginning of a mediation, someone who is not part of the specific mediation session could perform the task; possible people include court personnel in court-connected mediation programs, an administrator in a private or neighborhood mediation, or a written pamphlet prepared by any of these people or by a professional mediation organization. The mediation education would create party awareness of appropriate mediator behavior under either process.

1. The Role of a Facilitative Mediator in Mediation

A facilitative mediator may continue to serve under the traditional notions of mediation; she should be able to maintain neutrality and impartiality since her main responsibility is to enhance participant communication by emphasizing their interests. Through efforts to foster participant creativity, problem-solving, and personal evaluation, a facilitative mediator should be able to maintain the objectivity necessary to remain impartial. The mediator cannot, however, seek to ensure a fair result, attempt to balance the participant's power, or promote informed decision-making. Consequently, Standards would need to be modified to fit within the new description of "mediation."

2. The Role of an Evaluative Mediator in a Mediated Settlement Conference

If participants want a more directive mediator, they may choose the Mediated Settlement Conference rather than a traditional mediation. In a Mediated Settlement Conference, the participants could agree at the outset of the mediation to allow certain mediator behavior.

The participants could authorize the mediator to offer evaluation and even go so far as to encourage the parties in one direction. Under this process, the mediator could be authorized to ensure a just and fair result, a balanced process, and advocacy on behalf of a weak party if performed in a non-intimidating manner. Such authorizations mean that the evaluative mediator in this setting need not necessarily maintain impartiality. Standards would need to be modified accordingly.

In a Mediated Settlement Conference, the mediator would be expected to express some sort of evaluation. If the definition does not

"frank assessments" regarding a case. *Id.* The parties can make intelligent decisions based on their positions of being fully informed. *Id.*

require the mediator to be impartial, the mediator could approach the process as though she was facilitating and enhancing party communication as well as encouraging parties to resolve a dispute.

D. Alternative 4: Create a Hierarchy of Values Within Mediation Standards

The fourth and final alternative posits an organizational hierarchy, or prioritization of mediation values, within a single set of Standards. Standards would retain the typical values such as party self-determination, neutral process, impartial third-party mediator, and prohibition of conflicts of interest. The only difference would be to prioritize the values. The single, most important value would essentially trump other values. Some lesser values could trump the least important values. Such an approach is analogous to the posture in the current ABA Model Rules of Professional Conduct wherein Rule 1.6, Confidentiality of Information, specifically trumps all but one designated rule.[230]

The complexity of Alternative 4 lies in the process of determining the most important value. Party self-determination is touted as the fundamental principle of mediation and therefore may be considered the most important value. The notion of informed decision-making, balance of power, and balanced process are inherent parts of party autonomy because arguably a party cannot decide on a final resolution for a mediated dispute unless the party fully comprehends the consequences of that decision. In such a scenario, a mediator could sacrifice her impartiality to ensure that the parties are fully informed of the consequences of their decision so that no party takes advantage of any other party. This is just one example of how an evaluative mediator could direct and guide the parties without the fear of violating the ethical requirements of impartiality.

Alternative 4 would continue to promote the flexibility of various mediator styles and mediation models while concurrently requiring mediators to conform to all Standards. Mediation would continue as a flexible, fluid process during the evolution of ethical Standards and other guidelines necessary to regulate an industry.

230. Language in the following ABA MODEL RULES OF PROF'L CONDUCT illustrates that each of the rules is limited by Rule 1.6: Rules 1.8(f), 1.9(b), 1.10(b), 1.14(c), 2.3(c), 4.1(b), 8.1(b), and 8.3(c). ABA Model Rule 3.3, Candor to the Tribunal, is the only rule that requires disclosure of information otherwise deemed confidential pursuant to Rule 1.6. *Id.* at 3.3(c).

Several scholars already have weighed in on this type of alternative. Professor Michael Moffitt proffers the same basic approach with respect to the revised Model Standards, noting that the revised Model Standards fail to create any "hierarchy of ethical concerns" by disregarding ethical tensions such as those posed in this Article.[231] Professor Moffitt advocates for specific guidance by designating one standard that trumps the others.[232]

Professor Ellen Waldman acknowledges the internal inconsistencies of Standards, especially since they apply to such a far-reaching field in terms of subject matter application and mediator style.[233] Because it is difficult to create an all-encompassing set of Standards to apply to all types of disputes and scenarios, Professor Waldman proposes a "fact-specific, context-specific balancing approach."[234] She explains that mediators should consciously acknowledge mediation values yet determine which values are dominant and which are subordinate.[235] Mediators can engage in this weighing and balancing process by assessing the type of dispute and relational needs of the individuals, including the balance of power and resources.[236] The presence of representatives, such as attorneys, also affects the mediation dimension, especially when the representatives do not appear to be equally competent. Thus, "mediators should strive for . . . conscious, mindful consideration of the values at stake and the construction of a deliberate set of priorities that takes into account the particular circumstances of the case."[237]

Professor Waldman makes a passionate argument in favor of a balancing process by individual mediators based on subject matter and relational factors. While seemingly well-reasoned, it allows for the unfettered discretion of individual mediators. A better approach would be for the Standards to highlight the most important mediation value and then allow mediator freedom to decide how to balance other subordinate values. In this manner, the Standards would provide at least some guidance, yet maintain the flexibility and fluidity inherent in mediations.

231. Michael L. Moffitt, *The Wrong Model, Again: Why the Devil Is Not in the Details of the New Model Standards of Conduct for Mediators*, DISP. RESOL. MAG., Spring 2006, at 31–32.

232. *Id.*

233. Telephone Interview with Ellen Waldman, Professor of Law, Thomas Jefferson Sch. of Law, in San Diego, Cal. (Aug. 9, 2007).

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

VI. Conclusion

For years a dialogue has taken place regarding mediator styles and whether evaluative techniques are appropriate. Although some people may want to continue the dialogue, the simple fact is that mediators assert a variety of styles such as facilitative, evaluative, transformative, or some derivative classification. Mediators have the flexibility to use a variety of styles for a number of reasons—most notably due to the participants' unique needs. Despite choices regarding style, mediators are mandated to serve with impartiality. This Article demonstrates the tension between impartiality requirements and mediator styles most commonly associated with evaluative mediators.

The tension has resulted in the mediator's dilemma. How can a mediator be neutral and impartial when engaged in any and all mediator styles? It is time to address the mediator's dilemma so that we may act progressively as the mediation field matures.

This Article proposes several alternatives to ensure the integrity and credibility of the mediation field. First, for states that do not have Standards, wait and study the mediator's dilemma before adopting impartiality requirements that conflict with mediator styles. Second, broaden the definition of mediation by removing mediator impartiality requirements. Such an approach would permit mediators to be flexible enough to conform to any and all mediator styles. Third, narrow the definition of mediation so that different definitions with correspondingly different mediator duties apply to facilitative and evaluative mediators, the two most common mediator styles. Fourth, create a hierarchy of values within Standards that would allow flexibility while maintaining the rigors of the most important ethical values. Now it is up to the scholars, practicing mediators, regulators, and legislators to begin the dialogue for change and choose the most beneficial alternative.

COMMERCIAL DIVISION

SUPREME COURT, NEW YORK COUNTY

ALTERNATIVE DISPUTE RESOLUTION PROGRAM

STANDARDS OF CONDUCT FOR MEDIATORS

The following Standards of Conduct shall govern all who serve as mediators in cases that undergo mediation pursuant to the Rules ("the ADR Rules") of the Alternative Dispute Resolution Program of the Commercial Division, Supreme Court, New York County ("the ADR Program").[1] Separate Standards of Conduct for Arbitrators and Neutral Evaluators have been issued.

The ADR Program aims to provide an alternative to the formal litigation process that is sound, fair, efficient, expeditious, and inexpensive. To achieve this objective, the Program must have the confidence of the Bar and the public. All activities undertaken pursuant to the ADR Rules will reflect upon the Commercial Division and the court system as a whole. Therefore, the Program must be marked at all times by the highest possible standards of integrity, honesty, fairness, openness, intelligence, and diligence.

STANDARD I
SELF-DETERMINATION

A mediator should recognize that mediation is based on the principle of self-determination.

Self-determination is the fundamental principle of mediation. Mediation is built upon the ability and right of the parties to communicate, assess facts, events, and issues, and make choices for themselves, and, if they wish, to reach an agreement, voluntarily and free of coercion.

---

[1] In these Standards, the Commercial Division has sought to tailor to the particular characteristics of the Program and to implement standards that have gained national recognition and wide acceptance among ADR neutrals, Judges, court administrators, the Bar, and members of the public utilizing these processes. These Standards have been derived from the Model Standards of Conduct for Mediators, a product of the joint labors of the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution.

Ethical Considerations

1. As set forth in Standard VI, a mediator should provide information about the process to the parties. The primary role of the mediator is to foster dialogue and, when desired by the parties, facilitate a voluntary resolution of a dispute. A mediator may identify issues and help parties to communicate and explore options. A mediator should never do anything to undermine an atmosphere of free exchange of views and ideas, or to coerce an agreement.

2. The mediator may facilitate the parties' own engagement in assessment of risks or analysis of legal positions, in private discussions ("the caucus") or in joint sessions, if that will assist the parties to understand options fully. A mediator may also, where appropriate, provide an assessment of the risks associated with litigation or other binding processes.

3. A mediator should encourage balanced discussion and discourage intimidation by either party. A mediator should work to promote each party's understanding of and respect for the perspective, interests, feelings, concerns, and position of each of the other parties, even if they cannot agree.

4. A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement. However, a party in the ADR Program will normally be represented by counsel and the mediator should provide full opportunity to parties and their attorneys to consult with each other and, if necessary, for both to consult with outside professionals.

5. If the mediator discovers an intentional abuse of the process, the mediator may discontinue the process.

STANDARD II
IMPARTIALITY

A mediator should conduct the mediation in an impartial manner.

A mediator should act at all times with the utmost of impartiality and evenhandedness. A mediator should mediate only those matters in which he/she can remain impartial and evenhanded. The mediator should withdraw if unable to do so at any time.

Ethical Considerations

1. A mediator should avoid all conduct that gives the appearance of partiality toward one of the parties. A mediator should avoid favoritism or prejudice based on the parties' background, prominence, personal characteristics, economic importance, performance at the mediation, or any other factors. The quality of the mediation process is enhanced and the reputation of the Program protected when the parties have confidence in the impartiality of the mediator.

2. The principle of impartiality does not prohibit the mediator from engaging in caucuses in accordance with these Standards as part of the mediation process.

STANDARD III
CONFLICTS OF INTEREST

A mediator should decline any appointment if acceptance would create a conflict of interest. Before accepting an appointment, a mediator should disclose all potential conflicts of interest. After such disclosure, the mediator may accept the appointment if all parties so request. The mediator should avoid conflicts of interest during and even after the mediation.

A mediator offered an appointment in a case should comply with the ADR Rules regarding conflicts of interest. A mediator should review his/her past or present professional and other relationships, including with attorneys for parties and parents, subsidiaries, and affiliates of corporate parties, and should decline the appointment if the review reveals the existence of a conflict of interest. Consistent with the principle of self-determination by mediating parties, a mediator who contemplates accepting an appointment should disclose to all parties all potential conflicts of interest that could reasonably be seen as raising a question about impartiality. If in doubt, the mediator should err on the side of disclosure. If all parties agree to mediate after such disclosure, the mediator may proceed. If, however, the conflict of interest or potential conflict would cast serious doubt on the integrity of the process or the Program, the mediator should decline the appointment.

A mediator should avoid conflicts of interest during and even after the mediation. Before or during the mediation the mediator should not discuss with any party future retention in any capacity.

Ethical Considerations

1. If, during a mediation, the mediator discovers a conflict, the mediator should notify the Program Administration and counsel. Unless the mediator, the parties, and the Program Administration all give their informed consent to the mediator's continuation and continuation would not cast serious doubt on the integrity of the process or the Program, the mediator should withdraw.

2. A mediator should not recommend the services of particular professionals to assist the parties and counsel in the mediation unless a request for a recommendation is made jointly by all parties and provided that in so recommending the mediator does not engage in a conflict of interest. A mediator may make reference to professional referral services or associations that maintain rosters of qualified professionals.

STANDARD IV
COMPETENCE

A mediator should mediate only when he/she has the qualifications necessary to satisfy the reasonable expectations of the parties.

In principle, any person may be selected as a mediator, provided that the parties are satisfied with the mediator's qualifications. However, training and experience are necessary for effective mediation. All members of the Panel of Mediators should comply with the Division's training standards. Parties in the Program are free to utilize mediators not listed in the Panel. Any person who offers to serve as mediator in a case represents that he/she has the training and competency to mediate effectively. If the mediator in fact lacks that ability, due to the complexity or difficulty of the matter or other factors, the mediator should decline the appointment.

STANDARD V
CONFIDENTIALITY

A mediator should comply with the ADR Rules regarding confidentiality and should respect the reasonable expectations of the parties on that subject.

The ADR Rules provide for confidentiality in mediation, recognizing that confidentiality is essential to the process. Mediators should at all times comply with these Rules. The parties' expectations of confidentiality generally depend on the Rules and any other rules or law providing for confidentiality, the circumstances of the mediation, and agreements they may make. The parties may provide for additional levels of confidentiality beyond that guaranteed in the Rules and such agreement should be respected. The mediator should not disclose any information that a party, in accordance with the foregoing, reasonably expects to be confidential unless given permission by the confiding party or required by law or authorized by the Rules.

Ethical Considerations

1. At the outset, the mediator should explain to all parties the principle of confidentiality, with regard to both joint sessions and caucuses.

2. If a party conveys to the mediator in a caucus information that the mediator knows or believes the other party to the case does not possess, the mediator should exercise the utmost diligence to prevent revelation of that information to the other party unless the communicating party has specifically agreed to disclosure.

3. A mediator should not disclose confidential information to the Program Administration or the assigned Justice, including with regard to the merits of the case, settlement offers, and how the parties acted in the process, except that, as provided in the ADR Rules, the mediator may report violations of the Rules to the Administration.

4. Confidentiality should not be construed to prohibit effective monitoring or evaluation of the Program by the Program Administration. Thus, a mediator may report to the Administration, in general terms, whether the process is continuing and the future schedule for the proceeding. Under appropriate circumstances, the Program Administration may allow researchers access to general statistical data and, with the specific permission of all parties, individual case files, observations of live mediations, and interviews with participants. Similarly, mentors and trainees may observe live mediations, but only with permission of all parties and subject to the ADR Rules on confidentiality.

5. A mediator should not, at any time, use confidential information acquired during the ADR process to gain personal advantage or advantage for others, or to affect adversely the interests of another.

STANDARD VI
QUALITY OF THE PROCESS

A mediator should conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination.

A mediator should work to ensure a process of high quality. This requires a commitment by the mediator to fairness, diligence, sensitivity toward the parties, and maintenance of an atmosphere of respect among the parties. The mediator should guarantee that there is adequate and fair opportunity for counsel and each party to participate in discussions. The mediator should observe deadlines and handle his/her responsibilities with diligence and expedition. The parties decide when and under what conditions they will reach an agreement.

Ethical Considerations

1. A mediator should agree to accept an appointment only when able to commit the time and attention essential to a fair and effective process. If the mediator may be too busy with other matters to do so, then the proposed appointment should be declined. If after acceptance of the appointment, circumstances develop that prevent the mediator from serving, the mediator should withdraw. Withdrawal may cause significant inconvenience for the parties; therefore, the mediator should exercise diligence to determine availability in advance of commencement of the proceeding.

2. A mediator should ensure that deadlines set forth in the ADR Rules are adhered to and shall keep the Program Administration informed about the schedule for the process. A mediator should not allow a mediation to be delayed and should consult with the Administration if the process is being delayed.

3. A mediator should treat parties and counsel with sensitivity, civility and respect and should encourage parties and counsel to treat each other in the same way. A mediator should

foster cooperation and work to build reasonable trust among the parties in the process. A mediator should provide all counsel and parties with an adequate and fair opportunity to state positions, opinions and interests.

4. The primary purpose of the mediator is to facilitate communication by or among the parties, their development and assessment of options, and a voluntary agreement. A mediator should refrain from providing professional advice and should at all times distinguish between the roles of mediator and adviser. A mediator may, when appropriate, recommend that counsel and parties seek outside professional advice or consider resolving the dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who at the request of the parties agrees to undertake an additional dispute resolution role in the same matter is governed by other Standards of Conduct.

5. A mediator should explain to all participants at the outset of the process the procedures that will be followed in the process and what the mediator's role will be, including, insofar as practical, the extent to which the mediator will undertake an evaluative function. (Within the ADR field, there are differences of view as to whether, when, and to what degree a mediator may assume an evaluative approach.) The mediator should make reasonable efforts during the process to explain to the parties the mediator's role and these procedures.

6. A mediator should withdraw from a mediation or postpone a session if the mediation is being used to further illegal activity, or if a party or counsel is unable to participate due to physical or mental incapacity. Where authorized by the Rules or required by law a mediator may or shall disclose to appropriate authorities illegal or unprofessional activity being engaged in or threatened by a party to the mediation or counsel.

7. A mediator's behavior should not be distorted by a desire for a high settlement rate.

8. A mediator should be mindful of the needs of persons with disabilities, including but not limited to, obligations under the Americans with Disabilities Act.

STANDARD VII
COMPENSATION

At the outset of the mediation, the mediator shall explain the rules governing compensation, which are set forth in the ADR Rules. A mediator should not seek compensation in other circumstances.

At present, the Program provides for an initial mandatory mediation session or sessions totaling four hours (excluding time spent in arranging and preparing for the mediation). At

the conclusion of the four hours, any party may bring the mediation process to an end. If the parties agree to continue, the Panel mediator shall be compensated as provided in the rules. The Rules also govern compensation paid to a Panel mediator who is selected by the parties as substitute for a mediator designated by the ADR Coordinator. All Panel mediators shall comply with these Rules. The mediator shall explain these rules to the parties and counsel before the mediation begins.

Ethical Considerations

1. A Panel mediator who accepts an appointment should not, directly or indirectly, request from the parties any compensation other than as provided in the ADR Rules.

2. A mediator should not accept a fee or other benefit for referral of a matter to anyone.

3. A mediator who joins the Panel should provide ADR services in accordance with the ADR Rules. Such a mediator should not unreasonably decline to accept appointments upon request of the Program Administration. If the standards of compensation set forth in the Rules are not considered satisfactory by the mediator, he or she shall withdraw from the Panel.

STANDARD VIII
OBLIGATIONS TO THE MEDIATION PROCESS

Mediators are regarded as knowledgeable about the process of mediation. They should use their expertise to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities. Mediators should cooperate with efforts of court administrators to promote adequate professional skills among those who function as mediators. When serving in the Program, mediators should conduct themselves so as to protect and promote the integrity and standing of the Program.

