FEDERAL BAR ASSOCIATION
SOUTHERN DISTRICT OF NEW YORK CHAPTER
&
ADR SECTION

Town Hall: Effective Representation in Mediation

November 5, 2014
SDNY Courthouse
500 Pearl Street, Room 850
New York, NY

Moderator & Panelist:

Simeon H. Baum, Esq.,
President, Resolve Mediation Services, Inc. (*www.mediators.com*)

Speakers:
Hon. Loretta A. Preska, Chief Judge, SDNY; **and**
Rebecca Price, Esq., SDNY Mediation Supervisor

Guest Mediator:
Jeffrey Kichaven, Los Angeles, CA; Chair FBA ADR Section

With the Cooperation of the NYSBA Dispute Resolution Section; NYSBA Commercial & Federal Litigation Section; NYSBA Labor & Employment Law Section; and Metropolitan Black Bar Association

FEDERAL BAR ASSOCIATION
SOUTHERN DISTRICT OF NEW YORK CHAPTER
&
ADR SECTION

With the Cooperation of the NYSBA Dispute Resolution Section; NYSBA Commercial & Federal Litigation Section; NYSBA Labor & Employment Law Section; and Metropolitan Black Bar Association

Town Hall: Effective Representation in Mediation

Moderator & Panelist:
Simeon H. Baum, Esq., Resolve Mediation Services, Inc. (www.mediators.com)
Speakers:
Hon. Loretta A. Preska, Chief Judge, SDNY; **and**
Rebecca Price, Esq., SDNY Mediation Supervisor
Guest Mediator: Jeffrey Kichaven, Los Angeles, CA; Chair FBA ADR Section

Index of Materials

4. Simeon H. Baum, *Mediation – Alchemical Crucible for Transforming Conflict to Resolution*

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

6. Simeon H. Baum, *Top Ten Things Not to Do in Mediation*

7. S.E. Schlosser, *The Myth of Mediator as Settlement Broker*

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

9. J. Michael Keating, Jr., *Mediating in the Dance for Dollars*

10. Simeon H. Baum, "Mediation and Discovery" – *Dispute Resolution and e-Discovery*, Thomson Reuters, 2012 (Daniel Garrie and Yoav Griver, Editors)

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

12. Simeon H. Baum, "Twelve Tools For Creating Movement" – Slide #109 from *The Mediation Workshop*

13. Simeon H. Baum, "Gambits For Closure" – Slide #111 from *The Mediation Workshop*

14. Melvin A. Rubin & Brian F. Spector, *Ethical Conundrums for the 21st Century Lawyer/Mediator "Toto, We're Not in Kansas Any More"*

15. ABA, AAA, ACR, *Model Standards of Conduct for Mediators*

Town Hall: Effective Representation in Mediation

Presented by the Federal Bar Association's
Southern District of New York Chapter
&
ADR Section

November 5, 2014

AGENDA

Moderator: *Simeon H. Baum, Esq.*
President, Resolve Mediation Services, Inc. (www.mediators.com)

Simeon H. Baum, of Resolve Mediation Services, Inc., will facilitate An Interactive Discussion in which Experienced Mediators from the SDNY Panel will offer their best advice to Representatives of Parties in Mediation on the How to Make the Best Use of – and offer Clients the Most from - the Mediation Process

5:30 – 6:00 **Cocktails & Sign-In**

6:00 – 6:05 **Analysis of Importance of Effective Representation in Mediation**
Hon. Loretta A. Preska, Chief Judge SDNY

6:05 – 6:10 **Description & Analysis of ADR Program**
Rebecca Price, Esq., SDNY Mediation Supervisor

6:10 – 6:20 **The Mediation-Prep Five-Step: Lead-Off Tips**
Jeffrey Kichaven, Esq.; Chair FBA ADR Section

6:20 – 6:25 **Preparation for the Day Ahead**
Simeon H. Baum, Esq.

6:25 – 6:30 **Party Participation & Managing Expectations**
Simeon H. Baum, Esq.

6:30 – 6:35 **Effective Bargaining: Handing Unduly High or Low Offers/Demands**
Simeon H. Baum, Esq.

6:35 – 6:40 **Reading the Money**
Simeon H. Baum, Esq.

6:40 – 6:45 **Information Gathering & Disclosure**
Simeon H. Baum, Esq.

6:45 – 6:55 **Impasse Breaking**
Simeon H. Baum, Esq.

6:55 – 7:00 **Ethical Dilemmas**
Simeon H. Baum, Esq.

7:00 – 7:45 **Closing Cocktail Reception**

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. He was selected for New York Magazine's 2005 - 2014 "Best Lawyers" and "New York Super Lawyers" listings for ADR, and Best Lawyers' "*Lawyer of the Year*" for ADR in New York for 2011 and 2014, and for the International Who's Who of Commercial Mediation Lawyers 2012-14.

An attorney, with 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, and CPR, 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.

JEFF KICHAVEN BIOGRAPHY

JEFF KICHAVEN is an independent commercial mediator with a nationwide practice, based in California. *Best Lawyers* just named him the Best Mediator in Los Angeles, 2015. He is Chair of the Federal Bar Association's national ADR Section.

Jeff is an Honors Graduate of Harvard Law School (J.D. Cum Laude 1980), and a Phi Beta Kappa Graduate of the University of California, Berkeley (A.B. Economics, 1977). He practiced business litigation for 15 years before he began his full-time mediation practice in 1996.

In the American Bar Association, Jeff has served on the Council of the Section of Dispute Resolution, and as Chair of the ADR Committees of three sections, Business Law, Intellectual Property Law, and TIPS (Tort, Trial and Insurance Practice).

Jeff has taught mediation training and mediation advocacy for law schools and bar associations across the country, including the Master Class for Mediators for his Alma Mater, Harvard Law. He has been named California Lawyer Attorney of the Year in ADR, among his other honors.

Jeff is also Contributing Author of Chapter 25, "Considering ADR," in the New Appleman Insurance Law Practice Guide.

His views on mediation have been cited in *The New York Times* and *The Wall Street Journal.*

Loretta A. Preska

Judge Preska was appointed United States District Judge for the Southern District of New York on August 12, 1992 and entered duty on September 18, 1992. From June 1, 2009 to the present, she serves as Chief Judge of that Court. Judge Preska received a B.A. from the College of St. Rose in Albany, New York in 1970, a J.D. from Fordham University School of Law in 1973, and an LL.M. in Trade Regulation from New York University Law School in 1978. Following graduation from Fordham, Judge Preska was an associate at Cahill Gordon & Reindel LLP and an associate and, beginning in January 1983, a partner at Hertzog, Calamari & Gleason until her induction as a United States District Judge in September 1992.