Dated: June 15, 2008

HON. JACQUELINE W. SILBERMANN
ADMINISTRATIVE JUDGE

MODEL STANDARDS OF CONDUCT FOR MEDIATORS

AMERICAN BAR ASSOCIATION

AMERICAN ARBITRATION ASSOCIATION

ASSOCIATION FOR CONFLICT RESOLUTION

AUGUST 2005

The Model Standards of Conduct for Mediators
August 2005

The *Model Standards of Conduct for Mediators* was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution[1]. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.[2] Both the original 1994 version and the 2005 revision have been approved by each participating organization.[3]

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term "shall" in a Standard indicates that the mediator must follow the practice described. The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term "mediator" is understood to be inclusive so that it applies to co-mediator models.

---

[1] The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

[2] Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

[3] Proposed language. No organization as of April 10, 2005 has reviewed or approved the 2005 Revision.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each party or each party's 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.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

2. A mediator's fee arrangement should be in writing unless the parties request otherwise.

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

1. A mediator should not enter into a fee agreement 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.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

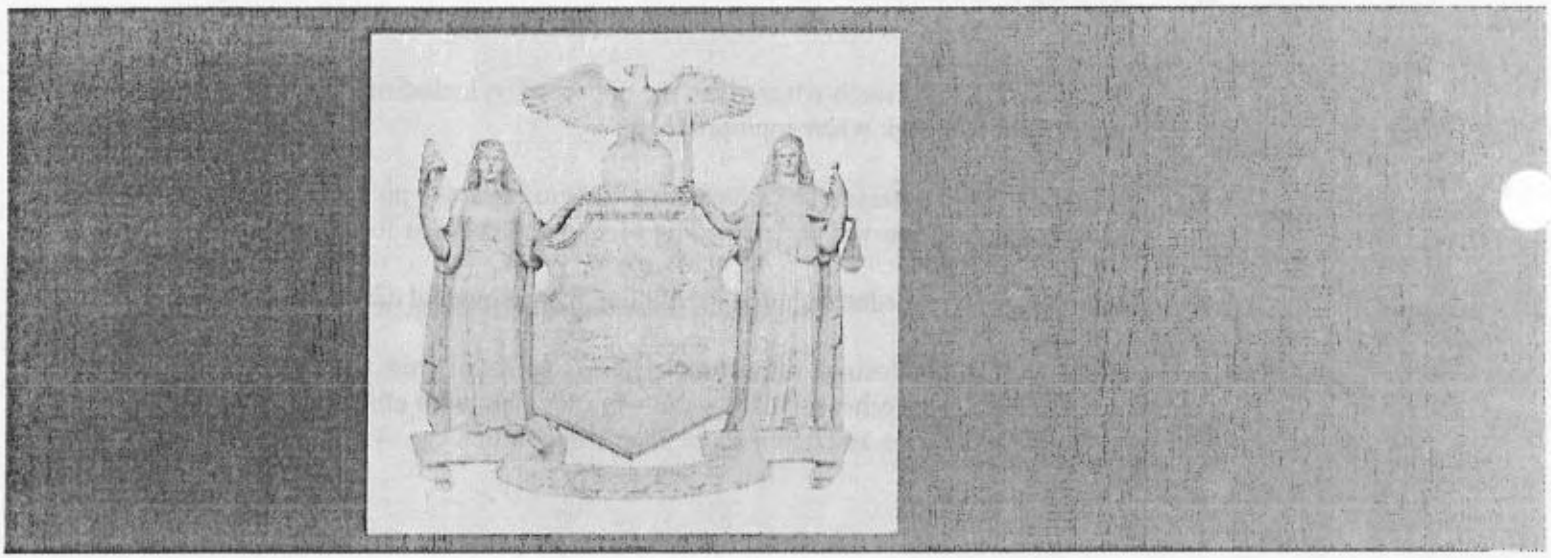
4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

NEW YORK STATE UNIFIED COURT SYSTEM

PART 1200 –
RULES OF PROFESSIONAL CONDUCT

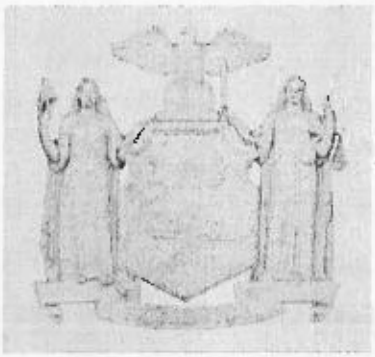


APRIL 1, 2009

NEW YORK STATE UNIFIED COURT SYSTEM

PART 1200 –

RULES OF PROFESSIONAL CONDUCT



APRIL 1, 2009

THESE RULES OF PROFESSIONAL CONDUCT WERE PROMULGATED AS JOINT RULES OF THE APPELLATE DIVISIONS OF THE SUPREME COURT, EFFECTIVE APRIL 1, 2009. THEY SUPERSEDE THE FORMER PART 1200 (DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY).

TABLE OF CONTENTS

RULE 1.0: TERMINOLOGY 1

RULE 1.1: COMPETENCE 2

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER 3

RULE 1.3: DILIGENCE 3

RULE 1.4: COMMUNICATION 3

RULE 1.5: FEES AND DIVISION OF FEES 4

RULE 1.6: CONFIDENTIALITY OF INFORMATION 5

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS 6

RULE 1.8: CURRENT CLIENTS: SPECIFIC CONFLICT OF INTEREST RULES 6

RULE 1.9: DUTIES TO FORMER CLIENTS 8

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST 8

RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES 9

RULE 1.12: SPECIFIC CONFLICTS OF INTEREST FOR FORMER JUDGES, ARBITRATORS, MEDIATORS OR OTHER THIRD-PARTY NEUTRALS 10

RULE 1.13: ORGANIZATION AS CLIENT 11

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY 11

RULE 1.15: PRESERVING IDENTITY OF FUNDS AND PROPERTY OF OTHERS; FIDUCIARY RESPONSIBILITY; COMMINGLING AND MISAPPROPRIATION OF CLIENT FUNDS OR PROPERTY; MAINTENANCE OF BANK ACCOUNTS; RECORD KEEPING; EXAMINATION OF RECORDS 12

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION 14

RULE 1.17: SALE OF LAW PRACTICE 16

RULE 1.18: DUTIES TO PROSPECTIVE CLIENTS 17

RULE 2.1: ADVISOR 18

RULE 2.2: [RESERVED] 18

RULE 2.3: EVALUATION FOR USE BY THIRD PERSONS 18

RULE 2.4: Lawyer Serving as Third-Party Neutral . . . 18
RULE 3.1: Non-Meritorious Claims And Contentions . . . 18
RULE 3.2: Delay of Litigation . . . 19
RULE 3.3: Conduct Before a Tribunal . . . 19
RULE 3.4: Fairness to Opposing Party and Counsel . . . 19
RULE 3.5: Maintaining and Preserving the Impartiality of Tribunals and Jurors . . . 20
RULE 3.6: Trial Publicity . . . 21
RULE 3.7: Lawyer As Witness . . . 22
RULE 3.8: Special Responsibilities of Prosecutors and Other Government Lawyers . . . 22
RULE 3.9: Advocate in Non-Adjudicative Matters . . . 23
RULE 4.1: Truthfulness In Statements To Others . . . 23
RULE 4.2: Communication With Person Represented By Counsel . . . 23
RULE 4.3: Communicating With Unrepresented Persons . . . 23
RULE 4.4: Respect for Rights of Third Persons . . . 23
RULE 4.5: Communication After Incidents Involving Personal Injury or Wrongful Death . . . 23
RULE 5.1: Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers . . . 24
RULE 5.2: Responsibilities of a Subordinate Lawyer . . . 24
RULE 5.3: Lawyer's Responsibility for Conduct of Nonlawyers . . . 24
RULE 5.4: Professional Independence of a Lawyer . . . 25
RULE 5.5: Unauthorized Practice of Law . . . 25
RULE 5.6: Restrictions On Right To Practice . . . 26
RULE 5.7: Responsibilities Regarding Nonlegal Services . . . 26
RULE 5.8: Contractual Relationship Between Lawyers And Nonlegal Professionals . . . 26
RULE 6.1: Voluntary Pro Bono Service . . . 28
RULE 6.2: [Reserved] . . . 28
RULE 6.3: Membership in a Legal Services Organization . . . 28
RULE 6.4 Law Reform Activities Affecting Client Interests . . . 28
RULE 6.5: Participation in Limited Pro Bono Legal Service Programs . . . 28
RULE 7.1: Advertising . . . 29

RULE 7.2: PAYMENT FOR REFERRALS 31

RULE 7.3: SOLICITATION AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT 33

RULE 7.4: IDENTIFICATION OF PRACTICE AND SPECIALTY 34

RULE 7.5: PROFESSIONAL NOTICES, LETTERHEADS, AND SIGNS 35

RULE 8.1: CANDOR IN THE BAR ADMISSION PROCESS 36

RULE 8.2: JUDICIAL OFFICERS AND CANDIDATES 36

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT 36

RULE 8.4: MISCONDUCT 37

RULE 8.5: DISCIPLINARY AUTHORITY AND CHOICE OF LAW 37

PART 1200 - RULES OF PROFESSIONAL CONDUCT

RULE 1.0:

TERMINOLOGY

(a) "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

(b) "Belief" or "believes" denotes that the person involved actually believes the fact in question to be true. A person's belief may be inferred from circumstances.

(c) "Computer-accessed communication" means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

(d) "Confidential information" is defined in Rule 1.6.

(e) "Confirmed in writing" denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(f) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

(g) "Domestic relations matter" denotes representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support or alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding.

(h) "Firm" or "law firm" includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.

(i) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

(j) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

(k) "Knowingly," "known," "know," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(l) "Matter" includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, ar-

rest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

(m) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional legal corporation or a member of an association authorized to practice law.

(n) "Person" includes an individual, a corporation, an association, a trust, a partnership, and any other organization or entity.

(o) "Professional legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(p) "Qualified legal assistance organization" means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof.

(q) "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer. When used in the context of conflict of interest determinations, "reasonable lawyer" denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.

(r) "Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(s) "Reasonably should know," when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(t) "Screened" or "screening" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law.

(u) "Sexual relations" denotes sexual intercourse or the touching of an intimate part of the lawyer or another person for the purpose of sexual arousal, sexual gratification or sexual abuse.

(v) "State" includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

(w) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

(x) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording and email. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

RULE 1.1:

COMPETENCE

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

RULE 1.2:

SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate this Rule by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

RULE 1.3:

DILIGENCE

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not neglect a legal matter entrusted to the lawyer.

(c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.

RULE 1.4:

COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of:

(i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;

(ii) any information required by court rule or other law to be communicated to a client; and

(iii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.12:
SPECIFIC CONFLICTS OF INTEREST FOR FORMER JUDGES, ARBITRATORS, MEDIATORS OR OTHER THIRD-PARTY NEUTRALS

(a) A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.

(b) Except as stated in paragraph (e), and unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:

(1) an arbitrator, mediator or other third-party neutral; or

(2) a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral.

(c) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral.

(d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also, the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. *See* Rule 1.11, Comment [4]. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Canons have the same meaning.

[2] Like a former judge, a lawyer who has served as an arbitrator, mediator or other third-party neutral may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consents, confirmed in writing. *See* Rules 1.0(j), (e). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. *See* Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not obtain information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Paragraph (d) therefore provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in paragraph (d). "Screened" and "screening" are defined in Rule 1.0(t).

[4A] The bookkeeping and accounting problems that may arise from prohibiting a personally disqualified lawyer from being apportioned a share of the fees from a matter make it inadvisable to impose an unqualified rule prohibiting this practice. Although this Rule does not prohibit a personally disqualified lawyer from being apportioned a share of the fees in the matter, if the disqualified lawyer's share of the fee would represent a significant increase in that lawyer's compensation over what the lawyer would otherwise earn, permitting the lawyer to be apportioned a share in the fee may create incentives that would call into question the effectiveness of the screening procedures. In such situations, a firm seeking to avoid imputed disqualification under this Rule would be well-advised to prohibit the personally disqualified lawyer from sharing in the fees in the matter.

[4B] A firm seeking to avoid disqualification under this Rule should also consider its ability to implement, maintain, and monitor the screening procedures permitted by paragraph (d) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will be effective to avoid imputed disqualification, a firm

should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. The size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraph (d).

[4C] In order to prevent any lawyer in the firm from acquiring confidential information about the matter from the newly associated lawyer, it is essential that notification be given and screening procedures implemented promptly. If the matter requiring screening is already pending before the personally disqualified lawyer joins the firm, the procedures required by this Rule should be implemented before the lawyer joins the firm. If a newly associated lawyer joins a firm before a conflict requiring screening arises, the requirements of this Rule should be satisfied as soon as practicable after the conflict arises. If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the personally disqualified lawyer and others in the firm in a given matter.

[5] Notice to the parties and any appropriate tribunal, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

RULE 2.1:
ADVISOR

In representing a client, a lawyer shall exercise professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.

Comment

Scope of Advice

[1] When acting as an advisor, a lawyer must be mindful that a client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. Nevertheless, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibilities as advisor may include the responsibility to indicate that more may be involved than strictly legal considerations. For the allocation of responsibility in decision making between lawyer and client, *see* Rule 1.2.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial or public relations specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer shall make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the

representation. Similarly, when a matter is likely to involve litigation, it may be advisable under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

law firm will be able to provide competent and diligent representation in the matter.

(e) A person who:

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client with the meaning of paragraph (a).

RULE 2.1:

ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.

RULE 2.2:

[RESERVED]

RULE 2.3:

EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Unless disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is protected by Rule 1.6.

RULE 2.4:

LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

RULE 3.1:

NON-MERITORIOUS CLAIMS AND CONTENTIONS

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer's conduct is "frivolous" for purposes of this Rule if:

(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely

RULE 2.4:
LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. In addition to representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A "third-party neutral" is a person such as a mediator, arbitrator, conciliator or evaluator or a person serving in another capacity that assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers although, in some court-connected contexts, only lawyers are permitted to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that applies either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as a third-party neutral and as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved

and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral may be asked subsequently to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (*see* Rule 1.0(w)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

RULE 3.1:
NON-MERITORIOUS CLAIMS AND CONTENTIONS

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer's conduct is "frivolous" for purposes of this Rule if:

(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or

(3) the lawyer knowingly asserts material factual statements that are false.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of a claim or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Lawyers are required, however, to inform themselves about the facts of their clients' cases and the applicable law, and determine that they can make good-faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the action has no substantial purpose other than to harass or maliciously injure a person, or if the lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification or reversal of existing law (which includes the establishment of new judge-made law).

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

to harass or maliciously injure another; or

(3) the lawyer knowingly asserts material factual statements that are false.

RULE 3.2:

DELAY OF LITIGATION

In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

RULE 3.3:

CONDUCT BEFORE A TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

RULE 3.4:

FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;

(2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

(4) knowingly use perjured testimony or false evidence;

(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or

(6) knowingly engage in other illegal conduct or

RULE 3.3:
CONDUCT BEFORE A TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. *See* Rule 1.0(w) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law and may not vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or by evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein because litigation documents ordinarily present assertions by the client or by someone on the client's behalf and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be based on the lawyer's own knowledge, as in an affidavit or declaration by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. *See also* Rule 8.4(b), Comments [2]-[3].

Legal Argument

[4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Paragraph (a)(2) requires an advocate to disclose directly adverse and controlling legal authority that is known to the lawyer and that has not been disclosed by the opposing party. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it.

Offering or Using False Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer or use evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce or use false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not (i) elicit or otherwise permit the witness to present testimony that the lawyer knows is false or (ii) base arguments to the trier of fact on evidence known to be false.

[6A] The prohibition against offering and using false evidence ordinarily requires a prosecutor to correct any false evidence that has been offered by the government, inform the tribunal when the prosecutor reasonably believes that a prosecution witness has testified falsely, and correct any material errors in a presentence report that are detrimental to a defendant.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If the criminal defendant insists on testifying and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form. The lawyer's ethical duty may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in criminal cases. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

[8] The prohibition against offering or using false evidence applies only if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's actual knowledge that evidence is false, however, can be inferred from the circumstances. *See* Rule 1.0(k) for the definition of "knowledge." Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) prohibits a lawyer from offering or using evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes to be false. Offering such proof may impair the integrity of an adjudicatory proceeding. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of a criminal defense client where the lawyer reasonably believes, but does not know, that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the criminal defendant's decision to testify.

Remedial Measures

[10] A lawyer who has offered or used material evidence in the belief that it was true may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done, such as making a statement about the matter to the trier of fact, ordering a mistrial, taking other appropriate steps or doing nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement. *See* Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. The client could therefore in effect coerce the lawyer into being a party to a fraud on the court.

Preserving Integrity of the Adjudicative Process

[12] Lawyers have a special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process. Accordingly, paragraph (b) requires a lawyer who represents a client in an adjudicative proceeding to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding. Such conduct includes, among other things, bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding; unlawfully destroying or concealing documents or other evidence related to the proceeding; and failing to disclose information to the tribunal when required by law to do so. For example, under some circumstances a person's omission of a material fact may constitute a crime or fraud on the tribunal.

[12A] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered or used the evidence in question. A lawyer's duty to take reasonable remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

[13] [Omitted.]

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the opposing position is expected to be presented by the adverse party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there may be no presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the opposing party, if absent, just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] A lawyer's compliance with the duty of candor imposed by this Rule does not automatically require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer, however, may be required by Rule 1.16(d) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. *See also* Rule 1.16(c) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

RULE 3.4:
FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;

(2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

(4) knowingly use perjured testimony or false evidence;

(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or

(6) knowingly engage in other illegal conduct or conduct contrary to these Rules;

(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:

(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or

(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;

(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;

(d) in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness;

(3) assert a personal opinion as to the justness of a cause, the credibility of a

witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; or

(c) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructionist tactics in discovery procedure, and the like. The Rule applies to any conduct that falls within its general terms (for example, "obstruct another party's access to evidence") that is a crime, an intentional tort or prohibited by rules or a ruling of a tribunal. An example is "advis[ing] or caus[ing] a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein."

[2] Documents and other evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Paragraph (a) protects that right. Evidence that has been properly requested must be produced unless there is a good-faith basis for not doing so. Applicable state and federal law may make it an offense to destroy material for the purpose of impairing its availability in a pending or reasonably foreseeable proceeding, even though no specific request to reveal or produce evidence has been made. Paragraph (a) applies to evidentiary material generally, including computerized information.

[2A] Falsifying evidence, dealt with in paragraph (a), is also generally a criminal offense. Of additional relevance is Rule 3.3(a)(3), dealing with use of false evidence in a proceeding before a tribunal. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] Paragraph (b) applies generally to any inducement to a witness that is prohibited by law. It is not improper to pay a witness's reasonable expenses or to compensate an expert witness on terms permitted by law. However, any fee contingent upon the content of a witness' testimony or the outcome of the case is prohibited.