Rebecca Price Biography

Rebecca Price has been the Mediation Supervisor at the U.S. District Court for the Southern District of New York since 2012. Prior to this position she directed the Mediation Clinic at Brooklyn Law School, was a Supervising Attorney in the Mediation Clinic at CUNY School of Law, taught lawyering/legal writing as an adjunct professor at CUNY School of Law and Cardozo Law School, and classes on Alternate Dispute Resolution at the New York University School of Continuing Professional Studies. Rebecca is the former Coordinator of the Special Education/Early Intervention and ACCES VR Mediation Programs for Safe Horizon Mediation Program (now the New York Peace Institute). She is an experienced mediator and litigator with an extensive background working with people with disabilities. Before turning her focus to ADR, Rebecca was the Assistant Director of Visual AIDS, created and oversaw the Children's Mental Health Project at New York Lawyers for the Public Interest, and was a Senior Attorney in the Special Litigation and Appeals Unit of Mental Hygiene Legal Service. Rebecca is certified as an Initial Mediation Trainer for the Community Dispute Resolution Centers Program of the Unified Court System of the State of New York.

United States District Court
Southern District Of New York

Procedures of the Mediation Program
(12/9/2013)

These Procedures are promulgated for the management of the Mediation Program of the Southern District of New York. They shall not be deemed to vest any rights in litigants or their attorneys and shall be subject to such amendments from time to time as shall be approved by the Court.

1. Confidentiality

a. Consistent with Standard V of the Model Standards of Conduct for Mediators[1], any communications made during the mediation process shall be confidential except as to the provisions indicated in this section. The mediator shall not disclose any information about the mediation to anyone except for Mediation Office staff. Administrative aspects of the mediation process, including the assignment of a mediator, scheduling and holding of sessions, and a final report that the case has concluded or not concluded through mediation, or that parties failed to participate, are not confidential and will appear on the docket of the case.

b. The parties may not disclose discussions with the mediator unless all parties agree, because it is required by law, or because otherwise confidential communications are relevant to a complaint against a mediator or the Mediation Program arising out of the mediation. The parties may agree to disclose information provided or obtained during mediation to the Court while engaged in further settlement negotiations with a District or Magistrate Judge. The parties may disclose the terms of settlement if either party seeks to enforce those terms.

c. The mediation process shall be treated as a compromise negotiation for purposes of Rule 408 of the Federal Rules of Evidence and state rules of evidence. Documents and information otherwise discoverable under the Federal Rules of Civil Procedure shall not

[1] Model Standards of Conduct for Mediators, promulgated by the American Bar Association, American Arbitration Association, and the Association for Conflict Resolution (August 2005).

be shielded from discovery merely because they are submitted or referred to in the mediation.

d. The mediator shall not be called as a witness or deponent in any proceeding related to the dispute in which the mediator served, or be compelled to produce documents that the mediator received or prepared for mediation.

2. Assignment of the Mediator

a. Cases enter the Mediation Program either through a process of automatic referral or by referral of a specific case from the assigned judge. In both instances the Mediation Office is notified through a Mediation Referral Order. The mediators on the panel for the Southern District of New York are divided into sub-groups based on areas of subject matter expertise. Once the Mediation Office receives the Mediation Referral Order, a mediator is selected at random from the sub-group of mediators who have the subject matter expertise that is relevant to the case. If no such mediator is available, the Mediation Office will select a mediator at random from a sub-group of mediators with expertise in a related subject matter. The mediator selected must respond as quickly as possible, but no later than three (3) business days, to accept the assignment, to request an extension of time to clear conflicts from the Mediation Supervisor, or to decline. Upon notice that the selected mediator has declined, or after three (3) business days without notice of acceptance or a request for an extension of time, another mediator will be selected. Once a mediator has accepted the case the Mediation Supervisor shall notify the mediator and the parties of the assignment. The assignment of a case to a mediator should take place within ten (10) business days of the receipt by the Mediation Supervisor of the Mediation Referral Order.

b. Mediators are provided with a free PACER account to access pleadings and other relevant information that may be needed when considering whether to accept a case. At the mediator's request, the Mediation Office will forward documents and information to the mediator directly.

3. Disqualification

a. Before accepting an appointment as a mediator, and at all times after accepting such an appointment, a mediator shall disclose to the Mediation Office, in the first instance, any circumstance that could give rise to a reasonable apprehension of a lack of impartiality such as those circumstances enumerated under 28 U.S.C. § 455.

b. Any mediator who makes a disclosure under (3)(a) and who is deemed qualified to serve by the Mediation Office shall continue as the assigned mediator if all parties to the dispute waive, in writing, the right to object to any reasonable apprehension of a lack of impartiality or conflict of interest that arises as a consequence of the disclosure.

c. Any party may submit a written request to the Mediation Supervisor for the mediator's disqualification based on any grounds enumerated in 28 U.S.C. § 455 or 28 U.S.C. § 144. This request should be submitted within seven (7) days from the date of the notification of the mediator's name, or from the date of the discovery of a new ground for disqualification. A denial of such a request by the Mediation Supervisor is subject to review by the assigned judge upon motion filed within ten (10) days of the date of the Mediation Supervisor's denial.

4. Mediation Scheduling

a. The mediator shall confer with counsel for the parties, or parties themselves if proceeding *pro se*, immediately after assignment of a case to determine an appropriate date, time, and location for the first mediation session. Unless cases enter the Mediation Program through an order that imposes specific timelines for the mediation process, the date, time, and location of the first session should be finalized within thirty (30) days of the assignment of the mediator unless there is a specific reason why a date certain cannot be established within thirty (30) days. If the parties require no discovery before mediation can take place, the mediator should hold the first session within thirty (30) days of the assignment of the mediator. If the parties require discovery, they must confer to establish a timeline for the completion of limited discovery and should hold the first session within thirty (30) days of the completion of limited discovery. The assigned mediator shall promptly notify the Mediation Supervisor of the date, time, and location of the first mediation session or the reason for failing to schedule within the 30-day period. The Mediation Office will docket the date, time, and location of the mediation session.

b. On or before receipt of each party's written submissions (see section 5), the assigned mediator may contact counsel, or parties themselves if proceeding *pro se*, to schedule either a joint or individual preliminary case conference.

c. Any subsequent sessions shall be scheduled within thirty (30) days of the prior session, unless there is a specific reason why a date certain cannot be established. The assigned mediator shall promptly notify the Mediation Supervisor of the date, time, and location of

the next mediation session or the reason for failing to schedule within the 30-day period. The Mediation Office will docket the date, time, and location of the mediation session.

d. The mediation will conclude when the parties reach a resolution of some or all issues in the case or when the mediator or parties conclude that resolution (or further resolution) is not possible.

5. Written Submissions

a. Unless otherwise directed by the mediator, at least seven (7) days before the first scheduled mediation session, each party shall prepare and deliver to the mediator, either *ex parte* or as the mediator directs, a memorandum presenting in concise form, not exceeding ten double-spaced pages:

   i. the party's contentions as to both liability and damages;

   ii. the status of any settlement negotiations;

   iii. the names of the persons, in addition to counsel, with full authority to resolve the matter who will attend the mediation; and

   iv. the parties' reasonable settlement range, including any non-monetary proposals for settlement of the action.

b. These memoranda shall be subject to the confidentiality of the mediation process and treated as documents prepared "for settlement purposes only."

6. Attendance at Mediation Sessions

a. Each party must attend mediation. This requirement is critical to the effectiveness of the mediation process as it enables parties to articulate their positions and interests, to hear firsthand the positions and interests of the other parties, and to participate in discussions with the mediator both in joint session and individually.

b. A party other than a natural person (e.g., a corporation or an association) satisfies this attendance requirement if represented by a decision maker who has full settlement authority and who is knowledgeable about the facts of the case. "Full settlement authority" means the authority to agree to the opposing side's settlement offer, if convinced to do so at the mediation.

c. Each represented party must be accompanied at mediation by the lawyer who will be primarily responsible for handling the trial of the matter.

d. A fully authorized representative of the client's insurance company must attend where the decision to settle and/or the amount of settlement must be approved by the insurance company.

e. A government unit or agency satisfies this attendance requirement if represented by a person who has, to the greatest extent feasible, full settlement authority, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements. In addition, in cases where the Comptroller of the City of New York has authority over settlement, the Assistant Corporation Counsel must make arrangements in advance of the conference for a representative of the Comptroller either to attend the conference or to be available by telephone to approve any proposed settlement. If the action is brought by the government on behalf of one or more individuals, at least one such individual also must attend.

f. Under some circumstances, if a party resides more than 100 miles from the Courthouse, and it would be a great hardship for the party to attend in person, he or she may request that the mediator allow for telephonic participation at the mediation; however, if such request is granted, that party must participate by telephone for the duration of the mediation.

g. Counsel for parties, parties if *pro se*, or the mediator may occasionally wish to invite individuals who are not part of the mediation process to observe the mediation. Absent consent of all parties, counsel for parties, and the mediator, observers may not attend. Requests for observers to attend should be made in advance to the Mediation Office, in writing, and should include the following:

    i. A statement of the requester's relationship to the individual who wishes to observe, and

    ii. A statement that all parties, counsel for parties, and the mediator have been consulted and that all consent to the individual(s) observing.

h. Any observers are required to sign the Mediation Confidentiality Agreement (attached) and will be bound by any confidentiality provisions that are relevant to the mediation as if they were a party to the mediation.

7. Mediation Location

a. Mediation sessions may take place at the mediator's office, at the Courthouse, or at any other location agreed to by the mediator and the parties.

8. Mediation Forms

a. All participants in the mediation must read and sign the Mediation Confidentiality Agreement (attached) before or at the start of the mediation. Copies of this signed form should be retained by parties, counsel for parties, and the mediator.
b. Any term sheet or stipulation developed through mediation must be read and signed by all parties and/or counsel for parties.

9. Reporting

a. After referral of a case to the Mediation Program, such referral will be closed with the docketing of a Final Report of Mediator indicating that the mediation was:
    i. Held and produced a stipulation settling all of the issues of the case.
    ii. Held and produced a stipulation settling less than all of the issues of the case. The parties by stipulation have agreed to submit the unresolved issues to binding arbitration.
    iii. Held and produced a stipulation submitting all issues to binding arbitration.
    iv. Held and produced a stipulation settling less than of the issues of the case. The unresolved issues should be treated as if they had not been sent to mediation.
    v. Held but was unsuccessful in resolving any issues in the case. The unresolved issues should be treated as if they had not been sent to mediation.
    vi. Not held as a stipulation settling all of the issues of the case was entered into prior to the mediation date.
    vii. Not held as one or both parties failed or refused to attend the mediation.

b. The Final Report of Mediator shall be submitted by the mediator to the Mediation Office within seven (7) days of the final mediation session or the results set forth in (a)(vi) or (vii).
c. If the Final Report of Mediator indicates the result set forth in (a)(i), (ii), (iii), or (iv), the parties should promptly submit a stipulation of discontinuance or other appropriate document to the Clerk of Court.

10. Post-mediation Survey

a. To assist in the continued development of the Mediation Program, the Court requests that all counsel for parties, or parties if *pro se*, respond to a short survey after the close of the mediation process. Surveys will be sent from the Mediation Office and are accessible through a hyperlink or a fillable document.

11. Mediation Panel Application Process

a. An individual may apply to serve as a mediator if he or she satisfies the following criteria:

i. Is a member in good standing of the bar of this Court or, if not admitted to practice in a state within the Second Circuit, a member in good standing of the bar of any United States District Court;
ii. Has substantial exposure to mediation in federal court or has mediated cases in other settings;
iii. Provides a letter of reference from a party, mediation training provider, colleague, judge, court administrator, or appropriate staff person with a public or private dispute resolution organization, that specifically addresses the applicant's mediation process skills including the ability to listen well, facilitate communication, and assist with settlement discussions; and
iv. Is willing to participate in training, mentoring programs, and ongoing assessment as detailed in section (12)(e).

12. Service as a Mediator

a. An individual may serve as a mediator once he or she has been certified by the Chief Judge or his/her designee to be competent to perform the duties of a mediator for this Court.
b. Each individual certified as a mediator shall take the oath or affirmation prescribed by 28 U.S.C. § 453.
c. All mediators shall serve without compensation. Mediators shall be eligible for credit for pro bono service.
d. Consistent with Standard IV of the Model Standards of Conduct for Mediators, all mediators shall participate in an apprenticeship during their first year on the panel including:
    i. Observing mediations;
    ii. Co-mediating with other panel members; and
    iii. Undergoing supervision and assessment before mediating independently.
e. Unless the Mediation Supervisor approves otherwise, mediators who are invited to join the Court's panel will be expected to meet the following requirements to remain on the panel:
    i. Attending at least one continuing education program in mediation each year;
    ii. Participating in ongoing assessment as determined by the Mediation Supervisor; and
    iii. Mediating at least two cases per year.

f. Mediators may resign from the mediation panel at any time by notifying the Mediation Office in writing. The Mediation Supervisor may remove mediators from the mediation panel for:
    i. Failing to meet the requirements of section (12)(e); or
    ii. Violating the Code of Conduct set forth in section (13) or any other Procedures promulgated by the Mediation Program.