[3A] Paragraph (d) deals with improper statements relating to the merits of a case when representing a client before a tribunal: alluding to irrelevant matters, asserting personal

knowledge of facts in issue, and asserting a personal opinion on issues to be decided by the trier of fact. *See also* Rule 4.4, prohibiting the use of any means that have no substantial purpose other than to embarrass or harm a third person. However, a lawyer may argue, upon analysis of the evidence, for any position or conclusion supported by the record. The term "admissible evidence" refers to evidence considered admissible in the particular context. For example, admission of evidence in an administrative adjudication or an arbitration proceeding may be governed by different standards than those applied in a jury trial.

[4] In general, a lawyer is prohibited from giving legal advice to an unrepresented person, other than the advice to secure counsel, when the interests of that person are or may have a reasonable possibility of being in conflict with the interests of the lawyer's client. *See* Rule 4.3.

[5] The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), the lawyer's threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done. But extortion is committed if the threat involves conduct of the third person unrelated to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute).

RULE 3.9:
ADVOCATE IN NON-ADJUDICATIVE MATTERS

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending non-adjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

Comment

[1] In representation before bodies such as legislatures, municipal councils and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument regarding the matters under consideration. The legislative body or administrative agency is entitled to know that the lawyer is appearing in a representative capacity. Ordinarily the client will consent to being identified, but if not, such as when the lawyer is appearing on behalf of an undisclosed principal, the governmental body at least knows that the lawyer is acting in a representative capacity as opposed to advancing the lawyer's personal opinion as a citizen. Representation in such matters is governed by Rule 4.1 through 4.4, and 8.4.

[1A] Rule 3.9 does not apply to adjudicative proceedings before a tribunal. Court rules and other law require a lawyer, in making an appearance before a tribunal in a representative capacity, to identify the client or clients and provide other information required for communication with the tribunal or other parties.

[2] [Omitted.]

[3] [Omitted.]

RULE 4.1:
TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. As to dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, *see* Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category; so is the existence of an undisclosed principal, except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Illegal or Fraudulent Conduct by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client as to conduct that the lawyer knows is illegal or fraudulent. Ordinarily, a lawyer can avoid assisting a client's illegality or fraud by withdrawing from the representation. *See* Rule 1.16(c)(2). Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. *See* Rules 1.2(d), 1.6(b)(3).

RULE 3.9:

ADVOCATE IN NON-ADJUDICATIVE MATTERS

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending non-adjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

RULE 4.1:

TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

RULE 4.2:

COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

RULE 4.3:

COMMUNICATING WITH UNREPRESENTED PERSONS

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

RULE 4.4:

RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

RULE 4.5:

COMMUNICATION AFTER INCIDENTS INVOLVING PERSONAL INJURY OR WRONGFUL DEATH

(a) In the event of a specific incident involving potential claims for personal injury or wrongful death, no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm representing actual or potential defendants or entities that may defend and/or indemnify said defendants, before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after

main in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

(c) Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners.

(d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(e) A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided:

(1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm;

(2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;

(3) the domain name does not imply an ability to obtain results in a matter; and

(4) the domain name does not otherwise violate these Rules.

(f) A lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate these Rules.

RULE 8.1:
Candor in the Bar Admission Process

(a) A lawyer shall be subject to discipline if, in connection with the lawyer's own application for admission to the bar previously filed in this state or in any other jurisdiction, or in connection with the application of another person for admission to the bar, the lawyer knowingly:

(1) has made or failed to correct a false statement of material fact; or

(2) has failed to disclose a material fact requested in connection with a lawful demand for information from an admissions authority.

RULE 8.2:
Judicial Officers and Candidates

(a) A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Part 100 of the Rules of the Chief Administrator of the Courts.

RULE 8.3:
Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

(c) This Rule does not require disclosure of:

(1) information otherwise protected by Rule 1.6;

or

(2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

RULE 8.4:

MISCONDUCT

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability:

(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

RULE 8.5:

DISCIPLINARY AUTHORITY AND CHOICE OF LAW

(a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

(b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

(1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) For any other conduct:

(i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and

(ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Mediation Clauses and Agreements

SIMPLE MEDIATION CLAUSE

The parties agree that any claim or dispute between them or against any agent, employee, successor or assign of the other, whether related to this agreement or otherwise, and any claim or dispute related to this agreement or to the relationship or duties contemplated under this agreement, including the validity of this clause, shall be resolved, if not by negotiation, then first by mediation, by Resolve Mediation Services, Inc., 575 Lexington Avenue, 10th Floor, New York, NY 10022-6117, (212) 355-6527 (http://www.mediators.com) under the mediation process provided by that neutral service provider. In the event of a declaration of an impasse by Resolve Mediation Services, Inc., the parties may proceed to litigation in the forum provided below.

SAMPLE MEDIATION CLAUSE

(Empowering Mediator, Where Concerned that Dispute Dynamics would Impede Even Selection of Mediator or Determination of Forum Location, etc.)

If a dispute between the parties cannot be resolved by informal meetings and discussions within seven days after commencement thereof, unless extended by both parties, either party to this Agreement may elect to exercise its right to require mediation of the dispute. During mediation, the parties agree to negotiate in good faith as to the matter submitted to mediation. In such event, the parties shall either: (i) notify Resolve Mediation Services, Inc., 575 Lexington Avenue, 10th Floor, New York, NY 10022-6117 (212) 355-6527, fax (212) 753-0396 (http://www.mediators.com) of the need for mediation and request mediation services or (ii) select such other mediator or service provider upon whom the parties may agree or (iii) if the parties cannot agree on a single mediator, each shall appoint one mediator and the two mediators shall appoint a third mediator who may, singly or with each of the other mediators, conduct the mediation.

No mediator shall be an employee, officer, Board member, consultant, supplier or customer or otherwise affiliated with a party to this Agreement. The mediator shall be a neutral party who is reasonably qualified to act as a mediator with respect to the negotiation of Agreements similar to this Agreement or with respect to the dispute in question, as applicable.

Each party shall share equally in the out-of-pocket costs for mediation; provided that the mediator shall be empowered to require one party to pay more than one-half of the expenses if the mediator determines, in his or her sole discretion, that such party is not negotiating in good faith in the mediation process.

The location of the mediation and specific procedures relating to the mediation shall be determined by Resolve Mediation Services, Inc., or such other mediator(s) selected by the parties, and each party agrees to comply with all such process related decisions, directions, instructions and procedures made or established in good faith by the mediator. Any mediated resolution shall be as consistent as practicable with the existing agreements between the parties and shall not serve to modify, amend or otherwise change their respective rights under such existing agreements, unless otherwise expressly indicated.

If the parties are unable to come to a resolution of the dispute within the lesser of 45 days after appointment of a mediator or within 15 days after commencement of the first mediation session, unless extended by agreement of the parties, either party may … {Alternative A: demand arbitration} {Alternative B: commence litigation}

SAMPLE MEDIATION CLAUSE

(Empowering Mediator, Where Concerned that Dispute Dynamics would Impede Even Selection of Mediator or Determination of Forum Location, etc.)

If a dispute between the parties cannot be resolved by informal meetings and discussions within seven days after commencement thereof, unless extended by both parties, either party to this Agreement may require mediation of the dispute, and shall give notice to the other party of its election of this right to mediate. In such event, the parties shall notify Resolve Mediation Services, Inc., 575 Lexington Avenue, 10th Floor, New York, NY 10022-6117 (212) 355-6527, fax (212) 753-0396 (http://www.mediators.com) of the need for mediation and request its mediation services. During mediation, the parties agree to negotiate in good faith as to the matter submitted to mediation. Each party shall share equally in the out-of-pocket costs for mediation.

The location of the mediation and specific procedures relating to the mediation shall be determined by Resolve Mediation Services, Inc., and each party agrees to comply with all such process related decisions, directions, instructions and procedures made or established in good faith by the mediator. Any mediated resolution shall be as consistent as practicable with the existing agreements between the parties and shall not serve to modify, amend or otherwise change their respective rights under such existing agreements, unless otherwise expressly indicated.

If the parties are unable to come to a resolution of the dispute within the lesser of 90 days after appointment of a mediator or within 45 days after commencement of the first mediation session, unless extended by agreement of the parties, either party may … {Alternative A: demand arbitration} {Alternative B: commence litigation}

MEDIATION AGREEMENT

AGREEMENT, made as of May 12, 2009 between and among Resolve Mediation Services, Inc., a New York corporation ("Resolve") and Simeon H. Baum, 575 Lexington Avenue, 10th Floor, New York, NY 10022-6113 (collectively referred to as the "Mediator"), and [Name] (Participant I), and [Name] (collectively referred to as Participant II) and [Name] (Participant III), and [Name] (collectively referred to as Participant IV) (all Participants are collectively referred to hereinafter as the "Participants").

WHEREAS, [Insert pre-conditions to mediation, including agreement providing for mediation of dispute]

NOW, THEREFORE, in consideration of the premises and of the covenants and agreements contained herein, the parties agree as follows:

THE MEDIATION PROCESS

1. Mediation is a collaborative process in which parties (here, the Participants) work together with the aid of a neutral and impartial person (the Mediator) to find a mutually acceptable negotiated resolution of their dispute.

2. Mediation has at times been called a "non-binding" process because the Mediator makes no binding adjudication, and the Participants are not obligated to agree to any proposals that are made during the mediation. During the course of the mediation, the Participants may express their positions; reflect upon the strengths and weaknesses of these positions; seek to understand the other Participant's perspectives; identify the issues involved in the dispute; identify and explore interests affected by and relating to the dispute and its possible resolutions; and explore creative options for resolving the dispute. Mediation is a "binding process" to the extent that the mediation produces an agreement of the parties with the binding effect of any contract.

3. In mediation, a series of meetings is held until resolution is reached on all issues, or until there is a joint determination that no resolution can be reached through this mediated negotiation process. Meetings may be held jointly with Mediator and all Participants, or in caucus where the Mediator meets privately with fewer than all Participants. Similarly, prior to the first mediation session and thereafter, the Mediator and one or more Participants might communicate by telephone or through written correspondence. The content of each meeting, phone call and communication is confidential and may not be disclosed to any person not a party to that meeting or communication unless with authorization of all Participants who were parties to the communication in question (whether it occurred in joint session, caucus, by telephone or otherwise).

4. [Subject to provisions in any agreement providing for mediation] The Mediator and any Participant may withdraw from the mediation at any time and for any reason. Nevertheless, the Participants are encouraged to use their best efforts to stay with the process and let it work, and to remain in mediation if the Mediator suggests that it is worth continuing with the mediation efforts.

5. To maximize the effectiveness of the process, Participants agree that they shall have present at each scheduled mediation session the person with full authority to settle this matter and with capacity to reevaluate Participant's position and authority to change position, if appropriate. Participants are encouraged to consult with the Mediator in advance of the mediation session to identify the most appropriate persons to attend the mediation session.

THE MEDIATOR'S ROLE

6. The Mediator's task is to facilitate negotiations of the Participants, not to decide the matter for them.

7. While Resolve provides the services of an informed neutral third party, the Mediator shall serve in a professional capacity as mediator only, and not in any other professional capacity, *e.g.*, as attorney. The Mediator shall offer no legal advice or opinions upon which the Participants should rely. Participants are encouraged to consult with their own professionals, such as attorneys or accountants, for independent substantive advice in areas where such advice is rendered by professionals.

8. Any settlement agreement prepared with the assistance of the Mediator should be reviewed by each Participant's independent legal counsel.

DISCLOSURE

9. The mediation process works best where parties participate as fully as possible and freely exchange information, feelings and ideas. This maximizes the possibility of the creative generation of options. Participants are therefore encouraged to share information with one another to the greatest extent to which they are comfortable.

10. If Participants are uncomfortable sharing information with other Participants, but might entrust this information privately to the Mediator, they are encouraged to do so. Sharing this information enables the Mediator to discover possibilities for settlement that Participants might not otherwise recognize, and to help generate settlement options (without disclosing any confidential information).

CONFIDENTIALITY

11. The terms of this Confidentiality provision apply to the Mediator, all Participants, their counsel, and to every person who is present at the mediation session or

participates in any communications concerning the mediation session, including, *inter alia*, telephone conferences before, during or after a mediation session.

12. Any information, document or communication presented in mediation is deemed to be confidential. The Mediator and each Participant agrees not to disclose, testify about, or seek testimony about transactions occurring or communications made in the course of the mediation process. The Parties hereto shall not, in court, arbitration or other adjudicative proceedings, use, introduce, refer to, or call for the production of information, documents or communications exchanged, developed or prepared in the mediation process.

13. The exchange of information or making of communications in the mediation process shall not constitute a waiver of: (a) the attorney-client privilege, (b) attorney work-product privilege, (c) the status of information as confidential, (d) the status of information as a trade secret. No information exchanged or communication made in the mediation process shall constitute an admission for purposes of any applicable rule of evidence.

14. The fact that a statement or communication is made in Mediation does not, however, insulate an otherwise independently discoverable fact or independent admission from discovery or use as an admission in a later court or adjudicative proceeding.

15. Participants shall not subpoena the Mediator or the Mediator's records, or call for the Mediator to testify in any court or other adjudicative proceedings.

16. Participants agree to indemnify the Mediator against all legal liability and costs and expenses, including legal fees, incurred by the Mediator in the event the Mediator is called to testify concerning matters relating to the mediation; and shall indemnify the Mediator for any attorneys fees and expenses incurred by the Mediator in opposing or seeking to quash any subpoena or other judicial compulsion to testify or disclose information concerning same. To the extent any such legal liability, costs, expenses, and legal fees are incurred by the Mediator as the result of a breach of this Agreement by one of the Participants, the other Participants shall have a claim against such breaching Participant for indemnification of any consequential costs they incur or payments they must make to the Mediator under this Paragraph 16.

FEES AND EXPENSES

17. Fees for mediation sessions are $XXX.00 per hour. Any balances due are payable at the end of each mediation session. Time is charged in tenths of an hour.

18. The Mediator typically speaks with Participants, or their representative or counsel, by phone prior to the first mediation session. In addition, the Mediator may speak with Participants or their representatives or counsel, jointly or in caucus, by

telephone between mediation sessions, or in follow up to mediation. Any time spent by the Mediator on the telephone is billed at the Mediator's hourly rate set forth above.

19. The Mediator typically receives information from Participants prior to the first mediation session, and may receive additional information for review at or following the mediation session. Time spent by the Mediator reviewing information or legal research is billed at the Mediator's hourly rate set forth above. In addition, time spent by a paralegal ($YYY per hour) or associate of the Mediator shall be billable at that service provider's regular rate.

20. All expenses incurred by the Mediator, including, but not limited to, long distance telephone calls, facsimile transmissions, photocopying, and overnight mail or messenger services, are payable within (15) days of receiving an invoice for these expenses, except as provided in the following paragraph.

21. The Mediator may at times require advance payments against fees and expenses. The Mediator will refund any amounts not earned or expended. Upon execution of this Agreement, the Participants shall advance to the Mediator a total of $XXXX.00 in fees, $XXXX.00 payable by Participant I and $XXXX.00 payable by Participant II, $XXXX.00 payable by Participant III and $XXXX.00 payable by Participant IV.

22. [Subject to provisions in any agreement providing for mediation, or to other agreement] Participants I, II, III and IV will share equally in the above fees and expenses, regardless of the relative time spent by the mediator in communications or review of information with the parties.

MISCELLANEOUS

23. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

IN WITNESS WHEREOF, the undersigned acknowledge that they have read, understood and agree with all matters stated in this Mediation Agreement.

RESOLVE MEDIATION SERVICES, INC.

By: _____
Simeon H. Baum
President

PARTICIPANT I:

[NAME]

By: _____
Name
Title

PARTICIPANT II:

[NAME]

By: _____
[Name]
President

PARTICIPANT III:

[NAME]

By: _____
Name
Title

PARTICIPANT IV:

[NAME]

By: _____
[Name]
President

[NAME]

_____
[Name]

The Following Persons agree on behalf of themselves, their firms, partners, agents and employees to obey and be bound by the terms of paragraphs 11-15 of the Confidentiality Section of this Agreement:

LAW FIRM I

By: _____
[Name], Esq.
Attorneys for Participant I
[Address]
[Telephone]

LAW FIRM II

By: _____
[Name], Esq.
Attorneys for Participant II
[Address]
[Telephone]

LAW FIRM III

By: _____
[Name], Esq.
Attorneys for Participant III
[Address]
[Telephone]

LAW FIRM IV

By: _____
[Name], Esq.
Attorneys for Participant IV
[Address]
[Telephone]

[Submitted by Stephen A. Hochman]

MEDIATION AGREEMENT

AGREEMENT, dated as of _____ __, 200_, between _____("Plaintiff") and _____("Defendant"). Plaintiff and Defendant are hereinafter collectively referred to as the "Parties."

WITNESSETH:

WHEREAS, the Parties are presently involved in a dispute; and

WHEREAS, the Parties desire to attempt to settle their dispute through non-binding mediation with the assistance of _____as the mediator (the "Mediator").

NOW, THEREFORE, the Parties hereby mutually agree as follows:

1. Impartiality of the Mediator. The Parties and their respective counsel represent and warrant that they have made a diligent effort to determine all prior contacts between them and the Mediator, and all such contacts have been disclosed to counsel for the opposing Party and the Mediator. The Parties acknowledge that the Mediator is impartial and cannot act as advocate, representative or counsel for either Party and has no authority to make binding decisions, impose settlements or require concessions by either Party, it being understood and agreed that any agreements which may be reached between the Parties as a result of the mediation process shall be embodied in a separate written agreement between the Parties prepared with the assistance of their respective counsel.

2. Caucuses and Conferences. The Parties understand and agree that, in connection with the mediation process, the Mediator may meet in confidential "caucus" sessions separately with each Party. The Mediator may, at the request of either Party or on his own initiative, conduct any conference pursuant to this Agreement by telephone, facsimile transmission or other means of communication.

3. Confidentiality, Immunity and Indemnification. To enable the Parties to discuss all aspects of their dispute freely and to enable the Mediator effectively to assist the Parties in reaching a voluntary resolution of their dispute, the Parties agree as follows:

a. All statements or other communications made in connection with the mediation conducted pursuant to this Agreement shall be confidential and, unless otherwise independently admissible or discoverable, shall be inadmissible and/or privileged as settlement discussions to the extent provided by applicable law. The Mediator will treat as confidential and refrain from disclosing any information conveyed to the Mediator during any private caucus unless the Party conveying such information authorizes the Mediator to disclose such information to the other Party.

b. The Mediator shall not be liable for any act or omission in connection with the mediation other than a willful disregard of his obligations under this Agreement.

c. The Parties agree, on behalf of themselves and their attorneys, that none of them will call

or subpoena the Mediator in any legal, arbitral or administrative proceeding of any kind to produce any of his notes or documents relating to the mediation or to testify concerning any such notes or documents or his thoughts or impressions. If any Party attempts to compel such testimony or production, such Party shall indemnify and hold the Mediator harmless from, and reimburse the Mediator for, any reasonable losses, liabilities, costs and expenses, including attorneys' fees and lost professional time, which he may suffer or incur in lawfully resisting such compulsion.

4. The Role of the Mediator. The Parties understand and agree that the Mediator may use evaluative as well as facilitative techniques in conducting the mediation. Thus, in the confidential caucus sessions with a Party, the Mediator may play an activist role as the "agent of reality" and express opinions as to alternative outcomes if he believes that such Party is not being realistic in making an objective cost/benefit or risk/reward analysis between a particular settlement proposal and the costs and uncertainties of the litigation (or arbitration) alternative.

The Parties understand that there is no attorney-client relationship between the Mediator and any Party to this Agreement, and each Party acknowledges that it will seek and rely on legal advice solely from its own counsel and not on any opinions which may be expressed by the Mediator.

5. Participation of Parties. At the request of the Mediator, each Party shall have a corporate officer or representative, in addition to its counsel, in attendance at at least one mediation session who will have full power and authority to negotiate and conclude a binding settlement of the dispute on behalf of such party.

6. Fees and Expenses. The fee for the Mediator's services hereunder shall, subject to the provisions of Section 7 below, be computed at the rate of $___ per hour for the time spent in connection with the mediation, including, but not limited to, pre-hearing consultations and preparation, joint mediation and caucus sessions, and all post-mediation caucuses and telephone and other mediation communications, including mediating any disputes as to a definitive settlement agreement. All fees and expenses of the Mediator shall be shared equally by the Parties. The Parties shall advance the total sum of $ _____, payable to _____, prior to the commencement of the mediation, and any portion of such advance that is not earned shall be returned by the Mediator to the Parties in the same ratio that they made such advance.

7. Discount If the Dispute Never Settles. Notwithstanding the forgoing, the fee for the Mediator's services hereunder shall retroactively be recomputed to reflect a 50% discount from the rate specified in Section 6 hereof (*i.e.*, $___ per hour) if the dispute does not settle prior to the date that there is a final judicial or arbitral determination of the dispute. The Mediator will not bill for his services in excess of the advance until the dispute has settled unless the Mediator determines, in his sole judgment, that the dispute will never settle, in which case he shall bill at the discounted rate.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date hereinabove first written.

For Plaintiff:

_____
Authorized Signature

For Defendant:

_____
Authorized Signature

Agreed:

_____
Mediator

Feedback Sheets

Feedback Sheet
(a/k/a Ed Koch Sheet: "How am I doing?")

Dear Facilitators:

Below are a list of factors to consider when giving feedback, or better when facilitating self-reflective discussion among the participants – and when reporting back to the entire assembly.

Before considering these factors, here are some special instructions just for you.

Special Instructions for Facilitators:

We are testing to see whether mediators and parties move towards business deals or case evaluation. Watch carefully to see who initiates discussion on these points. Does the mediator elicit interests and emotions? Does the mediator guide the discussion to case evaluation.

When the role play is done facilitate sharing of confidential information. From the parties, see what potential business deals were possible. From counsel, see what case evaluations would suggest (in light of transaction costs).

If business deals were developed, what was the key to that's happening? If case evaluation occurred, what and how was that process? Did the mediator and/or participants engage in: risk analysis? transaction cost analysis? Identification of "win/win range" (also ZOPA – zone of possible agreement)?

Now, following are general considerations for feedback.

General Feedback Considerations:

Seating:
- Parties closer than counsel to mediator
- Mediator by door

Introductions:
- Set tone?
- Party focus?
- Develop trust?
- Eye Contact?

Mediator's opening:
- Explain process?
- Any Ground rules?
- Neutrality?
- Non-adjudicative role? (Facilitator of negotiation/dialogue)

- Party self-determination?
- Confidentiality (joint and in caucus)?
- Settlement (not too critical for Commercial Division, where attorneys present and parties sophisticated)
- "Cheerlead" process? (*e.g.*, "resolution," satisfaction and adherence statistics [do not say "success"]; flexibility of remedy, relationship possibilities, accommodation of expression of feelings and interests, high level of party involvement and control, integrative possibilities)

Party openings:

- Who spoke? (Lawyer, Party?)
- How introduced? ("What brings us here?"; *not* tell us your case)

Active Listening:

- Use of silence? (leaving space for parties)
  - Avoiding detailed questions that interfere with flow and make communication about mediator rather than other parties
- Validation
- Empathizing
- Clarifying
- Summarizing
- Permitted (rather than cut off) emotional expression
- Caught cues from parties, rather than driven to make own point?

Body Language:

- Eye contact?
- Body posture
  - Communicating listening and neutrality?
  - Presence?
- Avoid "blocking" postures?

Note Taking:

- Not excessive, obsessive?
- Not interfering with contact?
- Seeking not only key Issues, but also
  - Interests
  - Feelings
  - Options
  - Offers

Comments to Generate Cooperation, and Cooperative Problem Solving?

- In Caucus: Avoiding "bad-mouthing" party outside the room

Opportunities Seized or Let Pass

- Empowerment
  - Explaining Process
  - Encouraging Expression
  - Encouraging Option Generation

- Encouraging Choice
- Encouraging Party Joint Problem Solving
- Recognition (of)
  - Feelings
  - Interests
  - Progress
  - Offers/Options
  - Recognition (noting where one party recognizes something in the other)

Maintain Facilitative Role?
- Kept parties first?
- Asked more than told?
- Encouraged constructive questions between parties?
- Sought to discern parties' needs, interests, issues and let those and the parties' own moving force drive the process?
- Balanced Control of Process?
  - Recognizing that Parties Drive Process

Build trust?

Build Understanding?
- Noting perspectives?
- Encouraging party restatement or reframing of "adverse" party perspective?

Work on Relationships?

Palatably Optimistic?

Respectfully Persistent?

Tactful Use of Humor?

Issues
- Identified Interests?
- Identified business needs?
- Elicited dreams?
- Identified Issues?
  - Raised *by Parties* (not mediator)?
- Legal Issues not raised where Interest Focus preferable?
- Timing
  - (not rushing to issues before party has chance for full expression)
- Sharpen focus
- Handling of Legal Issues
  - encouraged analysis by parties; analysis not performed by Mediator?

Option Generation
- Facilitative?
- Whose suggestions?

- Brainstorming used?
- Deferred Reality testing long enough to encourage option generation
- Identified possibilities for business solutions?

Reality Testing
- Encouraged Party to State Own Strengths
- Inquired About Party Sense and Assessment of Weaknesses
  - Discussed Weaknesses in terms of:
    - Party's own perceptions
    - Adverse party's authorized stated perceptions
    - Raised *Exploratory Questions* About
      - Legal Points
      - Facts to be Proved
      - Risks
- Risk Analysis
  - Decision Tree?
  - Percentages
- Assessment of Legal Issues
  - Inducing clarity without being evaluative?
  - BATNA used?
  - Style: Inquiry or Pronouncement?
- Use of damages assessement?

Effective Development of Standards
- Fair
- Doable
- Customary
- Reasonable
- Legal Calculus

Caucus
- Choose too soon?
- Use too often?
- Remembered to mention confidentiality?
- Began by "checking in" with parties?

Settlement
- Focussed issues for developing settlement agreement
- Clarified Issues for inclusion in Agreement?
- Ginger acknowledgment of closure?
- Keeps own cows from racing to the barn?
- Not over 'til the weight challenged person sings
- Developed effective writing

Role Plays

Nucci Flood – General Facts

Known around the world for creating glamorous designs using the highest quality printed silks, Pamela Nucci's evening gowns retail for as high as $10,000 a piece. Nucci is a high fashion designer with a showroom and warehouse in New York's Garment District on 35th Street between 7th and 8th Avenues. Nucci's showroom and warehouse are located on the 12th Floor of a twenty-story office building.

In the second week of February, Nucci's upstair neighbor, Extremely Realty, Inc., a large commercial real estate brokerage firm, had work done on its HVAC system. It retained Hovac Contractors for the job. Hovac, in turn, hired Bogie Plumbing to assist with the connections. In the course of the work, a massive pipe burst, which in turn set off a chain reaction causing a key water tank on the roof to burst, as well. The resulting massive flood sent thousands of gallons of water down to Nucci's space over the course of eight hours, drenching all 800 gowns that were stored in the showroom and warehouse.

When she came into the office on Tuesday morning, Nucci's assistant, Ludovica Longelux, called Pamela, who was at Bryant Park, for Fashion week. Ms. Nucci refused to be bothered by this triviality where the future of the Spring collection was at stake. No action was taken until she returned. Even then, her chief action was to complain to one and all. Although there was a nearby cleaner who specialized in drying fine wear, Nucci let the goods sit in water for a week. The water ruined Nucci's entire stock.

Nucci estimates the damage costs approximately 5 million dollars – what this fine clothing would bring at retail. As the case has progressed, defendants, while denying liability, have urged that the proper calculation is cost of manufacture of the clothing - $1,000,000, at best. The most likely standard of damages, though, is the wholesale cost, roughly $2.5 million at which Nucci would have sold these items.

Nucci has sued her landlord, Lenny Laches; Extremely Realty, Inc. – the real estate brokerage firm on the penthouse; Hovac and Bogie Plumbing.

Under a special law that applies to high fashion, comparative negligence coupled with failure to mitigate can, 1/3 of the time, result in an award of summary judgment for defendants.

The parties have agreed to mediate this matter.

Special Instructions for Mediator For Risk Analysis Exercise

You have already held a joint session, and have held caucuses with each of the parties and their counsel. As a result, you have a general sense that there is risk all around. Your overall impression is that the landlord and Extremely Realty will end up with little liability and that the lion's share will fall on the contractors, with a bit heavier dose on Bogie Plumbing.

You would like to help the parties think seriously and clearly about this matter, and move towards some concrete numbers without just a back and forth of negotiation offers and concessions, and without your having to make Delphic pronouncements of your own opinion. You decide to try a risk analysis/decision tree approach. You might also couple this with a transaction cost approach.

The collective sense from the parties is that:

- Damages probabilities at trial are 15% likelihood for Retail cost, 25% of likelihood for Manufacturing cost, and 60% for wholesale cost.
- There is a 33% chance that Nucci might lose on summary judgment.
- If liability were apportioned, it would likely be 50% for Bogie, 30% for Hovac, 15% for Laches and 5% for Extremely Realty.
- Litigation fees will likely exceed $150,000 per party through trial. Experts will be required.

Of course, there has not yet been clear recognition of this collective sense from each party most adversely affected by a particular assessment.

Assume that as the case progresses, Nucci's claim will get stronger. This is true because of her overwhelming evidence, and the likelihood of a sympathetic jury in this venue. Keep in mind that, in addition to trial, there are four critical stages at which the chance of recovery changes: pre-litigation settlement; post discovery settlement; summary judgment; pre-trial settlement.

Engage in an analysis of the risk considering the value of litigation versus settlement. When is the best time to settle? How much is the settlement worth?

Directions

Split up into groups of three. Begin in caucus with the Mediator, the Plaintiff, and Plaintiff's attorney. Engage in a decision tree analysis to help decide how to proceed and what terms you are willing to settle for.

If time permits, change roles and conduct a caucus, engaging in a decision tree analysis with the defendant of your choice and that defendant's attorney.

Confidential Facts for Pamela Nucci Representative

You represent Pamela Nucci, and her company Nucci Enterprises, Inc. In February of last year, just after the first day of New York's Fall Fashion week, there was a massive flood in Nucci's space, initiated by HVAC work being done by an upstairs tenant, Extremely Realty.

The flood, which was augmented by a resultant break in the roof top water tank, lasted eight hours, drenching 800 of Nucci's fine evening gowns, which were on display in her showroom or stored in her warehouse, both located in a 20 story building owned by Lenny Laches, situated on 35th Street between 7th and 8th Avenues.

When the flood was discovered, Nucci was off site at Bryant Park for the first day of Fall Fashion Week. When her assistant, Ludavica Langelux, called to report the disaster, Nucci was outraged, to say the least. How dare the building let this happen to her at the start of the most important week of the year (other than Spring Fashion week)! They would just have to take care of it. And they had best be sure that nothing bad happened to her clothing. When Luddie asked what they should do with the soaked garments, Nucci screamed "I am not to be bothered with this again!" and hung up. For the rest of the week, Nucci was busy with galas, after parties, and pressing the flesh at the various Fashion week gatherings. The ever obedient Ludovica knew better than to bother her boss at this critical time, but knew nothing about what to do with the clothes. On Wednesday, the day after she discovered the flood, Luddie was alarmed when she saw workers entering the building. To ensure that no further damage occurred in Nucci's absence, Ludovica moved all the drenched showroom garments to the warehouse, placing them with the other soaked garments there, and surrounded the bundle in cellophane to prevent further damage from any new leaks. There they sat until the following Tuesday, when Nucci returned to the showroom. To Nucci's dismay, the gowns were soaked through and through. Indeed, a fine clothing mold had begun to infect the gowns. By the time they got to the nearest cleaner, the cleaner reported that the mold could not be removed.

Nucci was beside herself. This would waste all her hard work of the past week. How could she deliver on orders that were going to come from the newly encouraged buyers and her well established worldwide accounts? She would have to ramp up production, at increased cost.

Of the 800 gowns, Nucci estimates that they would have the following retail values:

200 gowns at $4,000 a piece = $800,000
200 gowns at $5,500 a piece = $1,100,000
200 gowns at $6,500 a piece = $1,300,000
100 gowns at $8,000 a piece = $800,000
100 gowns at $10,000 a piece = $1,000,000

Thus, the total estimated retail value of the gowns is $5 million.

Nucci typically sells her gowns at 250% of their production cost. She estimates it would have cost roughly $1 million to manufacture these gowns. She believes that she would have sold them to her customers at the wholesale price of $2.5 million. Her customers typically mark her clothes up by 200%. This is a win/win for everyone. They send the message that hers are the top dresses around, get to make a good profit on their sales, and leave themselves a good cushion for end of season mark downs when a number of these high priced items do not sell.

In the end, Nucci did manage to reproduce 400 of the 800 lost gowns (distributed evenly on a pro rata basis among the gown types) at twice the normal production cost (i.e., at a cost of $1 million). Because of delays, she sold these 400 gowns at 80% of her usual price, i.e, in total, for $1 million. She was willing to do this to maintain her good name for long term gain (and out of pride in being the best.) Moreover, the production rush impeded her famed quality control processes, resulting in a tripling of her typical 5% rate of returns for quality issues, reducing her gross receipts for those 400 gowns to $850,000. Thus, replacement of these 400 gowns actually cost her an additional $150,000 beyond the initial lost profit of $1,250,000 for these 400 dresses.

Despite the cleaner's initial report, approximately forty percent of the soaked gowns were salvageable, distributed evenly on a pro rata basis among the gown types, although none of them could be sold to regular buyers. They could be sold at 25% of their regular price (i.e., for $250,000) to outlet stores, big box stores, lower end retailers, or in lesser developed countries. But Nucci would rather burn the stock than dilute her platinum brand name by selling this year's line at significantly lower prices to a lower end market.

Nucci had been trying for the last year to get reimbursed by her insurer, Geneva Insurance Co. for this loss. Hers is a generous policy, which would cover more than replacement cost. The insurer issued a reservation of rights letter for untimely notice, on account of the stock's sitting for a week in water. The insurer was notified the week following Nucci's return. The reservation of rights letter permits Nucci to sue directly for recovery from the tortfeasors.

After consultation with optimistic counsel, she has decided not to wait for the now imminent payment of her claim by Geneva, but to seek the highest damages through direct litigation. You are on a 1/3 contingent fee, but are paid a lower (25%) fee if the matter settles within the first year of litigation.

You are eager to settle this matter and are under a bit of pressure to bring in a high recovery in light of the impact of your fee on the net to Nucci and the chance that Nucci might otherwise have done fairly well with her insurer.

A side factor is that Nucci's lease with her landlord is up for renewal on October 1st. She has been happy enough in this space, and would prefer not to incur the cost of a

Frankly, you do not have a stake in the percentage each party contributes. For you, the key is the total recovery. You are interested in seeing what can develop through this mediation.

Confidential Facts for Lenny Laches Representative

You represent Lenny Laches, the owner of The Higher Building, one of the garment center's prime spots for fashionistas. Nucci has been one of Lenny's flagship tenants, but has also been somewhat high maintenance, to say the least. Her lease is up for renewal on October 1st. Rental prices have been rising and Lenny expects to seek higher rent, together with adequate escalations. Lenny is unsure whether he wishes to maintain this tenant or to find an easier tenant who can still pay the rent and provide cache.

The evening of the first Monday of last year's Fall Fashion week was a major disaster. Extremely Realty was having HVAC work done, when a pipe burst. The flood continued for 8 hours. Something about the vacuum created by the sudden rush of water triggered a rupture in the building's roof top water tank. As a result the contents of the entire tank were dumped through the pipe system.

The true cause and origin of this massive flood are a bit of a mystery. Extremely Realty's HVAC contractor, Hovac, deemed it necessary to connect the system not only to the pipes immediately above that tenant's 14th floor space, but also to develop connections directly with the building's rooftop tank to augment water pressure and speed availability of water as needed for its cooling processes. It hired what was plainly a below par plumber, Bogie Plumbing to connect the pipes both on the 14th floor and at the roof level. There is a good likelihood that Bogie left the pipes open to conduct a test of the HVAC system, without telling the building's super, Eddie Eager. Apparently, on Monday evening Eddie or one of his handymen turned the water back on. It took a while to realize that there was a flood. Tenants were out of the site, and the Nucci showroom had closed at 5 p.m. The flooding was discovered by a night security guard. At first the guard was not sure who to call or what to do. He eventually got in touch with Laches personnel. When they arrived, they shut the valve on the riser running to the affected area. Still the flooding continued. It took some time before they saw the additional feeder pipe. Even then, the flood continued as a result of pooling from the burst roof top tank.

Tuesday morning brought a slew of complaints from tenants. The most heavily affected was Nucci, whose showroom and warehouse were situated on the floor immediately below Extremely Realty. (To prevent unlucky occurrences, there is no 13th floor in the Higher Building.)

You are attending this mediation to look out for Laches's interests. Laches is named as an additional insured both under the policies of Extremely Realty and under the policies that Hovac and Bogie had to obtain before commencing work in the building. You are confident that, ultimately, the three insurers for one or another of these parties will cover you. Nevertheless, for some reason, they have not yet appeared on your behalf. Counsel for Extremely Realty is also present, and should certainly be looking after your interests. You do not understand why, knowing that their insurer should ultimately foot the bill, that they have started making noises about the rooftop tank.

Claims that the building failed to maintain the tank will only produce more complicated litigation. If you have to implead the tank maintenance company and the manufacturer of this 3 year old tank, of course you will. Someone else, not Lenny Laches, will pay in the end.

Knowing that there is some risk of litigation cost, or worse, you are authorized to contribute nuisance value to a settlement. Lenny is available by phone, so that you will not lack additional authority if needed.