13. Code of Conduct

The code of conduct set forth herein applies in its entirety to every mediator who is on the panel of the Southern District of New York. While mediators come from various professional backgrounds and may have been exposed to differing mediation theories, every mediator for the Southern District of New York must adhere to this code of conduct at a minimum.

a. As representatives of the Southern District of New York, mediators should at all times be professional, respectful, and measured in their communication with attorneys for parties, *pro se* parties, and the Mediation Office.
b. Mediators should understand and clearly convey that they are not decision-makers but facilitators of the decision-making of the parties. They may choose to meet with parties separate from their attorneys, or with attorneys separate from the parties. Mediators should ensure that participants in mediation understand that the role of the mediator is that of a neutral intermediary, not that of an advocate or representative for any party. A mediator should not offer legal advice to a party. If a mediator offers an evaluation of a party's position or of the likely outcome in court, or offers a recommendation with regard to settlement, the mediator should ensure that the parties understand that the mediator is not acting as an attorney for any party and is not providing legal advice.
c. Mediators should provide the same quality of service as they would for paying clients, or should request that the case be reassigned if they cannot do so.
d. Mediators shall not work as consultants or attorneys in any pending or future action relating to any dispute in which they served as mediators, including actions between persons not parties to the mediation process.
e. Mediators shall not solicit payment for any aspect of any case undertaken as a panel mediator.
f. Mediators should be familiar with, and at all time uphold, the values of the Model Standards of Conduct for Mediators, particularly Standard VI.

14. Complaints

a. The following protocol is observed with every complaint about a mediator:
    i. The Mediation Supervisor will begin by gathering information from relevant parties, attorneys for parties, and other relevant Court personnel or observers. The Mediation Supervisor will then contact the mediator in question to discuss the complaint or concern directly. This may be a phone call or an in-person meeting, depending on convenience and the nature of the complaint. In most cases, the issue will be considered sufficiently addressed after a discussion with the mediator.
    ii. If the complaint is serious, or if the particular complaint is part of a pattern, the Mediation Supervisor and the mediator will explore options for redress. A plan will be determined on a case-by-case basis, and might include being observed or observing cases, attending relevant training, co-mediating, or participating in simulated mediations. It is possible that a mediator will be suspended from mediating during the remedial period. The situation will be reassessed after the determined course of action is completed.
    iii. If a mediator chooses not to participate in the remedial process, he or she will be choosing to discontinue serving as a panel mediator.
    iv. If similar complaints persist after the remedial period, the mediator and the Mediation Supervisor may discuss options for additional remedial work or other remedies for rectifying the situation.
    v. Ultimately, the Mediation Supervisor may decide that a mediator is no longer mediating in a way that is appropriate for the Mediation Program or that resources are not available to provide sufficient additional training or support.
b. Complaints by a mediator about Mediation Program staff or protocols should be made to the Mediation Supervisor. The Chair of the Mediation Services Committee shall be contacted if the complaint is not resolved or if the complaint is about the Mediation Supervisor.

15. Immunity

a. Any person designated to serve as a mediator pursuant to these Procedures shall be immune from suit based upon actions engaged in or omission made while performing the duties of a mediator.

United States District Court
Southern District Of New York

Mediation Confidentiality Agreement

Parties, counsel for the Parties, and the mediator agree as follows:

1. Any communications made during the mediation process shall be confidential except as to the provisions indicated in this agreement. The mediator shall not disclose any information about the mediation to anyone except for Mediation Office staff. Administrative aspects of the mediation process, including the assignment of a mediator, scheduling and holding of sessions, and a final report that the case has concluded or not concluded through mediation, or that parties failed to participate, are not confidential and will appear on the docket of the case.
2. The parties may not disclose discussions with the mediator unless all parties agree, because it is required by law, or because otherwise confidential communications are relevant to a complaint against a mediator or the Mediation Program arising out of the mediation. The parties may agree to disclose information provided or obtained during mediation to the Court while engaged in further settlement negotiations with a District or Magistrate Judge. The parties may disclose the terms of settlement if either party seeks to enforce those terms.
3. The mediation process shall be treated as a compromise negotiation for purposes of Rule 408 of the Federal Rules of Evidence and state rules of evidence. Documents and information otherwise discoverable under the Federal Rules of Civil Procedure shall not be shielded from discovery merely because they are submitted or referred to in the mediation.
4. The mediator shall not be called as a witness or deponent in any proceeding related to the dispute in which the mediator served, or be compelled to produce documents that the mediator received or prepared for mediation.

The undersigned have read and agree to comply with this agreement.

Dated:

Plaintiff(s): _____ Defendant(s): _____

Attorney(s) for Plaintiff(s):_____ Attorney(s) for Defendant(s):_____

Mediator:_____ Observer(s):_____

The Mediation-Prep Five-Step

Confucius said, "Success depends upon previous preparation, and without such preparation there is sure to be failure."

Words more true have never been spoken, and they apply to commercial mediation as much as they apply anywhere. But Confucius' mandate is also vague. Just how does a lawyer prepare for a mediation? While some cases may differ, here are five basic steps to success.

1. Send the mediator a brief in advance. Exchange it with the other side. Show both briefs to your client.

Everyone wants the mediator to help them somehow. Advance, exchanged briefs help you achieve that goal.

Mediators most want to help those lawyers who earn their respect. The best way to earn that respect is by showing that you are well-prepared. There's no better vehicle for doing that than a brief prepared comfortably in advance of the mediation.

In addition to earning the mediator's respect, an exchanged brief gets you two additional benefits. First, the other side is better able to engage you in substantive negotiations. They cannot claim surprise. No matter how well you think they know your case, an exchanged brief insures that they can read, consider and prepare to respond to your current positions.

If you think the other side doesn't know your strengths, consider disclosing them. Assuming proper discovery, your strengths will not be secret for long. And, if you want to get the value your strengths deserve in the mediation, you can't keep them secret at all.