Confidential Facts for Extremely Realty Representative

You have been appointed as counsel by Freedom Insurance Co., insurer for Extremely Realty. Accompanying you is Freedom's adjuster, Terry Tightpocket. Terry has full authority needed to resolve this matter, considering that the exposure to Extremely Realty is virtually nil. If needed, Terry has the cellphone of Rusty Ratchet, who can open the payment spigot on a higher level.

From Extremely Realty's perspective, this is everyone else's problem. Extremely is not in the HVAC or plumbing business. Extremely neither designed the extra pipe system, nor did it install it. Extremely had nothing to do with turning on the water or poor communication between the contractors and the building staff. Extremely was not responsible for purchasing or maintaining the building's rooftop water tank. And it was not Extremely's decision to let the 800 gowns marinate for a week.

If there is any payment to be had here, it will be nuisance value only. You certainly should bear no greater share of the payment than the Landlord, given the Landlord's exposure on the water tank, its business interest in tenant relations, and the fact that, at least now, Freedom has not had you appear on Laches's behalf. Beyond that, as a matter of professional pride, how would it look if an experienced insurance defense counsel like you were bested by an insured's private counsel?

While you see your exposure as minimal, you also believe Nucci's damages are inflated. You will need to hear in detail the basis for Nucci's damages claim.

Confidential Facts for Hovac Representative

You have been appointed as counsel by AllCity Insurance Co., insurer for Hovac. Accompanying you is AllCity's adjuster, Gita Fami. Gita should have adequate authority to resolve this matter. She expects to learn from the mediation and seek an increase in her authority, if warranted. She has an open line to her manager, complete with cell phone number.

On Monday, the second week of February last year, your insured was responsible for an HVAC job for Extremely Realty. Extremely Realty had given you strict instructions to come up with a system that would provide more than ample cooling and heating with state of the art adjustment time. Your savvy engineers chose to supplement the water supply line that ran above the 14th floor, with another feed line from the rooftop tank on this 20th story building. You hired Bogie Plumbing as your subcontractor to install and run the pipes up to the roof and to handle connections on the 14th floor.

Apparently, there was not the best communication between Bogie and the building staff. At the end of the day, Bogie had turned off the riser leading down to the 14th floor system. It had also left one of its pipes disconnected. In the evening, as part of his final rounds, the building's super, Eddie Eager, or perhaps one of his handymen, made sure all water valves were well open - and then left the premises. Neither Eddie nor any building staff member recalls having been notified by Bogie or Hovac that the pipes were open or that the water needed to be shut off. There is no written record of any request or notice from Hovac concerning this special condition.

The initial water leak from a pipe left open by Bogie on the 14th floor apparently created a vacuum that caused the building's rooftop tank to burst, compounding the flood. You have some concerns that Bogie's workers might have done something to the rooftop tank when they were doing installation work on the roof.

Nevertheless, you and Bogie agree that the landlord, Lenny Laches, bears some liability here, given the super's turning on the water valve and the leak in the rooftop tank. As this case progresses, you certainly would develop a claim of failure to maintain or faulty tank, which you see as the Landlord's problem. You are aware that Lenny Laches is named as additional insured on Hovac's and Bogie's policies. It has not yet been worked out whether Freedom Ins. Co. (Extremely Realty's carrier), AllCity, or Bogie's carrier (Passengers Insurance Co.) will end up appearing for Laches, or for that matter, whether AllCity or Passengers will assume responsibility for Extremely Realty, which as also named on their policies as additional insured for this job.

For the time being, though, you are fighting tooth and nail to limit Hovac's exposure. Certainly, the prime culprit, unfortunately, is your own sub, Bogie, which left a pipe disconnected, might have tampered with the rooftop tank, quite possibly failed to notify the building of the water shut down, and set this series of events in motion.

Beyond Bogie, though, serious attention should be paid to Nucci herself. How can someone let garments that are claimed to be worth millions sit steeped in water for a week? Everyone knows that mold warnings require prompt drying of garments, certainly within 24 - 48 hours after they are wet. Beyond this, you will urge that tort law creates exposure only for cost of replacement, not for lost profits; and plaintiff's current claim for retail value makes no sense at all.

You will expect Nucci to lay out in detail the economic basis for Nucci's damages claim. Beyond this, there have been cases recently that place full responsibility on the Plaintiff where, as here, there has been so gross a failure to mitigate damages.

Confidential Facts for Bogie Plumbing Representative

You are under the gun. Someone has to be the target defendant, and today you are it. You are counsel for Bogie Plumbing. Accompanying you is Biggie Bucks, claims representative for Passengers Insurance Co., the insurer who retained you for this matter. If needed, Biggie can reach the Claims Manager, Payton Moore, to get this matter done. Each of you has Payton's cell phone to be sure nothing goes awry.

On the second Monday in February last year, your insured, Bogie Plumbing was installing and connecting pipes as subcontractor to Hovac. Hovac designed an HVAC system for Extremely Realty, a tenant on the 14th floor of the Higher Building in the garment center. Part of the design was to run an additional feed line from the 14th floor up to the 20 story building's rooftop tank. Bogie's worker had done some work on the roof installing the auxiliary feed line and had left open a pipe running from the building's main riser into Extremely Realty's new HVAC system.

From this point on, stories differ. Bogie's workers claim that they had told the building's super that they had turned off the water in the main riser, pending further work to be done the next day. The building super, Eddie Eager, claims never to have heard this, and there are no records or written requests showing notice of this extraordinary action.

In the evening, as part of his final rounds, the building's super, Eddie Eager, or perhaps one of his handymen, made sure all water valves were well open - and then left the premises. Water came pouring out of the open pipe on the 14th floor. Apparently, the vacuum created by this sudden drain caused the rooftop tank to burst, augmenting the flood. While the other parties have not focussed on this, you wonder whether Bogie's workers could have done something during the course of their work on the roof to jeopardize the integrity of the water tank.

Either way the finger is squarely pointed at Bogie as chief cause of this disaster.

The flood was not discovered until much later by a night guard. It took the guard some time to notify the building, more time for the building staff to arrive on scene, more time for them to shut down the main riser, and much more time for them to realize that the flood was going down the auxiliary pipe and to deal with flooding coming from the burst water tank.

Compounding matters, Nucci let the 800 evening gowns sit for a week before trying to dry them.

Your objective is to limit your exposure as much as possible in this difficult situation. You can blame Hovac for its wacky design, blame the Landlord for turning on the water, having a faulty tank, and poor maintenance of the tank. You can assert that Nucci will be no caused by a sometime followed rule that imposes 100% of liability on a

Plaintiff in extreme cases of failure to mitigate. You might also look to Extremely to contribute at least nuisance value to get this done.

You will be highly attentive to Nucci's damages theory and to the economic basis for her claims. It might help you to frame your overall exposure if you can see what the damages look like. You will approach this mediation with an open mind, gathering as much information as possible. Of course, this will not stop you from asserting theories and defenses that might help others see the need to contribute and limit your total contribution.

Feedback Sheet
(a/k/a Ed Koch Sheet: "How am I doing?")

Dear Facilitators:

Below are a list of factors to consider when giving feedback, or better when facilitating self-reflective discussion among the participants – and when reporting back to the entire assembly.

Before considering these factors, here are some special instructions just for you.

Special Instructions for Facilitators:

We are testing to see whether mediators and parties move towards business deals or case evaluation. Watch carefully to see who initiates discussion on these points. Does the mediator elicit interests and emotions? Does the mediator guide the discussion to case evaluation.

When the role play is done facilitate sharing of confidential information. From the parties, see what potential business deals were possible. From counsel, see what case evaluations would suggest (in light of transaction costs).

If business deals were developed, what was the key to that's happening? If case evaluation occurred, what and how was that process? Did the mediator and/or participants engage in: risk analysis? transaction cost analysis? Identification of "win/win range" (also ZOPA – zone of possible agreement)?

Now, following are general considerations for feedback.

General Feedback Considerations:

Seating:
- Parties closer than counsel to mediator
- Mediator by door

Introductions:
- Set tone?
- Party focus?
- Develop trust?
- Eye Contact?

Mediator's opening:
- Explain process?
- Any Ground rules?
- Neutrality?
- Non-adjudicative role? (Facilitator of negotiation/dialogue)

- Party self-determination?
- Confidentiality (joint and in caucus)?
- Settlement (not too critical for Commercial Division, where attorneys present and parties sophisticated)
- "Cheerlead" process? (*e.g.*, "resolution," satisfaction and adherence statistics [do not say "success"]; flexibility of remedy, relationship possibilities, accommodation of expression of feelings and interests, high level of party involvement and control, integrative possibilities)

Party openings:

- Who spoke? (Lawyer, Party?)
- How introduced? ("What brings us here?"; *not* tell us your case)

Active Listening:

- Use of silence? (leaving space for parties)
  - Avoiding detailed questions that interfere with flow and make communication about mediator rather than other parties
- Validation
- Empathizing
- Clarifying
- Summarizing
- Permitted (rather than cut off) emotional expression
- Caught cues from parties, rather than driven to make own point?

Body Language:

- Eye contact?
- Body posture
  - Communicating listening and neutrality?
  - Presence?
- Avoid "blocking" postures?

Note Taking:

- Not excessive, obsessive?
- Not interfering with contact?
- Seeking not only key Issues, but also
  - Interests
  - Feelings
  - Options
  - Offers

Comments to Generate Cooperation, and Cooperative Problem Solving?

- In Caucus: Avoiding "bad-mouthing" party outside the room

Opportunities Seized or Let Pass

- Empowerment
  - Explaining Process
  - Encouraging Expression
  - Encouraging Option Generation

- Encouraging Choice
- Encouraging Party Joint Problem Solving
- Recognition (of)
  - Feelings
  - Interests
  - Progress
  - Offers/Options
  - Recognition (noting where one party recognizes something in the other)

Maintain Facilitative Role?
- Kept parties first?
- Asked more than told?
- Encouraged constructive questions between parties?
- Sought to discern parties' needs, interests, issues and let those and the parties' own moving force drive the process?
- Balanced Control of Process?
  - Recognizing that Parties Drive Process

Build trust?

Build Understanding?
- Noting perspectives?
- Encouraging party restatement or reframing of "adverse" party perspective?

Work on Relationships?

Palatably Optimistic?

Respectfully Persistent?

Tactful Use of Humor?

Issues
- Identified Interests?
- Identified business needs?
- Elicited dreams?
- Identified Issues?
  - Raised *by Parties* (not mediator)?
- Legal Issues not raised where Interest Focus preferable?
- Timing
  - (not rushing to issues before party has chance for full expression)
- Sharpen focus
- Handling of Legal Issues
  - encouraged analysis by parties; analysis not performed by Mediator?

Option Generation
- Facilitative?
- Whose suggestions?

- Brainstorming used?
- Deferred Reality testing long enough to encourage option generation
- Identified possibilities for business solutions?

Reality Testing
- Encouraged Party to State Own Strengths
- Inquired About Party Sense and Assessment of Weaknesses
  - Discussed Weaknesses in terms of:
    - Party's own perceptions
    - Adverse party's authorized stated perceptions
    - Raised *Exploratory Questions* About
      - Legal Points
      - Facts to be Proved
      - Risks
- Risk Analysis
  - Decision Tree?
  - Percentages
- Assessment of Legal Issues
  - Inducing clarity without being evaluative?
  - BATNA used?
  - Style: Inquiry or Pronouncement?
- Use of damages assessement?

Effective Development of Standards
- Fair
- Doable
- Customary
- Reasonable
- Legal Calculus

Caucus
- Choose too soon?
- Use too often?
- Remembered to mention confidentiality?
- Began by "checking in" with parties?

Settlement
- Focussed issues for developing settlement agreement
- Clarified Issues for inclusion in Agreement?
- Ginger acknowledgment of closure?
- Keeps own cows from racing to the barn?
- Not over 'til the weight challenged person sings
- Developed effective writing

Nucci Flood – General Facts

Known around the world for creating glamorous designs using the highest quality printed silks, Pamela Nucci's evening gowns retail for as high as $10,000 a piece. Nucci is a high fashion designer with a showroom and warehouse in New York's Garment District on 35th Street between 7th and 8th Avenues. Nucci's showroom and warehouse are located on the 12th Floor of a twenty-story office building.

In the second week of February, Nucci's upstair neighbor, Extremely Realty, Inc., a large commercial real estate brokerage firm, had work done on its HVAC system. It retained Hovac Contractors for the job. Hovac, in turn, hired Bogie Plumbing to assist with the connections. In the course of the work, a massive pipe burst, which in turn set off a chain reaction causing a key water tank on the roof to burst, as well. The resulting massive flood sent thousands of gallons of water down to Nucci's space over the course of eight hours, drenching all 800 gowns that were stored in the showroom and warehouse.

When she came into the office on Tuesday morning, Nucci's assistant, Ludovica Longelux, called Pamela, who was at Bryant Park, for Fashion week. Ms. Nucci refused to be bothered by this triviality where the future of the Spring collection was at stake. No action was taken until she returned. Even then, her chief action was to complain to one and all. Although there was a nearby cleaner who specialized in drying fine wear, Nucci let the goods sit in water for a week. The water ruined Nucci's entire stock.

Nucci estimates the damage costs approximately 5 million dollars – what this fine clothing would bring at retail. As the case has progressed, defendants, while denying liability, have urged that the proper calculation is cost of manufacture of the clothing - $1,000,000, at best. The most likely standard of damages, though, is the wholesale cost, roughly $2.5 million at which Nucci would have sold these items.

Nucci has sued her landlord, Lenny Laches; Extremely Realty, Inc. – the real estate brokerage firm on the penthouse; Hovac and Bogie Plumbing.

Under a special law that applies to high fashion, comparative negligence coupled with failure to mitigate can, 1/3 of the time, result in an award of summary judgment for defendants.

The parties have agreed to mediate this matter.

Special Instructions for Mediator For Risk Analysis Exercise

You have already held a joint session, and have held caucuses with each of the parties and their counsel. As a result, you have a general sense that there is risk all around. Your overall impression is that the landlord and Extremely Realty will end up with little liability and that the lion's share will fall on the contractors, with a bit heavier dose on Bogie Plumbing.

You would like to help the parties think seriously and clearly about this matter, and move towards some concrete numbers without just a back and forth of negotiation offers and concessions, and without your having to make Delphic pronouncements of your own opinion. You decide to try a risk analysis/decision tree approach. You might also couple this with a transaction cost approach.

The collective sense from the parties is that:

- Damages probabilities at trial are 15% likelihood for Retail cost, 25% of likelihood for Manufacturing cost, and 60% for wholesale cost.
- There is a 33% chance that Nucci might lose on summary judgment.
- If liability were apportioned, it would likely be 50% for Bogie, 30% for Hovac, 15% for Laches and 5% for Extremely Realty.
- Litigation fees will likely exceed $150,000 per party through trial. Experts will be required.

Of course, there has not yet been clear recognition of this collective sense from each party most adversely affected by a particular assessment.

Assume that as the case progresses, Nucci's claim will get stronger. This is true because of her overwhelming evidence, and the likelihood of a sympathetic jury in this venue. Keep in mind that, in addition to trial, there are four critical stages at which the chance of recovery changes: pre-litigation settlement; post discovery settlement; summary judgment; pre-trial settlement.

Engage in an analysis of the risk considering the value of litigation versus settlement. When is the best time to settle? How much is the settlement worth?

Directions

Split up into groups of three. Begin in caucus with the Mediator, the Plaintiff, and Plaintiff's attorney. Engage in a decision tree analysis to help decide how to proceed and what terms you are willing to settle for.

If time permits, change roles and conduct a caucus, engaging in a decision tree analysis with the defendant of your choice and that defendant's attorney.

Confidential Facts for Bogie Plumbing Representative

You are under the gun. Someone has to be the target defendant, and today you are it. You are counsel for Bogie Plumbing. Accompanying you is Biggie Bucks, claims representative for Passengers Insurance Co., the insurer who retained you for this matter. If needed, Biggie can reach the Claims Manager, Payton Moore, to get this matter done. Each of you has Payton's cell phone to be sure nothing goes awry.

On the second Monday in February last year, your insured, Bogie Plumbing was installing and connecting pipes as subcontractor to Hovac. Hovac designed an HVAC system for Extremely Realty, a tenant on the 14th floor of the Higher Building in the garment center. Part of the design was to run an additional feed line from the 14th floor up to the 20 story building's rooftop tank. Bogie's worker had done some work on the roof installing the auxiliary feed line and had left open a pipe running from the building's main riser into Extremely Realty's new HVAC system.

From this point on, stories differ. Bogie's workers claim that they had told the building's super that they had turned off the water in the main riser, pending further work to be done the next day. The building super, Eddie Eager, claims never to have heard this, and there are no records or written requests showing notice of this extraordinary action.

In the evening, as part of his final rounds, the building's super, Eddie Eager, or perhaps one of his handymen, made sure all water valves were well open - and then left the premises. Water came pouring out of the open pipe on the 14th floor. Apparently, the vacuum created by this sudden drain caused the rooftop tank to burst, augmenting the flood. While the other parties have not focussed on this, you wonder whether Bogie's workers could have done something during the course of their work on the roof to jeopardize the integrity of the water tank.

Either way the finger is squarely pointed at Bogie as chief cause of this disaster.

The flood was not discovered until much later by a night guard. It took the guard some time to notify the building, more time for the building staff to arrive on scene, more time for them to shut down the main riser, and much more time for them to realize that the flood was going down the auxiliary pipe and to deal with flooding coming from the burst water tank.

Compounding matters, Nucci let the 800 evening gowns sit for a week before trying to dry them.

Your objective is to limit your exposure as much as possible in this difficult situation. You can blame Hovac for its wacky design, blame the Landlord for turning on the water, having a faulty tank, and poor maintenance of the tank. You can assert that Nucci will be no caused by a sometime followed rule that imposes 100% of liability on a

Plaintiff in extreme cases of failure to mitigate. You might also look to Extremely to contribute at least nuisance value to get this done.

You will be highly attentive to Nucci's damages theory and to the economic basis for her claims. It might help you to frame your overall exposure if you can see what the damages look like. You will approach this mediation with an open mind, gathering as much information as possible. Of course, this will not stop you from asserting theories and defenses that might help others see the need to contribute and limit your total contribution.

Nucci Flood – General Facts

Known around the world for creating glamorous designs using the highest quality printed silks, Pamela Nucci's evening gowns retail for as high as $10,000 a piece. Nucci is a high fashion designer with a showroom and warehouse in New York's Garment District on 35th Street between 7th and 8th Avenues. Nucci's showroom and warehouse are located on the 12th Floor of a twenty-story office building.

In the second week of February, Nucci's upstair neighbor, Extremely Realty, Inc., a large commercial real estate brokerage firm, had work done on its HVAC system. It retained Hovac Contractors for the job. Hovac, in turn, hired Bogie Plumbing to assist with the connections. In the course of the work, a massive pipe burst, which in turn set off a chain reaction causing a key water tank on the roof to burst, as well. The resulting massive flood sent thousands of gallons of water down to Nucci's space over the course of eight hours, drenching all 800 gowns that were stored in the showroom and warehouse.

When she came into the office on Tuesday morning, Nucci's assistant, Ludovica Longelux, called Pamela, who was at Bryant Park, for Fashion week. Ms. Nucci refused to be bothered by this triviality where the future of the Spring collection was at stake. No action was taken until she returned. Even then, her chief action was to complain to one and all. Although there was a nearby cleaner who specialized in drying fine wear, Nucci let the goods sit in water for a week. The water ruined Nucci's entire stock.

Nucci estimates the damage costs approximately 5 million dollars – what this fine clothing would bring at retail. As the case has progressed, defendants, while denying liability, have urged that the proper calculation is cost of manufacture of the clothing - $1,000,000, at best. The most likely standard of damages, though, is the wholesale cost, roughly $2.5 million at which Nucci would have sold these items.

Nucci has sued her landlord, Lenny Laches; Extremely Realty, Inc. – the real estate brokerage firm on the penthouse; Hovac and Bogie Plumbing.

Under a special law that applies to high fashion, comparative negligence coupled with failure to mitigate can, 1/3 of the time, result in an award of summary judgment for defendants.

The parties have agreed to mediate this matter.

Special Instructions for Mediator For Risk Analysis Exercise

You have already held a joint session, and have held caucuses with each of the parties and their counsel. As a result, you have a general sense that there is risk all around. Your overall impression is that the landlord and Extremely Realty will end up with little liability and that the lion's share will fall on the contractors, with a bit heavier dose on Bogie Plumbing.

You would like to help the parties think seriously and clearly about this matter, and move towards some concrete numbers without just a back and forth of negotiation offers and concessions, and without your having to make Delphic pronouncements of your own opinion. You decide to try a risk analysis/decision tree approach. You might also couple this with a transaction cost approach.

The collective sense from the parties is that:

- Damages probabilities at trial are 15% likelihood for Retail cost, 25% of likelihood for Manufacturing cost, and 60% for wholesale cost.
- There is a 33% chance that Nucci might lose on summary judgment.
- If liability were apportioned, it would likely be 50% for Bogie, 30% for Hovac, 15% for Laches and 5% for Extremely Realty.
- Litigation fees will likely exceed $150,000 per party through trial. Experts will be required.

Of course, there has not yet been clear recognition of this collective sense from each party most adversely affected by a particular assessment.

Assume that as the case progresses, Nucci's claim will get stronger. This is true because of her overwhelming evidence, and the likelihood of a sympathetic jury in this venue. Keep in mind that, in addition to trial, there are four critical stages at which the chance of recovery changes: pre-litigation settlement; post discovery settlement; summary judgment; pre-trial settlement.

Engage in an analysis of the risk considering the value of litigation versus settlement. When is the best time to settle? How much is the settlement worth?

Directions

Split up into groups of three. Begin in caucus with the Mediator, the Plaintiff, and Plaintiff's attorney. Engage in a decision tree analysis to help decide how to proceed and what terms you are willing to settle for.

If time permits, change roles and conduct a caucus, engaging in a decision tree analysis with the defendant of your choice and that defendant's attorney.

Confidential Facts for Extremely Realty Representative

You have been appointed as counsel by Freedom Insurance Co., insurer for Extremely Realty. Accompanying you is Freedom's adjuster, Terry Tightpocket. Terry has full authority needed to resolve this matter, considering that the exposure to Extremely Realty is virtually nil. If needed, Terry has the cellphone of Rusty Ratchet, who can open the payment spigot on a higher level.

From Extremely Realty's perspective, this is everyone else's problem. Extremely is not in the HVAC or plumbing business. Extremely neither designed the extra pipe system, nor did it install it. Extremely had nothing to do with turning on the water or poor communication between the contractors and the building staff. Extremely was not responsible for purchasing or maintaining the building's rooftop water tank. And it was not Extremely's decision to let the 800 gowns marinate for a week.

If there is any payment to be had here, it will be nuisance value only. You certainly should bear no greater share of the payment than the Landlord, given the Landlord's exposure on the water tank, its business interest in tenant relations, and the fact that, at least now, Freedom has not had you appear on Laches's behalf. Beyond that, as a matter of professional pride, how would it look if an experienced insurance defense counsel like you were bested by an insured's private counsel?

While you see your exposure as minimal, you also believe Nucci's damages are inflated. You will need to hear in detail the basis for Nucci's damages claim.

Nucci Flood – General Facts

Known around the world for creating glamorous designs using the highest quality printed silks, Pamela Nucci's evening gowns retail for as high as $10,000 a piece. Nucci is a high fashion designer with a showroom and warehouse in New York's Garment District on 35th Street between 7th and 8th Avenues. Nucci's showroom and warehouse are located on the 12th Floor of a twenty-story office building.

In the second week of February, Nucci's upstair neighbor, Extremely Realty, Inc., a large commercial real estate brokerage firm, had work done on its HVAC system. It retained Hovac Contractors for the job. Hovac, in turn, hired Bogie Plumbing to assist with the connections. In the course of the work, a massive pipe burst, which in turn set off a chain reaction causing a key water tank on the roof to burst, as well. The resulting massive flood sent thousands of gallons of water down to Nucci's space over the course of eight hours, drenching all 800 gowns that were stored in the showroom and warehouse.

When she came into the office on Tuesday morning, Nucci's assistant, Ludovica Longelux, called Pamela, who was at Bryant Park, for Fashion week. Ms. Nucci refused to be bothered by this triviality where the future of the Spring collection was at stake. No action was taken until she returned. Even then, her chief action was to complain to one and all. Although there was a nearby cleaner who specialized in drying fine wear, Nucci let the goods sit in water for a week. The water ruined Nucci's entire stock.

Nucci estimates the damage costs approximately 5 million dollars – what this fine clothing would bring at retail. As the case has progressed, defendants, while denying liability, have urged that the proper calculation is cost of manufacture of the clothing - $1,000,000, at best. The most likely standard of damages, though, is the wholesale cost, roughly $2.5 million at which Nucci would have sold these items.

Nucci has sued her landlord, Lenny Laches; Extremely Realty, Inc. – the real estate brokerage firm on the penthouse; Hovac and Bogie Plumbing.

Under a special law that applies to high fashion, comparative negligence coupled with failure to mitigate can, 1/3 of the time, result in an award of summary judgment for defendants.

The parties have agreed to mediate this matter.

Special Instructions for Mediator For Risk Analysis Exercise

You have already held a joint session, and have held caucuses with each of the parties and their counsel. As a result, you have a general sense that there is risk all around. Your overall impression is that the landlord and Extremely Realty will end up with little liability and that the lion's share will fall on the contractors, with a bit heavier dose on Bogie Plumbing.

You would like to help the parties think seriously and clearly about this matter, and move towards some concrete numbers without just a back and forth of negotiation offers and concessions, and without your having to make Delphic pronouncements of your own opinion. You decide to try a risk analysis/decision tree approach. You might also couple this with a transaction cost approach.

The collective sense from the parties is that:

- Damages probabilities at trial are 15% likelihood for Retail cost, 25% of likelihood for Manufacturing cost, and 60% for wholesale cost.
- There is a 33% chance that Nucci might lose on summary judgment.
- If liability were apportioned, it would likely be 50% for Bogie, 30% for Hovac, 15% for Laches and 5% for Extremely Realty.
- Litigation fees will likely exceed $150,000 per party through trial. Experts will be required.

Of course, there has not yet been clear recognition of this collective sense from each party most adversely affected by a particular assessment.

Assume that as the case progresses, Nucci's claim will get stronger. This is true because of her overwhelming evidence, and the likelihood of a sympathetic jury in this venue. Keep in mind that, in addition to trial, there are four critical stages at which the chance of recovery changes: pre-litigation settlement; post discovery settlement; summary judgment; pre-trial settlement.

Engage in an analysis of the risk considering the value of litigation versus settlement. When is the best time to settle? How much is the settlement worth?

Directions

Split up into groups of three. Begin in caucus with the Mediator, the Plaintiff, and Plaintiff's attorney. Engage in a decision tree analysis to help decide how to proceed and what terms you are willing to settle for.

If time permits, change roles and conduct a caucus, engaging in a decision tree analysis with the defendant of your choice and that defendant's attorney.

Confidential Facts for Hovac Representative

You have been appointed as counsel by AllCity Insurance Co., insurer for Hovac. Accompanying you is AllCity's adjuster, Gita Fami. Gita should have adequate authority to resolve this matter. She expects to learn from the mediation and seek an increase in her authority, if warranted. She has an open line to her manager, complete with cell phone number.

On Monday, the second week of February last year, your insured was responsible for an HVAC job for Extremely Realty. Extremely Realty had given you strict instructions to come up with a system that would provide more than ample cooling and heating with state of the art adjustment time. Your savvy engineers chose to supplement the water supply line that ran above the 14th floor, with another feed line from the rooftop tank on this 20th story building. You hired Bogie Plumbing as your subcontractor to install and run the pipes up to the roof and to handle connections on the 14th floor.

Apparently, there was not the best communication between Bogie and the building staff. At the end of the day, Bogie had turned off the riser leading down to the 14th floor system. It had also left one of its pipes disconnected. In the evening, as part of his final rounds, the building's super, Eddie Eager, or perhaps one of his handymen, made sure all water valves were well open - and then left the premises. Neither Eddie nor any building staff member recalls having been notified by Bogie or Hovac that the pipes were open or that the water needed to be shut off. There is no written record of any request or notice from Hovac concerning this special condition.

The initial water leak from a pipe left open by Bogie on the 14th floor apparently created a vacuum that caused the building's rooftop tank to burst, compounding the flood. You have some concerns that Bogie's workers might have done something to the rooftop tank when they were doing installation work on the roof.

Nevertheless, you and Bogie agree that the landlord, Lenny Laches, bears some liability here, given the super's turning on the water valve and the leak in the rooftop tank. As this case progresses, you certainly would develop a claim of failure to maintain or faulty tank, which you see as the Landlord's problem. You are aware that Lenny Laches is named as additional insured on Hovac's and Bogie's policies. It has not yet been worked out whether Freedom Ins. Co. (Extremely Realty's carrier), AllCity, or Bogie's carrier (Passengers Insurance Co.) will end up appearing for Laches, or for that matter, whether AllCity or Passengers will assume responsibility for Extremely Realty, which as also named on their policies as additional insured for this job.

For the time being, though, you are fighting tooth and nail to limit Hovac's exposure. Certainly, the prime culprit, unfortunately, is your own sub, Bogie, which left a pipe disconnected, might have tampered with the rooftop tank, quite possibly failed to notify the building of the water shut down, and set this series of events in motion.

Beyond Bogie, though, serious attention should be paid to Nucci herself. How can someone let garments that are claimed to be worth millions sit steeped in water for a week? Everyone knows that mold warnings require prompt drying of garments, certainly within 24 - 48 hours after they are wet. Beyond this, you will urge that tort law creates exposure only for cost of replacement, not for lost profits; and plaintiff's current claim for retail value makes no sense at all.

You will expect Nucci to lay out in detail the economic basis for Nucci's damages claim. Beyond this, there have been cases recently that place full responsibility on the Plaintiff where, as here, there has been so gross a failure to mitigate damages.

Nucci Flood – General Facts

Known around the world for creating glamorous designs using the highest quality printed silks, Pamela Nucci's evening gowns retail for as high as $10,000 a piece. Nucci is a high fashion designer with a showroom and warehouse in New York's Garment District on 35th Street between 7th and 8th Avenues. Nucci's showroom and warehouse are located on the 12th Floor of a twenty-story office building.

In the second week of February, Nucci's upstair neighbor, Extremely Realty, Inc., a large commercial real estate brokerage firm, had work done on its HVAC system. It retained Hovac Contractors for the job. Hovac, in turn, hired Bogie Plumbing to assist with the connections. In the course of the work, a massive pipe burst, which in turn set off a chain reaction causing a key water tank on the roof to burst, as well. The resulting massive flood sent thousands of gallons of water down to Nucci's space over the course of eight hours, drenching all 800 gowns that were stored in the showroom and warehouse.

When she came into the office on Tuesday morning, Nucci's assistant, Ludovica Longelux, called Pamela, who was at Bryant Park, for Fashion week. Ms. Nucci refused to be bothered by this triviality where the future of the Spring collection was at stake. No action was taken until she returned. Even then, her chief action was to complain to one and all. Although there was a nearby cleaner who specialized in drying fine wear, Nucci let the goods sit in water for a week. The water ruined Nucci's entire stock.

Nucci estimates the damage costs approximately 5 million dollars – what this fine clothing would bring at retail. As the case has progressed, defendants, while denying liability, have urged that the proper calculation is cost of manufacture of the clothing - $1,000,000, at best. The most likely standard of damages, though, is the wholesale cost, roughly $2.5 million at which Nucci would have sold these items.

Nucci has sued her landlord, Lenny Laches; Extremely Realty, Inc. – the real estate brokerage firm on the penthouse; Hovac and Bogie Plumbing.

Under a special law that applies to high fashion, comparative negligence coupled with failure to mitigate can, 1/3 of the time, result in an award of summary judgment for defendants.

The parties have agreed to mediate this matter.

Special Instructions for Mediator For Risk Analysis Exercise

You have already held a joint session, and have held caucuses with each of the parties and their counsel. As a result, you have a general sense that there is risk all around. Your overall impression is that the landlord and Extremely Realty will end up with little liability and that the lion's share will fall on the contractors, with a bit heavier dose on Bogie Plumbing.

You would like to help the parties think seriously and clearly about this matter, and move towards some concrete numbers without just a back and forth of negotiation offers and concessions, and without your having to make Delphic pronouncements of your own opinion. You decide to try a risk analysis/decision tree approach. You might also couple this with a transaction cost approach.

The collective sense from the parties is that:

- Damages probabilities at trial are 15% likelihood for Retail cost, 25% of likelihood for Manufacturing cost, and 60% for wholesale cost.
- There is a 33% chance that Nucci might lose on summary judgment.
- If liability were apportioned, it would likely be 50% for Bogie, 30% for Hovac, 15% for Laches and 5% for Extremely Realty.
- Litigation fees will likely exceed $150,000 per party through trial. Experts will be required.

Of course, there has not yet been clear recognition of this collective sense from each party most adversely affected by a particular assessment.

Assume that as the case progresses, Nucci's claim will get stronger. This is true because of her overwhelming evidence, and the likelihood of a sympathetic jury in this venue. Keep in mind that, in addition to trial, there are four critical stages at which the chance of recovery changes: pre-litigation settlement; post discovery settlement; summary judgment; pre-trial settlement.

Engage in an analysis of the risk considering the value of litigation versus settlement. When is the best time to settle? How much is the settlement worth?

Directions

Split up into groups of three. Begin in caucus with the Mediator, the Plaintiff, and Plaintiff's attorney. Engage in a decision tree analysis to help decide how to proceed and what terms you are willing to settle for.

If time permits, change roles and conduct a caucus, engaging in a decision tree analysis with the defendant of your choice and that defendant's attorney.

Confidential Facts for Lenny Laches Representative

You represent Lenny Laches, the owner of The Higher Building, one of the garment center's prime spots for fashionistas. Nucci has been one of Lenny's flagship tenants, but has also been somewhat high maintenance, to say the least. Her lease is up for renewal on October 1st. Rental prices have been rising and Lenny expects to seek higher rent, together with adequate escalations. Lenny is unsure whether he wishes to maintain this tenant or to find an easier tenant who can still pay the rent and provide cache.

The evening of the first Monday of last year's Fall Fashion week was a major disaster. Extremely Realty was having HVAC work done, when a pipe burst. The flood continued for 8 hours. Something about the vacuum created by the sudden rush of water triggered a rupture in the building's roof top water tank. As a result the contents of the entire tank were dumped through the pipe system.

The true cause and origin of this massive flood are a bit of a mystery. Extremely Realty's HVAC contractor, Hovac, deemed it necessary to connect the system not only to the pipes immediately above that tenant's 14th floor space, but also to develop connections directly with the building's rooftop tank to augment water pressure and speed availability of water as needed for its cooling processes. It hired what was plainly a below par plumber, Bogie Plumbing to connect the pipes both on the 14th floor and at the roof level. There is a good likelihood that Bogie left the pipes open to conduct a test of the HVAC system, without telling the building's super, Eddie Eager. Apparently, on Monday evening Eddie or one of his handymen turned the water back on. It took a while to realize that there was a flood. Tenants were out of the site, and the Nucci showroom had closed at 5 p.m. The flooding was discovered by a night security guard. At first the guard was not sure who to call or what to do. He eventually got in touch with Laches personnel. When they arrived, they shut the valve on the riser running to the affected area. Still the flooding continued. It took some time before they saw the additional feeder pipe. Even then, the flood continued as a result of pooling from the burst roof top tank.

Tuesday morning brought a slew of complaints from tenants. The most heavily affected was Nucci, whose showroom and warehouse were situated on the floor immediately below Extremely Realty. (To prevent unlucky occurrences, there is no 13th floor in the Higher Building.)

You are attending this mediation to look out for Laches's interests. Laches is named as an additional insured both under the policies of Extremely Realty and under the policies that Hovac and Bogie had to obtain before commencing work in the building. You are confident that, ultimately, the three insurers for one or another of these parties will cover you. Nevertheless, for some reason, they have not yet appeared on your behalf. Counsel for Extremely Realty is also present, and should certainly be looking after your interests. You do not understand why, knowing that their insurer should ultimately foot the bill, that they have started making noises about the rooftop tank.

Claims that the building failed to maintain the tank will only produce more complicated litigation. If you have to implead the tank maintenance company and the manufacturer of this 3 year old tank, of course you will. Someone else, not Lenny Laches, will pay in the end.

Knowing that there is some risk of litigation cost, or worse, you are authorized to contribute nuisance value to a settlement. Lenny is available by phone, so that you will not lack additional authority if needed.

Nucci Flood – General Facts

Known around the world for creating glamorous designs using the highest quality printed silks, Pamela Nucci's evening gowns retail for as high as $10,000 a piece. Nucci is a high fashion designer with a showroom and warehouse in New York's Garment District on 35th Street between 7th and 8th Avenues. Nucci's showroom and warehouse are located on the 12th Floor of a twenty-story office building.

In the second week of February, Nucci's upstair neighbor, Extremely Realty, Inc., a large commercial real estate brokerage firm, had work done on its HVAC system. It retained Hovac Contractors for the job. Hovac, in turn, hired Bogie Plumbing to assist with the connections. In the course of the work, a massive pipe burst, which in turn set off a chain reaction causing a key water tank on the roof to burst, as well. The resulting massive flood sent thousands of gallons of water down to Nucci's space over the course of eight hours, drenching all 800 gowns that were stored in the showroom and warehouse.

When she came into the office on Tuesday morning, Nucci's assistant, Ludovica Longelux, called Pamela, who was at Bryant Park, for Fashion week. Ms. Nucci refused to be bothered by this triviality where the future of the Spring collection was at stake. No action was taken until she returned. Even then, her chief action was to complain to one and all. Although there was a nearby cleaner who specialized in drying fine wear, Nucci let the goods sit in water for a week. The water ruined Nucci's entire stock.