Their responses to your strengths may be good or bad. If they are bad, the mediator's job is to help the other side understand their weaknesses. If they are good, that's nothing to fear. You'd rather learn the other side's good responses at a mediation than at trial.

Second, your side is better able to engage in substantive negotiations, too. You won't spend precious time on mediation day learning their current positions. And, you will be better prepared psychologically. The other side is likely to believe some things about your client that are less than complimentary. If your client has read about them in advance, they may not be quite so shocking if said out loud on mediation day.

2. Send the mediator a private brief, too.

You may want to communicate some things to the mediator in writing that you'd prefer the other side not see. Often, these are less-than-complimentary things about the other lawyer or his client. Communicate these in a second mediation brief, sent only to the mediator.

3.Talk to the mediator on the telephone before the mediation.

These may be the most important 15 minutes of the entire process. Here, you and the mediator can collaborate on a customized game plan for the mediation. Here's a brief checklist for this call:

What are the specific challenges we face?
What are your expectations of the mediator?
What should the mediator know about the personalities of the participants?
What mediation process issues are there? (Joint session or no joint session?)

The answers may be awkward to put in writing. Sometimes, they touch on your relationship with your own client. They will vary greatly from case to case. The mediator needs the answers to customize a game plan for your mediation. If your mediator doesn't call you to discuss these issues, you should call the mediator.

4. Talk to your client before the mediation.

Discuss the game plan with your client. Develop a framework for decision making. List the issues which, if you learn more about them, might change your top dollar or bottom line. That's more important than formulating an actual number. If you come to mediation glued to a number, you lose the opportunity to learn and react on mediation day—and you always learn something significant.

5. Meet with your client and the mediator, privately, at the start of mediation day.

At day's end, you often want the mediator's help to persuade your client to pay a little more or take a little less, because the benefits of finality outweigh your client's disappointment with the financial terms. The mediator needs credibility with your client to give you that help. The mediator should start developing that credibility at the beginning of mediation day.

Clients often arrive at mediations with questions. Sometimes, they are nervous. The mediator and you, privately, can answer your client's questions and help calm your client's nerves. If the mediator treats your client with respect, then credibility, maybe even a little chemistry can develop. These pay off in spades at mediation's end, when the mediator can help you close that last gap.

After these five steps of preparation, you are ready for the mediation's formal start. You will be well on your way to settlement, and success. Confucius would be proud.

Courtesy of Jeff Kichaven. Jeff Kichaven is an independent commercial mediator. He has been honored as California Lawyer Attorney of the Year in ADR.

THE RESOLUTION EXPERTS®

P: 800/352-5267
E: info@jamsadr.com
W: www.jamsadr.com

Founded in 1979, JAMS, The Resolution Experts, is the largest private provider of alternative dispute resolution services. With Resolution Centers worldwide, JAMS and its more than 300 full-time, exclusive mediators and arbitrators, known as neutrals, are responsible for resolving the world's most important cases. Based on past results, JAMS takes pride that almost all of the cases mediated, even the most complex ones, are successfully resolved.

AREAS OF EXPERTISE:

Antitrust, Bankruptcy, Business, Class Action, Commercial, Construction, Construction Defect, E-Discovery, Education, Employment, Engineering and Construction, Entertainment and Sports, Environment, Family, Federal, Financial Markets, Franchise, Government, Healthcare, Insurance/Reinsurance, Intellectual Property, Landlord/Tenant, Lender Liability, Professional Malpractice, Marital Dissolution, Mass Tort, Partnership, Personal Injury, Probate, Product Liability, Public Policy, Real Estate, Securities, Toxic Tort, Trusts and Estates.

ADR OPTIONS:

Facilitative and evaluative mediation, binding arbitration, neutral case evaluation, settlement conference, mini trial, summary jury trial, neutral expert fact finding, special master, discovery referee, class action settlement adjudication, project neutral and dispute review board services.

EDUCATIONAL PROGRAMS:

JAMS offers select seminars, workshops and external educational programs that aid organizations and individuals in resolving their own disputes. JAMS also provides training in conflict prevention and dispute resolution. As an accredited CLE provider in California and many other states, JAMS conducts hundreds of complimentary ADR workshops and CLE programs each year. Each program is tailored to meet the needs and experience level of the specific audience, and CLE credit is provided where applicable.

LOCATIONS:

East/Central U.S.: Atlanta, Boston, Chicago, Denver, Greenbelt, Miami, Minneapolis, New York, Philadelphia and Washington, DC.

Northwest U.S.: Sacramento, San Francisco, Santa Rosa, Seattle, Silicon Valley and Walnut Creek.

Southwest U.S.: Dallas, Inland Empire, Las Vegas, Los Angeles, Orange, San Diego and Santa Monica.

Canada: Toronto, ON

MEDIATE.COM

PO Box 51090
Eugene, OR 97405
P: 541/345-1629
Contact: Jim Melamed, CEO
E: admin@mediate.com
W: www.Mediate.com

In business since 1996, Mediate.com is the world's most visited dispute resolution website with over 14,000 daily visitor sessions. Mediate.com now offers over 15,000 searchable articles, news items and videos and was awarded the ABA's 2010 Institutional Problem Solver of the Year Award.

Mediate.com also offers the most used ADR Professional Directories on the planet, including Mediate.com, Arbitrate.com, CollabLaw.com, OnlineMediators.com & OnlineArbitrators.com. Please join these directories at www.Mediate.com/Membership.

Further, Mediate.com offers the following services for ADR professionals and programs worldwide:

- custom website development (see www.mediate.com/Web)
- geographically targetted online advertising (see www.mediate.com/Marketing) and
- online case management (see www.CaseloadManager.com)

Let Mediate.com be your partner in expanding your online presence and capacity.

Mediate.com Services are fully described at www.mediate.com/Services

Please join Mediate.com today at: www.mediate.com/Membership

◇◇◇◇◇◇◇◇◇◇

NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

104 Churchill Way
West Palm Beach, FL 33411
P: 813/600-3678
F: 866/257-4698
Contact: Rose-Anne Raies, Roster Coordinator
E: support@NADN.org
W: www.NADN.org

Service: The National Academy of Distinguished Neutrals is an association whose membership consists of ADR professionals distinguished by their extensive experience in the field of civil and commercial conflict resolution and by their commitment to the practice of alternative dispute resolution.

Membership is by invitation only and limited to attorney-mediators and arbitrators who have proven experience in the field. All Academy members have been thoroughly reviewed and found to meet stringent practice criteria. Members are amongst the most in-demand neutrals in their respective states, as reviewed by local litigation firms.

With over 850 members across 40+ states, the NADN is the nation's largest professional association of top-tier mediators and arbitrators, available online at no cost to law firms at www.NADN.org. In 2013, NADN was named as the official neutrals roster to both the Defense Research Institute (DRI) and the American Association for Justice (AAJ).

The majority of Academy members also allow firms to view their Available Dates Calendars online and request appointments directly with scheduling staff through the use of our free Appointment Request form System.

◇◇◇◇◇◇◇◇◇

DANIEL BEN-ZVI, ESQ.
Mediator · Arbitrator

ADR SERVICES, INC.
Offices in Century City, downtown LA and Irvine
P: 310/201-0010
E: dbenzvi@adrservices.org
W: www.dbmediation.com

Daniel Ben-Zvi is a "Distinguished Fellow" with the International Academy of Mediators and 1 of 32 "Power Mediators" [Hollywood Reporter]. Judge Pro Tem. Mediated over 2,000 disputes. Co-Author of the book, "Inside the Minds—Alternative Dispute Resolution". Active Speaker on ADR. 20 years as multi-state trial lawyer and admitted to 5 State Bars. A "warrior turned peacemaker" with a unique blend of persistence and creativity to end bitterly fought lawsuits [Daily Journal]. Chairman, since 2004, City of Los Angeles' Annual Mediation Awareness Week. Practice includes business, real estate, construction, employment, entertainment, intellectual property, personal injury, wrongful death, civil rights, professional liability, franchises, estates, international law and class actions.

C. MARK HUMBERT
ATTORNEY, ARBITRATOR, MEDIATOR

220 Montgomery Street, Suite 1068
San Francisco, CA 94104
P: (415) 837-5433
D: (415) 837-5435
F: (415) 837-0127
E: markh@humbertlaw.us
W: www.greenhumbert.com

Mediation and arbitration of life, health and disability insurance, ERISA, employee benefits, medical payor-provider and commercial disputes.

Member: American Health Lawyers Association ADR Panel, Mediation and ENE Panels of U.S. District Court N.D. Cal., Kaiser Permanente Arbitration System, The Mediation Society, American Bar Foundation (Fellow), ABA Health Law Section, ABA TIPS Employee Benefits Committee (Former Chair).

Martindale Hubbell AV-rated. Northern California 'Superlawyer'.

Legal Education: Boalt Hall, J.D. 1983

◇◇◇◇◇◇◇◇◇

JEFF KICHAVEN
Jeff Kichaven Commercial Mediation

555 West Fifth Street, Suite 3100
Los Angeles, CA 90013

555 California Street, Suite 300
San Francisco, CA 94104
P: 888/425-2520
E: jk@jeffkichaven.com
W: jeffkichaven.com; youtube.com/jeffkichaven
Special mediation experience and expertise in:

- Insurance Coverage
- Intellectual Property
- Professional Liability

California Lawyer Attorney of the Year, ADR

7-time Daily Journal Top Neutrals

Honors Graduate, Harvard Law

Phi Beta Kappa Graduate, UC Berkeley

Member, American Law Institute

Cited on mediation in The New York Times and The Wall Street Journal

Zero "Case Management Fee"

Zero "Administrative Fee"

Zero "Travel Fee." Available nationwide.

HON. ISABEL R. COHEN
Retired Judge

4929 Wilshire Boulevard, Suite 410
Los Angeles, CA 90010
P: 323/465-5336
F: 323/465-2590
E: judgeicohen@gmail.com

Over 20 years judicial experience. Served six years as a family law judge in Central District, Los Angeles Superior Court.

Private judge, mediator, special master, discovery referee, arbitrator, and parenting plan coordinator.

Significant cases are: *In re Marriage of Drake* (1997) 53 CA 4th 1130 (Rev den 6/97); *In re Marriage of O'Connor* (1997) 59 CA 4th, 877 (Rev den 2/98)

Member, Family Law Executive Committee, Beverly Hills Bar Association. Former member, Family Law Executive Committee, Los Angeles County Bar Association (LACBA).Former member of CJA Executive Committee & CJA Ethics Committee. Former chair of Center for Judicial Education & Research (governs continuing education of California Judges). Former member of Planning Committee for, and faculty of, Continuing Judicial Studies Program (taught family law and jurisprudence). Former LACBA Trustee, Served on numerous family law panels.

Graduate of NYU Law School.

JUDICATE WEST
Alternative Dispute Resolution

Results Beyond Dispute℠

JUDICATE WEST
1851 E. First St., Suite 1600
Santa Ana, CA 92705
P: 800/488-8805
F: 714/834-1344
Contact: Rosemarie Chiusano Drohan
E: rosemarie@judicatewest.com
W: www.judicatewest.com

Judicate West (JW) is one of California's leading providers of dispute resolution services, with six fully staffed well appointed statewide offices from San Diego to San Francisco. JW features a select panel of neutrals consisting of former state and federal judges and skilled professional attorney mediators and arbitrators. Since 1993, JW has grown both in size and reputation by consistently delivering for all clients "results beyond dispute℠." JW's team of highly trained, knowledgeable and experienced case management professionals serve you by handling all the details of the case in a manner that promotes results and ensures neutrality.

LUELLA E. NELSON

4096 Piedmont Avenue #159
Oakland, CA 94611
P: 510/658-4959
F: 510/658-9423
Contact: Luella E. Nelson
E: Luella.Nelson@SBCGlobal.net

I have been a full-time neutral since 1986. My practice includes labor arbitration, mediation, and fact-finding; employment mediation; special master; and related dispute resolution services. I am the former Chair of the Labor and Employment Law Sections of both the State Bar of California and the Bar Association of San Francisco; I am also former Chair of the Pacific Northwest Region of the National Academy of Arbitrators and the Labor and Employment Law Section of the Oregon State Bar. I am a Fellow in the College of Labor and Employment Lawyers; other professional memberships include: inter alia, the National Academy of Arbitrators, the Association for Conflict Resolution, and the Professional Organization of Women in Employment Relations.

◇◇◇◇◇◇◇◇◇

HERMAN D. PAPA, ATTORNEY/MEDIATOR

One Market Plaza, Spear Tower #3600
San Francisco, CA 94105
P: 415/213-3758
F: 415/213-3759
Contact: Maureen Tapalla-Perez, Case Manager
E: hpapa@papamediation.net
W: www.hpapa@papamediation.com

Service: Focusing on cases in the area of personal injury, product defect, medical negligence, construction site accidents, governmental entity liability, premises liability, highway design defect accidents, aviation accidents, Longshore & Harbor Workers Act injuries and maritime injuries, schools and playground injuries, real estate project development liability, motorcycle and motor vehicle liability.