Nucci estimates the damage costs approximately 5 million dollars – what this fine clothing would bring at retail. As the case has progressed, defendants, while denying liability, have urged that the proper calculation is cost of manufacture of the clothing - $1,000,000, at best. The most likely standard of damages, though, is the wholesale cost, roughly $2.5 million at which Nucci would have sold these items.

Nucci has sued her landlord, Lenny Laches; Extremely Realty, Inc. – the real estate brokerage firm on the penthouse; Hovac and Bogie Plumbing.

Under a special law that applies to high fashion, comparative negligence coupled with failure to mitigate can, 1/3 of the time, result in an award of summary judgment for defendants.

The parties have agreed to mediate this matter.

Special Instructions for Mediator For Risk Analysis Exercise

You have already held a joint session, and have held caucuses with each of the parties and their counsel. As a result, you have a general sense that there is risk all around. Your overall impression is that the landlord and Extremely Realty will end up with little liability and that the lion's share will fall on the contractors, with a bit heavier dose on Bogie Plumbing.

You would like to help the parties think seriously and clearly about this matter, and move towards some concrete numbers without just a back and forth of negotiation offers and concessions, and without your having to make Delphic pronouncements of your own opinion. You decide to try a risk analysis/decision tree approach. You might also couple this with a transaction cost approach.

The collective sense from the parties is that:

- Damages probabilities at trial are 15% likelihood for Retail cost, 25% of likelihood for Manufacturing cost, and 60% for wholesale cost.
- There is a 33% chance that Nucci might lose on summary judgment.
- If liability were apportioned, it would likely be 50% for Bogie, 30% for Hovac, 15% for Laches and 5% for Extremely Realty.
- Litigation fees will likely exceed $150,000 per party through trial. Experts will be required.

Of course, there has not yet been clear recognition of this collective sense from each party most adversely affected by a particular assessment.

Assume that as the case progresses, Nucci's claim will get stronger. This is true because of her overwhelming evidence, and the likelihood of a sympathetic jury in this venue. Keep in mind that, in addition to trial, there are four critical stages at which the chance of recovery changes: pre-litigation settlement; post discovery settlement; summary judgment; pre-trial settlement.

Engage in an analysis of the risk considering the value of litigation versus settlement. When is the best time to settle? How much is the settlement worth?

Directions

Split up into groups of three. Begin in caucus with the Mediator, the Plaintiff, and Plaintiff's attorney. Engage in a decision tree analysis to help decide how to proceed and what terms you are willing to settle for.

If time permits, change roles and conduct a caucus, engaging in a decision tree analysis with the defendant of your choice and that defendant's attorney.

Nucci Flood – General Facts

Known around the world for creating glamorous designs using the highest quality printed silks, Pamela Nucci's evening gowns retail for as high as $10,000 a piece. Nucci is a high fashion designer with a showroom and warehouse in New York's Garment District on 35th Street between 7th and 8th Avenues. Nucci's showroom and warehouse are located on the 12th Floor of a twenty-story office building.

In the second week of February, Nucci's upstair neighbor, Extremely Realty, Inc., a large commercial real estate brokerage firm, had work done on its HVAC system. It retained Hovac Contractors for the job. Hovac, in turn, hired Bogie Plumbing to assist with the connections. In the course of the work, a massive pipe burst, which in turn set off a chain reaction causing a key water tank on the roof to burst, as well. The resulting massive flood sent thousands of gallons of water down to Nucci's space over the course of eight hours, drenching all 800 gowns that were stored in the showroom and warehouse.

When she came into the office on Tuesday morning, Nucci's assistant, Ludovica Longelux, called Pamela, who was at Bryant Park, for Fashion week. Ms. Nucci refused to be bothered by this triviality where the future of the Spring collection was at stake. No action was taken until she returned. Even then, her chief action was to complain to one and all. Although there was a nearby cleaner who specialized in drying fine wear, Nucci let the goods sit in water for a week. The water ruined Nucci's entire stock.

Nucci estimates the damage costs approximately 5 million dollars – what this fine clothing would bring at retail. As the case has progressed, defendants, while denying liability, have urged that the proper calculation is cost of manufacture of the clothing - $1,000,000, at best. The most likely standard of damages, though, is the wholesale cost, roughly $2.5 million at which Nucci would have sold these items.

Nucci has sued her landlord, Lenny Laches; Extremely Realty, Inc. – the real estate brokerage firm on the penthouse; Hovac and Bogie Plumbing.

Under a special law that applies to high fashion, comparative negligence coupled with failure to mitigate can, 1/3 of the time, result in an award of summary judgment for defendants.

The parties have agreed to mediate this matter.

Special Instructions for Mediator For Risk Analysis Exercise

You have already held a joint session, and have held caucuses with each of the parties and their counsel. As a result, you have a general sense that there is risk all around. Your overall impression is that the landlord and Extremely Realty will end up with little liability and that the lion's share will fall on the contractors, with a bit heavier dose on Bogie Plumbing.

You would like to help the parties think seriously and clearly about this matter, and move towards some concrete numbers without just a back and forth of negotiation offers and concessions, and without your having to make Delphic pronouncements of your own opinion. You decide to try a risk analysis/decision tree approach. You might also couple this with a transaction cost approach.

The collective sense from the parties is that:

- Damages probabilities at trial are 15% likelihood for Retail cost, 25% of likelihood for Manufacturing cost, and 60% for wholesale cost.
- There is a 33% chance that Nucci might lose on summary judgment.
- If liability were apportioned, it would likely be 50% for Bogie, 30% for Hovac, 15% for Laches and 5% for Extremely Realty.
- Litigation fees will likely exceed $150,000 per party through trial. Experts will be required.

Of course, there has not yet been clear recognition of this collective sense from each party most adversely affected by a particular assessment.

Assume that as the case progresses, Nucci's claim will get stronger. This is true because of her overwhelming evidence, and the likelihood of a sympathetic jury in this venue. Keep in mind that, in addition to trial, there are four critical stages at which the chance of recovery changes: pre-litigation settlement; post discovery settlement; summary judgment; pre-trial settlement.

Engage in an analysis of the risk considering the value of litigation versus settlement. When is the best time to settle? How much is the settlement worth?

Directions

Split up into groups of three. Begin in caucus with the Mediator, the Plaintiff, and Plaintiff's attorney. Engage in a decision tree analysis to help decide how to proceed and what terms you are willing to settle for.

If time permits, change roles and conduct a caucus, engaging in a decision tree analysis with the defendant of your choice and that defendant's attorney.

Confidential Facts for Pamela Nucci Representative

You represent Pamela Nucci, and her company Nucci Enterprises, Inc. In February of last year, just after the first day of New York's Fall Fashion week, there was a massive flood in Nucci's space, initiated by HVAC work being done by an upstairs tenant, Extremely Realty.

The flood, which was augmented by a resultant break in the roof top water tank, lasted eight hours, drenching 800 of Nucci's fine evening gowns, which were on display in her showroom or stored in her warehouse, both located in a 20 story building owned by Lenny Laches, situated on 35th Street between 7th and 8th Avenues.

When the flood was discovered, Nucci was off site at Bryant Park for the first day of Fall Fashion Week. When her assistant, Ludavica Langelux, called to report the disaster, Nucci was outraged, to say the least. How dare the building let this happen to her at the start of the most important week of the year (other than Spring Fashion week)! They would just have to take care of it. And they had best be sure that nothing bad happened to her clothing. When Luddie asked what they should do with the soaked garments, Nucci screamed "I am not to be bothered with this again!" and hung up. For the rest of the week, Nucci was busy with galas, after parties, and pressing the flesh at the various Fashion week gatherings. The ever obedient Ludovica knew better than to bother her boss at this critical time, but knew nothing about what to do with the clothes. On Wednesday, the day after she discovered the flood, Luddie was alarmed when she saw workers entering the building. To ensure that no further damage occurred in Nucci's absence, Ludovica moved all the drenched showroom garments to the warehouse, placing them with the other soaked garments there, and surrounded the bundle in cellophane to prevent further damage from any new leaks. There they sat until the following Tuesday, when Nucci returned to the showroom. To Nucci's dismay, the gowns were soaked through and through. Indeed, a fine clothing mold had begun to infect the gowns. By the time they got to the nearest cleaner, the cleaner reported that the mold could not be removed.

Nucci was beside herself. This would waste all her hard work of the past week. How could she deliver on orders that were going to come from the newly encouraged buyers and her well established worldwide accounts? She would have to ramp up production, at increased cost.

Of the 800 gowns, Nucci estimates that they would have the following retail values:

200 gowns at $4,000 a piece = $800,000
200 gowns at $5,500 a piece = $1,100,000
200 gowns at $6,500 a piece = $1,300,000
100 gowns at $8,000 a piece = $800,000
100 gowns at $10,000 a piece = $1,000,000

Thus, the total estimated retail value of the gowns is $5 million.

Nucci typically sells her gowns at 250% of their production cost. She estimates it would have cost roughly $1 million to manufacture these gowns. She believes that she would have sold them to her customers at the wholesale price of $2.5 million. Her customers typically mark her clothes up by 200%. This is a win/win for everyone. They send the message that hers are the top dresses around, get to make a good profit on their sales, and leave themselves a good cushion for end of season mark downs when a number of these high priced items do not sell.

In the end, Nucci did manage to reproduce 400 of the 800 lost gowns (distributed evenly on a pro rata basis among the gown types) at twice the normal production cost (i.e., at a cost of $1 million). Because of delays, she sold these 400 gowns at 80% of her usual price, i.e, in total, for $1 million. She was willing to do this to maintain her good name for long term gain (and out of pride in being the best.) Moreover, the production rush impeded her famed quality control processes, resulting in a tripling of her typical 5% rate of returns for quality issues, reducing her gross receipts for those 400 gowns to $850,000. Thus, replacement of these 400 gowns actually cost her an additional $150,000 beyond the initial lost profit of $1,250,000 for these 400 dresses.

Despite the cleaner's initial report, approximately forty percent of the soaked gowns were salvageable, distributed evenly on a pro rata basis among the gown types, although none of them could be sold to regular buyers. They could be sold at 25% of their regular price (i.e., for $250,000) to outlet stores, big box stores, lower end retailers, or in lesser developed countries. But Nucci would rather burn the stock than dilute her platinum brand name by selling this year's line at significantly lower prices to a lower end market.

Nucci had been trying for the last year to get reimbursed by her insurer, Geneva Insurance Co. for this loss. Hers is a generous policy, which would cover more than replacement cost. The insurer issued a reservation of rights letter for untimely notice, on account of the stock's sitting for a week in water. The insurer was notified the week following Nucci's return. The reservation of rights letter permits Nucci to sue directly for recovery from the tortfeasors.

After consultation with optimistic counsel, she has decided not to wait for the now imminent payment of her claim by Geneva, but to seek the highest damages through direct litigation. You are on a 1/3 contingent fee, but are paid a lower (25%) fee if the matter settles within the first year of litigation.

You are eager to settle this matter and are under a bit of pressure to bring in a high recovery in light of the impact of your fee on the net to Nucci and the chance that Nucci might otherwise have done fairly well with her insurer.

A side factor is that Nucci's lease with her landlord is up for renewal on October 1st. She has been happy enough in this space, and would prefer not to incur the cost of a new lease.

Frankly, you do not have a stake in the percentage each party contributes. For you, the key is the total recovery. You are interested in seeing what can develop through this mediation.

The Heart of Things Role Play

Facilitators Introductory Instructions

Dear Facilitators:

Thank you for taking on the role that organizes the role play group and facilitates the group's self reflection and learning.

With these instructions is a complete set of materials.

There are:

1. General Facts. Everyone has these.
2. Confidential Facts. There is a sheet of confidential facts for each of the participants:
    a. Plaintiff – Dirk Bowie
    b. Defendant – Svetlana Svobodich
    c. Plaintiff's Attorney – Terry Mason
    d. Defendant's Attorney – Robbie Sankara.

A. If not already distributed, kindly distribute the Confidential Facts to each of the role players.

B. We are allotting 90 minutes to the entire Role Play part of this Training Program. 20 of those minutes will be spent in reporting and discussing the outcome of the role plays back with the other groups in the main room. Your private group session will consist of 50 minutes (allowing yourselves 10 minutes at the end for a break or as a cushion if things run longer). These 50 minutes are divided into:

    a. 5 minutes for each participant to review his or her private facts.
    b. 35 - 40 minutes for the role play.
    c. 10 – 15 minutes for reflection and mutual comment within your own 6 person group.

C. You have also gotten a Feedback Sheet. Please review this as others are reviewing their private facts (you may also review all common and private facts – but may not discuss or share this information until after the role play is complete). Keep an eye out for these items as the role play proceeds.

D. It is up to you and the group whether you stick with the same mediator throughout or decide to change after 15-20 minutes to give another participant the chance to play mediator. Of course, at that time, the old mediator would have to quickly read the new mediator's role play facts and assume that role.

E. When the role play is over, you facilitate discussion among the participants.

F. In addition to using the annexed Feedback Sheet as a guide for facilitating discussion, please consider the following as key points for the group's post-role play discussion:

We are testing to see whether mediators and parties move towards business deals or case evaluation. Watch carefully to see who initiates discussion on these points. Does the mediator elicit interests and emotions? Does the mediator guide the discussion to case evaluation.

From the parties, see what potential business deals were possible. From counsel, see what case evaluations would suggest (in light of transaction costs).

If business deals were developed, what was the key to that's happening? If case evaluation occurred, what and how was that process? Did the mediator and/or participants engage in: risk analysis? transaction cost analysis? Identification of "win/win range" (also ZOPA – zone of possible agreement)?

Here is a recast of the key points:

1. Party focus? How much do parties speak? How much do counsel speak?
2. Case evaluation. How much time is spent on this? Is this driven by mediator, parties, counsel?
3. Business analysis. How much time is spent on this? Is this driven by mediator, parties, counsel?
4. What were possible outcomes? What led to outcome in your mediation?
5. Did you see active listening? How were emotions expressed and handled?
6. Again, overall, how much was driven by mediator, parties, counsel?

Getting to the Heart of Things

In the 1980s Dirk Bowie launched a national craze, the green wristband. People everywhere seized on these items as signs of environmental consciousness. Before long, they were found on the wrists of public school teachers, corporate leaders, mayors and councilmen, schoolchildren and grandparents, pool men and yoga instructors.

In short order, green turned to pink, pink turned to blue, and a host of other meanings were attributed to these bands. Dirk opened a flagship store for this product, affectionately termed heart-on-sleeves. They were popular giveaways at corporate functions, trade shows and other large scale brand events.

As business grew, Dirk needed a capable person to run his New York flagship store Heart on Prince, located in the heart of Soho. Fortunately for him, in the late 1990s along came Svetlana Svobodich, a young and beautiful Russian émigré, loaded with ambition and smarts. In no time, Svetlana was running the Soho store so well that Dirk felt comfortable retreating to his manufacturing operation in Poughkeepsie. There, he could maintain quality control and continue to develop nifty concepts and designs: the chartreuse band, the cherry band, the vermillion band – with boundless creativity.

Over the next decade Dirk made Svetlana a 50/50 partner, and trusted her increasingly with not only the full operation of the Manhattan store, but also marketing and sales domestically and abroad, and the handling of all billing and accounting for Heart. Dirk grew increasingly engaged in the creative side to the exclusion of the business side. He also greatly enjoyed cultivating his garden and traveling.

Now it is 2009. Throughout the last year, Dirk has been growing increasingly anxious. He was accustomed to receiving monthly distributions of $45,000 from Svetlana representing his share of profits from the Store and other receipts. But over the course of 2008, his monthlies fell to $25,000 or less, and there were three months with no distribution. Convinced that Svetty is siphoning funds from the company till, Dirk instructed his attorney, Terry Mason, to commence an accounting proceeding in Supreme Court, New York County. Mason began with an order to show cause, seeking an injunction against Svetlana's transferring receipts or company funds, and alleging fraud, unjust enrichment and breach of fiduciary duties. Svetlana's counsel, Robbie Sankara, interposed defenses and mirror image counterclaims.

The matter has surfaced before the Hon. Eileen Bransten in the Commercial Division. Justice Bransten has deferred imposing the full extent of the relief sought in the Order to Show Cause, recognizing that, while the contested funds should not be transferred to the partners, they must be available for use in order to meet expenses of the business. The Judge has ordered this matter to mediation under the Commercial Division rules. Counsel have conducted an organizational pre-mediation conference call with the Mediator, and are now appearing for a mediation session.

Confidential Facts for Dirk Bowie

(Dirk's inner dialogue – which you are free to express as you see fit. Your love of color has made its mark on your language – which is both colorful and, at times, off color.):

You have had it with this manipulative and deceptive ingrate. How did this business get here in the first place? Who is it who came up with the name, the product that you all sell? You introduced the cool wristband look before anyone ever thought of it. Now you see them everywhere. A simple plastic strap – You are the Andy Warhol of wristwear. If it weren't for your creative efforts, all of her sales and marketing would have gone nowhere.

You had imagined staying in the country, leaving the store in her competent hands, and getting a solid paycheck every month. So much for sweet retirement days. Now you go away, and where's the money? You have had it with her keeping you in the dark. Your thanks for trust is a drop in revenue; whatever happened to loyalty?

The retail store used to be yours; now if you step foot in there, "HER" employees make a phone call and she is there in 5 minutes asking what you need. You have had it with her micro management. You could run this store better yourself; supply it directly as manufacturer and do without her as middleman. But she'd never go for that.

You are hitting the late 50s early 60s. Your daughter has been helping you with the manufacturing business and is a sounding board for some of your creative ideas: "Hey what about magenta?" You remember that one day when you spent hours going back and forth between Persian Rose and Hot Pink. What a feisty girl! But now, what are you likely to be able to leave her as inheritance?

Confidential Facts for Svetlana Svobodich

(Svetlana's inner dialogue – which you are free to express as you see fit):

That old lech. At first he really appreciated you. Not just for your appearance but because you were so reliable, so energetic – you made things happen. But then he grew complacent, relying on you to do the work while he explored the color wheel in Poughkeepsie. He expected you to bankroll him no matter what.

Sure it is a good thing that you have resources from the home country. When Gary Shteyngart wrote Absurdistan, he had you in mind as the true Russian Debutante. The 1238th richest man in Russia is nothing compared to your relatives. You love visits to the dacha and are fortunate to have access to foreign accounts.

These could come in quite handy. You could make a fortune taking the "heart-on-sleeve" concept global. If only he would let you fly. But no matter what you do or suggest for international marketing, he is stuck on the local scene. The Mom and Pop shop in Soho, and the homey manufacturing plant upstate. Who needs them? You, if left to your own devices, could outsource manufacturing and make a killing in the old homeland and elsewhere. Selling Byzantium in St. Petersburg, Islamic green in Saudi Arabia, India green in the subcontinent, Han purple in China, and international orange everywhere.

If only you could have the intellectual property rights, you could make a fortune.

But you are sick of his looking over your shoulders. If he does not believe that last year was tough for retail, let him read the Wall Street Journal once in a while instead of the color wheel and the Farmer's Almanac. Mr. Grassroots. He never had a sense of the numbers, no matter how street smart he thinks he is. It is true: when he comes into the store, your employees have instructions to let you know immediately. You do not want him poking around the books and records, or messing with inventory. There is no telling the damage that he could do.

Deep down, the thing that is killing you is his lack of trust and gratitude. You have carried him all these years, and been tremendously loyal. How dare he accuse you of siphoning off funds for international ventures or whatever else is in his mind?!

Confidential Facts for Terry Mason

(You are free to share as you see fit, with your client or others, per your sense of what will lead to the best and most expeditious resolution)

You have known Dirk for years. He is an inspired man. He is also a bit of a renegade. Hard to control. You can imagine the trial before Judge Bransten. Not a pretty picture. Among other things, his speech is a bit colorful, to say the least.

You have to credit him for starting the heart-on-sleeve craze, and for being an entrepreneur. Although he is street smart, he seems to miss quite a lot, when it comes to financial detail.

Here is what you have learned. In the early 1990s, Heart on Prince was generating gross sales of $500,000 per year. Ten years later, these revenues had doubled. This is independent from deals and sales that went directly from the Poughkeepsie factory to wholesalers or even certain boutiques in other states. There is some confusion on whether sales should have come through the Heart on Prince headquarters or whether it was appropriate for them to be initiated by the Poughkeepsie plant. By and large, receivables were handled by the Soho store, even for Poughkeepsie generated transactions, but this is far from uniform.

In short, financial recordkeeping and the ability to attribute receipts to sales is a mess. Even worse is the question of whether Dirk declared his Poughkeepsie receipts to both his partner, Svetlana and to his Uncle Sam.

Nevertheless, you take comfort in the fact that recordkeeping was poor in Soho, under Svetlana's dominion. This cuts both ways, however. It will be hard for you to prove that receipts are due to Dirk without a clearer financial picture. Your plan, though, is to call for an accounting, cry fraud, unjust enrichment, and breach of fiduciary duty, rattle the receivership sword (G-d forbid!) and hope that something will shake loose to the tune of $500,000 or so.

You do recognize that dissolution proceedings will be a pox on both houses.

If you are asked, you can acknowledge that cost of litigation is $150,000 or more. You do not come cheaply, and there is much to do. Experts and accountants will be needed. There is a risk that the fraud claim might be dismissed – the facts of misrepresentation are a bit dicey. But you hope you can hold onto the breach of fiduciary duties and the accounting claim. Unjust enrichment will be difficult in light of tracing problems when push comes to shove. Feel free to do your best if called on to give percentages of win/lose on any of these points, and to ad lib with case detail affecting the evaluation, as long as it is more or less consistent with the general description in these facts.

Confidential Facts for Robbie Sankara

(You are free to share as you see fit, with your client or others, per your sense of what will lead to the best and most expeditious resolution)

That Svetlana is a dynamo. She runs a tight ship in the Soho store. And at the same time is globe trotting looking for international deals. The family money she has is impressive, which is something one appreciates when delivering a bill for services rendered and costs, expenses and disbursements incurred. This case can be a gold mine. You will see $200,000 in fees before the parties collapse in exhaustion.

You know Svetlana Svobodich can be tough. And, you have concerns about the record keeping at the Soho store. Svetty tells you that she has not taken any funds for personal purposes, and that she has been sharing revenues with Dirk, as required under their unwritten partnership agreement. Thank G-d for K-1s.

Speaking of K-1s, you are not sure just how accurate the tax reporting has been over the years. Most of this is Dirk's fault, but it could harm both partners under the wrong circumstances.

You are not enthusiastic about the prospects of an accounting. Poor record keeping might harm your client even if there was no actual malfeasance. But they say that there is no defense quite like a good offense. You have reason to believe that Dirk has made various deals out of the Poughkeepsie factory – even though all sales should run from, and bring receivables to, Soho – and have asserted breach of fiduciary duty and unjust enrichment claims against him. You will hammer away at this and hope that no one pushes too hard on the Soho mess or wonders how Svetlana supports her luxe lifestyle.

If the mediator pushes you for an evaluation, you must recognize that the accounting will be costly and produce a mess. This will cut against the Plaintiff on the unjust enrichment side – try tracing those funds. You are pretty sure everyone knows that dissolution or even a receivership will be a pox on both houses.

Feel free to do your best if called on to give percentages of win/lose on any of these points, claims or counterclaims, and to ad lib with case detail affecting the evaluation, as long as it is more or less consistent with the general description in these facts.

Feedback Sheet
(a/k/a Ed Koch Sheet: "How am I doing?")

Dear Facilitators:

Below are a list of factors to consider when giving feedback, or better when facilitating self-reflective discussion among the participants – and when reporting back to the entire assembly.

Before considering these factors, here are some special instructions just for you.

Special Instructions for Facilitators:

We are testing to see whether mediators and parties move towards business deals or case evaluation. Watch carefully to see who initiates discussion on these points. Does the mediator elicit interests and emotions? Does the mediator guide the discussion to case evaluation.

When the role play is done facilitate sharing of confidential information. From the parties, see what potential business deals were possible. From counsel, see what case evaluations would suggest (in light of transaction costs).

If business deals were developed, what was the key to that's happening? If case evaluation occurred, what and how was that process? Did the mediator and/or participants engage in: risk analysis? transaction cost analysis? Identification of "win/win range" (also ZOPA – zone of possible agreement)?

Now, following are general considerations for feedback.

General Feedback Considerations:

Seating:
- Parties closer than counsel to mediator
- Mediator by door

Introductions:
- Set tone?
- Party focus?
- Develop trust?
- Eye Contact?

Mediator's opening:
- Explain process?
- Any Ground rules?
- Neutrality?
- Non-adjudicative role? (Facilitator of negotiation/dialogue)

- Party self-determination?
- Confidentiality (joint and in caucus)?
- Settlement (not too critical for Commercial Division, where attorneys present and parties sophisticated)
- "Cheerlead" process? (*e.g.*, "resolution," satisfaction and adherence statistics [do not say "success"]; flexibility of remedy, relationship possibilities, accommodation of expression of feelings and interests, high level of party involvement and control, integrative possibilities)

Party openings:

- Who spoke? (Lawyer, Party?)
- How introduced? ("What brings us here?"; *not* tell us your case)

Active Listening:

- Use of silence? (leaving space for parties)
  - Avoiding detailed questions that interfere with flow and make communication about mediator rather than other parties
- Validation
- Empathizing
- Clarifying
- Summarizing
- Permitted (rather than cut off) emotional expression
- Caught cues from parties, rather than driven to make own point?

Body Language:

- Eye contact?
- Body posture
  - Communicating listening and neutrality?
  - Presence?
- Avoid "blocking" postures?

Note Taking:

- Not excessive, obsessive?
- Not interfering with contact?
- Seeking not only key Issues, but also
  - Interests
  - Feelings
  - Options
  - Offers

Comments to Generate Cooperation, and Cooperative Problem Solving?

- In Caucus: Avoiding "bad-mouthing" party outside the room

Opportunities Seized or Let Pass

- Empowerment
  - Explaining Process
  - Encouraging Expression
  - Encouraging Option Generation

Encouraging Choice
Encouraging Party Joint Problem Solving
Recognition (of)
Feelings
Interests
Progress
Offers/Options
Recognition (noting where one party recognizes something in the other)

Maintain Facilitative Role?
Kept parties first?
Asked more than told?
Encouraged constructive questions between parties?
Sought to discern parties' needs, interests, issues and let those and the parties' own moving force drive the process?
Balanced Control of Process?
Recognizing that Parties Drive Process

Build trust?

Build Understanding?
Noting perspectives?
Encouraging party restatement or reframing of "adverse" party perspective?

Work on Relationships?

Palatably Optimistic?

Respectfully Persistent?

Tactful Use of Humor?

Issues
Identified Interests?
Identified business needs?
Elicited dreams?
Identified Issues?
Raised *by Parties* (not mediator)?
Legal Issues not raised where Interest Focus preferable?
Timing
(not rushing to issues before party has chance for full expression)
Sharpen focus
Handling of Legal Issues
encouraged analysis by parties; analysis not performed by Mediator?

Option Generation
Facilitative?
Whose suggestions?

- Brainstorming used?
- Deferred Reality testing long enough to encourage option generation
- Identified possibilities for business solutions?

Reality Testing
- Encouraged Party to State Own Strengths
- Inquired About Party Sense and Assessment of Weaknesses
  - Discussed Weaknesses in terms of:
    - Party's own perceptions
    - Adverse party's authorized stated perceptions
    - Raised *Exploratory Questions* About
      - Legal Points
      - Facts to be Proved
      - Risks
- Risk Analysis
  - Decision Tree?
  - Percentages
- Assessment of Legal Issues
  - Inducing clarity without being evaluative?
  - BATNA used?
  - Style: Inquiry or Pronouncement?
- Use of damages assessement?

Effective Development of Standards
- Fair
- Doable
- Customary
- Reasonable
- Legal Calculus

Caucus
- Choose too soon?
- Use too often?
- Remembered to mention confidentiality?
- Began by "checking in" with parties?

Settlement
- Focussed issues for developing settlement agreement
- Clarified Issues for inclusion in Agreement?
- Ginger acknowledgment of closure?
- Keeps own cows from racing to the barn?
- Not over 'til the weight challenged person sings
- Developed effective writing

Getting to the Heart of Things

In the 1980s Dirk Bowie launched a national craze, the green wristband. People everywhere seized on these items as signs of environmental consciousness. Before long, they were found on the wrists of public school teachers, corporate leaders, mayors and councilmen, schoolchildren and grandparents, pool men and yoga instructors.

In short order, green turned to pink, pink turned to blue, and a host of other meanings were attributed to these bands. Dirk opened a flagship store for this product, affectionately termed heart-on-sleeves. They were popular giveaways at corporate functions, trade shows and other large scale brand events.

As business grew, Dirk needed a capable person to run his New York flagship store Heart on Prince, located in the heart of Soho. Fortunately for him, in the late 1990s along came Svetlana Svobodich, a young and beautiful Russian émigré, loaded with ambition and smarts. In no time, Svetlana was running the Soho store so well that Dirk felt comfortable retreating to his manufacturing operation in Poughkeepsie. There, he could maintain quality control and continue to develop nifty concepts and designs: the chartreuse band, the cherry band, the vermillion band – with boundless creativity.

Over the next decade Dirk made Svetlana a 50/50 partner, and trusted her increasingly with not only the full operation of the Manhattan store, but also marketing and sales domestically and abroad, and the handling of all billing and accounting for Heart. Dirk grew increasingly engaged in the creative side to the exclusion of the business side. He also greatly enjoyed cultivating his garden and traveling.

Now it is 2009. Throughout the last year, Dirk has been growing increasingly anxious. He was accustomed to receiving monthly distributions of $45,000 from Svetlana representing his share of profits from the Store and other receipts. But over the course of 2008, his monthlies fell to $25,000 or less, and there were three months with no distribution. Convinced that Svetty is siphoning funds from the company till, Dirk instructed his attorney, Terry Mason, to commence an accounting proceeding in Supreme Court, New York County. Mason began with an order to show cause, seeking an injunction against Svetlana's transferring receipts or company funds, and alleging fraud, unjust enrichment and breach of fiduciary duties. Svetlana's counsel, Robbie Sankara, interposed defenses and mirror image counterclaims.

The matter has surfaced before the Hon. Eileen Bransten in the Commercial Division. Justice Bransten has deferred imposing the full extent of the relief sought in the Order to Show Cause, recognizing that, while the contested funds should not be transferred to the partners, they must be available for use in order to meet expenses of the business. The Judge has ordered this matter to mediation under the Commercial Division rules. Counsel have conducted an organizational pre-mediation conference call with the Mediator, and are now appearing for a mediation session.

Confidential Facts for Dirk Bowie

(Dirk's inner dialogue – which you are free to express as you see fit. Your love of color has made its mark on your language – which is both colorful and, at times, off color.):

You have had it with this manipulative and deceptive ingrate. How did this business get here in the first place? Who is it who came up with the name, the product that you all sell? You introduced the cool wristband look before anyone ever thought of it. Now you see them everywhere. A simple plastic strap – You are the Andy Warhol of wristwear. If it weren't for your creative efforts, all of her sales and marketing would have gone nowhere.

You had imagined staying in the country, leaving the store in her competent hands, and getting a solid paycheck every month. So much for sweet retirement days. Now you go away, and where's the money? You have had it with her keeping you in the dark. Your thanks for trust is a drop in revenue; whatever happened to loyalty?

The retail store used to be yours; now if you step foot in there, "HER" employees make a phone call and she is there in 5 minutes asking what you need. You have had it with her micro management. You could run this store better yourself; supply it directly as manufacturer and do without her as middleman. But she'd never go for that.

You are hitting the late 50s early 60s. Your daughter has been helping you with the manufacturing business and is a sounding board for some of your creative ideas: "Hey what about magenta?" You remember that one day when you spent hours going back and forth between Persian Rose and Hot Pink. What a feisty girl! But now, what are you likely to be able to leave her as inheritance?

Confidential Facts for Robbie Sankara

(You are free to share as you see fit, with your client or others, per your sense of what will lead to the best and most expeditious resolution)

That Svetlana is a dynamo. She runs a tight ship in the Soho store. And at the same time is globe trotting looking for international deals. The family money she has is impressive, which is something one appreciates when delivering a bill for services rendered and costs, expenses and disbursements incurred. This case can be a gold mine. You will see $200,000 in fees before the parties collapse in exhaustion.

You know Svetlana Svobodich can be tough. And, you have concerns about the record keeping at the Soho store. Svetty tells you that she has not taken any funds for personal purposes, and that she has been sharing revenues with Dirk, as required under their unwritten partnership agreement. Thank G-d for K-1s.

Speaking of K-1s, you are not sure just how accurate the tax reporting has been over the years. Most of this is Dirk's fault, but it could harm both partners under the wrong circumstances.

You are not enthusiastic about the prospects of an accounting. Poor record keeping might harm your client even if there was no actual malfeasance. But they say that there is no defense quite like a good offense. You have reason to believe that Dirk has made various deals out of the Poughkeepsie factory – even though all sales should run from, and bring receivables to, Soho – and have asserted breach of fiduciary duty and unjust enrichment claims against him. You will hammer away at this and hope that no one pushes too hard on the Soho mess or wonders how Svetlana supports her luxe lifestyle.

If the mediator pushes you for an evaluation, you must recognize that the accounting will be costly and produce a mess. This will cut against the Plaintiff on the unjust enrichment side – try tracing those funds. You are pretty sure everyone knows that dissolution or even a receivership will be a pox on both houses.

Feel free to do your best if called on to give percentages of win/lose on any of these points, claims or counterclaims, and to ad lib with case detail affecting the evaluation, as long as it is more or less consistent with the general description in these facts.

Confidential Facts for Svetlana Svobodich

(Svetlana's inner dialogue – which you are free to express as you see fit):

That old lech. At first he really appreciated you. Not just for your appearance but because you were so reliable, so energetic – you made things happen. But then he grew complacent, relying on you to do the work while he explored the color wheel in Poughkeepsie. He expected you to bankroll him no matter what.

Sure it is a good thing that you have resources from the home country. When Gary Shteyngart wrote Absurdistan, he had you in mind as the true Russian Debutante. The 1238th richest man in Russia is nothing compared to your relatives. You love visits to the dacha and are fortunate to have access to foreign accounts.

These could come in quite handy. You could make a fortune taking the "heart-on-sleeve" concept global. If only he would let you fly. But no matter what you do or suggest for international marketing, he is stuck on the local scene. The Mom and Pop shop in Soho, and the homey manufacturing plant upstate. Who needs them? You, if left to your own devices, could outsource manufacturing and make a killing in the old homeland and elsewhere. Selling Byzantium in St. Petersburg, Islamic green in Saudi Arabia, India green in the subcontinent, Han purple in China, and international orange everywhere.

If only you could have the intellectual property rights, you could make a fortune.

But you are sick of his looking over your shoulders. If he does not believe that last year was tough for retail, let him read the Wall Street Journal once in a while instead of the color wheel and the Farmer's Almanac. Mr. Grassroots. He never had a sense of the numbers, no matter how street smart he thinks he is. It is true: when he comes into the store, your employees have instructions to let you know immediately. You do not want him poking around the books and records, or messing with inventory. There is no telling the damage that he could do.

Deep down, the thing that is killing you is his lack of trust and gratitude. You have carried him all these years, and been tremendously loyal. How dare he accuse you of siphoning off funds for international ventures or whatever else is in his mind?!

Confidential Facts for Terry Mason

(You are free to share as you see fit, with your client or others, per your sense of what will lead to the best and most expeditious resolution)

You have known Dirk for years. He is an inspired man. He is also a bit of a renegade. Hard to control. You can imagine the trial before Judge Bransten. Not a pretty picture. Among other things, his speech is a bit colorful, to say the least.

You have to credit him for starting the heart-on-sleeve craze, and for being an entrepreneur. Although he is street smart, he seems to miss quite a lot, when it comes to financial detail.

Here is what you have learned. In the early 1990s, Heart on Prince was generating gross sales of $500,000 per year. Ten years later, these revenues had doubled. This is independent from deals and sales that went directly from the Poughkeepsie factory to wholesalers or even certain boutiques in other states. There is some confusion on whether sales should have come through the Heart on Prince headquarters or whether it was appropriate for them to be initiated by the Poughkeepsie plant. By and large, receivables were handled by the Soho store, even for Poughkeepsie generated transactions, but this is far from uniform.

In short, financial recordkeeping and the ability to attribute receipts to sales is a mess. Even worse is the question of whether Dirk declared his Poughkeepsie receipts to both his partner, Svetlana and to his Uncle Sam.

Nevertheless, you take comfort in the fact that recordkeeping was poor in Soho, under Svetlana's dominion. This cuts both ways, however. It will be hard for you to prove that receipts are due to Dirk without a clearer financial picture. Your plan, though, is to call for an accounting, cry fraud, unjust enrichment, and breach of fiduciary duty, rattle the receivership sword (G-d forbid!) and hope that something will shake loose to the tune of $500,000 or so.

You do recognize that dissolution proceedings will be a pox on both houses.

If you are asked, you can acknowledge that cost of litigation is $150,000 or more. You do not come cheaply, and there is much to do. Experts and accountants will be needed. There is a risk that the fraud claim might be dismissed – the facts of misrepresentation are a bit dicey. But you hope you can hold onto the breach of fiduciary duties and the accounting claim. Unjust enrichment will be difficult in light of tracing problems when push comes to shove. Feel free to do your best if called on to give percentages of win/lose on any of these points, and to ad lib with case detail affecting the evaluation, as long as it is more or less consistent with the general description in these facts.