Mr. Papa has 40 years experience in trials, mediations and arbitrations in State and Federal courts throughout California and Oregon.

Judicate West affiliated with conference and business center support throughout California.

ROSS MEDIATION SERVICES

BARRY ROSS, ESQ.
ROSS Mediation Services

539 N. Glenoaks Blvd., Suite 305
Burbank, CA 91502
P: 818/840-0950
F: 818/840-0990
E: BarryRoss@ROSSmediation.com
W: www.ROSSmediation.com

Expertise: Best known for his speedy resolution of real estate and business disputes, Barry Ross has developed a highly effective mediation practice since 1993. He regularly resolves cases related to real estate, banking, business, lender liability, agency, escrow, title, homeowner association, commercial and employment law. Barry has mediated more than 1,900 litigated and non-litigated cases with an exceptionally high resolution rate.

Member: International Academy of Mediators, Distinguished Fellow; National & California Academies of Distinguished Neutrals; Southern California Mediation Association.

Available Statewide.

pma DISPUTE RESOLUTION

PMA DISPUTE RESOLUTION

3090 Bristol Street, Suite 190
Costa Mesa, California 92626
P: 877-678-1010
F: 877-230-0777
Contact: Sonia Patel Dalton, General Manager
W: www.pma-adr.com
E: spatel@pma-adr.com

PMA is not a typical dispute resolution firm with a large panel of neutrals, as is evident by the select number of neutrals on board —all of whom have very high skill sets and expertise in various practice areas.

OUR PANEL OF NEUTRALS

Eleanor Barr, Esq., Lee Jay Berman, John DiCaro, Esq., Robert D. Coviello, Esq, Katherine J. Edwards, Esq., Howard C. Hay, Esq., Louise A. LaMothe, Esq., Denise Madigan, Esq., Christine Masters, Esq., Eugene C. Moscovitch, Esq., Alan Ribakoff, Esq.

To learn more, visit www.pma-adr.com.

California LAWYER

California Lawyer Resource Guides

Each month, we provide our readers with a comprehensive and focused Resource Guide. The straightforward format of these valuable reference guides makes it easy for readers to find products and services they need in a matter of minutes. Access to the latest versions are available at **www.callawyer.com.**

ADR RESOURCE GUIDE:
March & August

CLE & OFFICE RESOURCE GUIDE:
November

COURTROOM RESOURCE GUIDE:
December

EXPERT WITNESS RESOURCE GUIDE:
February, June, & October

RECRUITMENT RESOURCE GUIDE:
July

TECHNOLOGY RESOURCE GUIDE:
January, May, & September

To be included in any of these guides, please contact Cailan Calandro, 415/296-2428 or email at cailan_calandro@dailyjournal.com

NEGOTIATION SKILLS - For Deals, Disputes & Mediation

FEDERAL BAR ASSOCIATION

SOUTHERN DISTRICT CHAPTER

SDNY Courthouse, Room 850

November 5, 2014

Simeon H. Baum, Esq.

Resolve Mediation Services, Inc.

1211 Avenue of the Americas, 40th floor, New York, NY 10036

(212)355-6527; fax (212) 753-0396

www.mediators.com

SimeonHB@disputeResolve.com

DISPUTE RESOLUTION SPECTRUM

FIGHT

LITIGATION

ARBITRATION

ADVISORY JURY TRIAL

NEUTRAL EVALUATION

MEDIATION

EVALUATIVE (?)
FACILITATIVE
TRANSFORMATIVE

NEGOTIATION

ACCOMMODATION

FLIGHT

COERCION

INACTION/
FREEDOM

DISPUTE RESOLUTION SPECTRUM

INDIVIDUAL VIOLENCE

SELF HELP

NEGOTIATION

MEDIATION
TRANSFORMATIVE
FACILITATIVE
EVALUATIVE (?)

NEUTRAL EVALUATION

ADVISORY JURY TRIAL

ARBITRATION

LITIGATION

POLICE

OTHER HELP

WAR

DISPUTE RESOLUTION SPECTRUM

LITIGATION

ARBITRATION

ADVISORY JURY TRIAL

NEUTRAL EVALUATION

MEDIATION
EVALUATIVE (?)
FACILITATIVE
TRANSFORMATIVE

NEGOTIATION

FIGHT OR FLIGHT

FORMAL

INFORMAL

Knowledge Is Power

Make the Most out of the Opportunities Available in Mediation by:

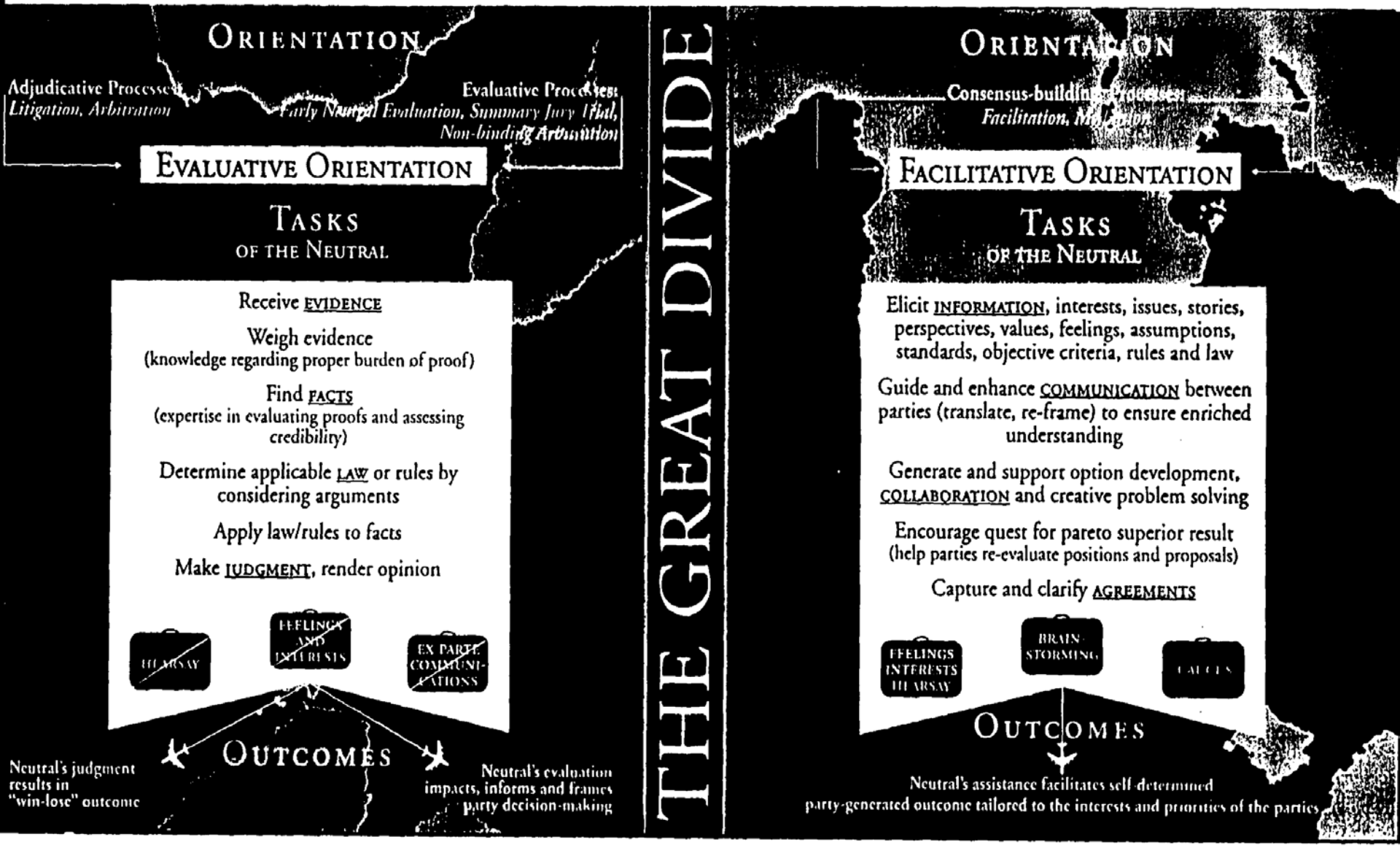
- Knowing the Nature of the Process – Negotiation *Plus* – &
- Making Fullest, Appropriate Use of the Mediator.

Pre-Mediation

- Mediator Selection – Guided by Your Needs & Understanding Possibilities for Mediator Role
- Selection Not Our Focus Today.
- But, Keep in Mind – Who is Your Mediator?

NOT JUST RENT-A-JUDGE

Intervenor Orientations & Related Tasks & Outcomes



from *Mapping Mediation: The Risks of Riskin's Grid*, Kimberlee K. Kovach and Lela P. Love,

FIGURE 1

PROBLEM–DEFINITION CONTINUUM

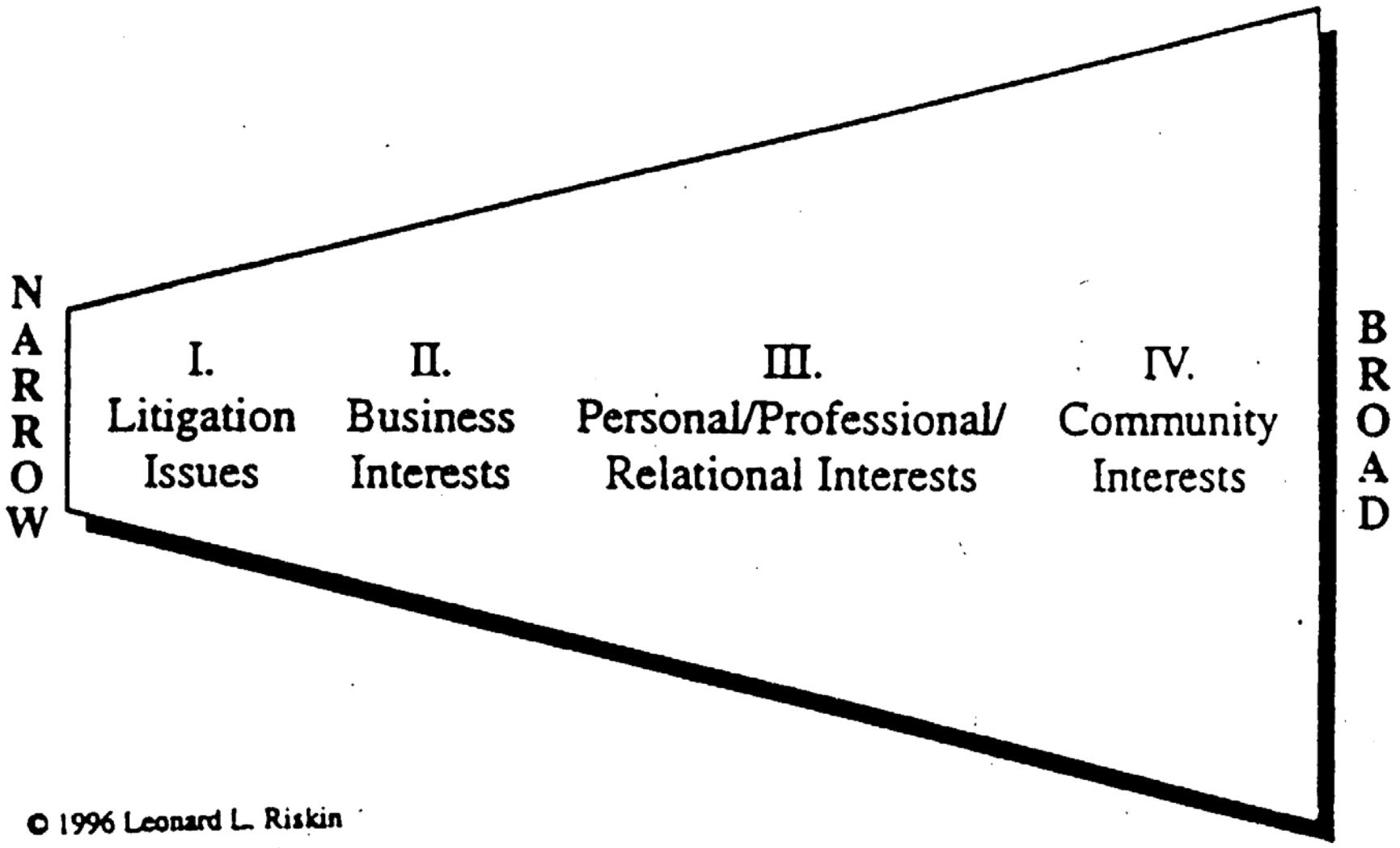


FIGURE 2

MEDIATOR ORIENTATIONS

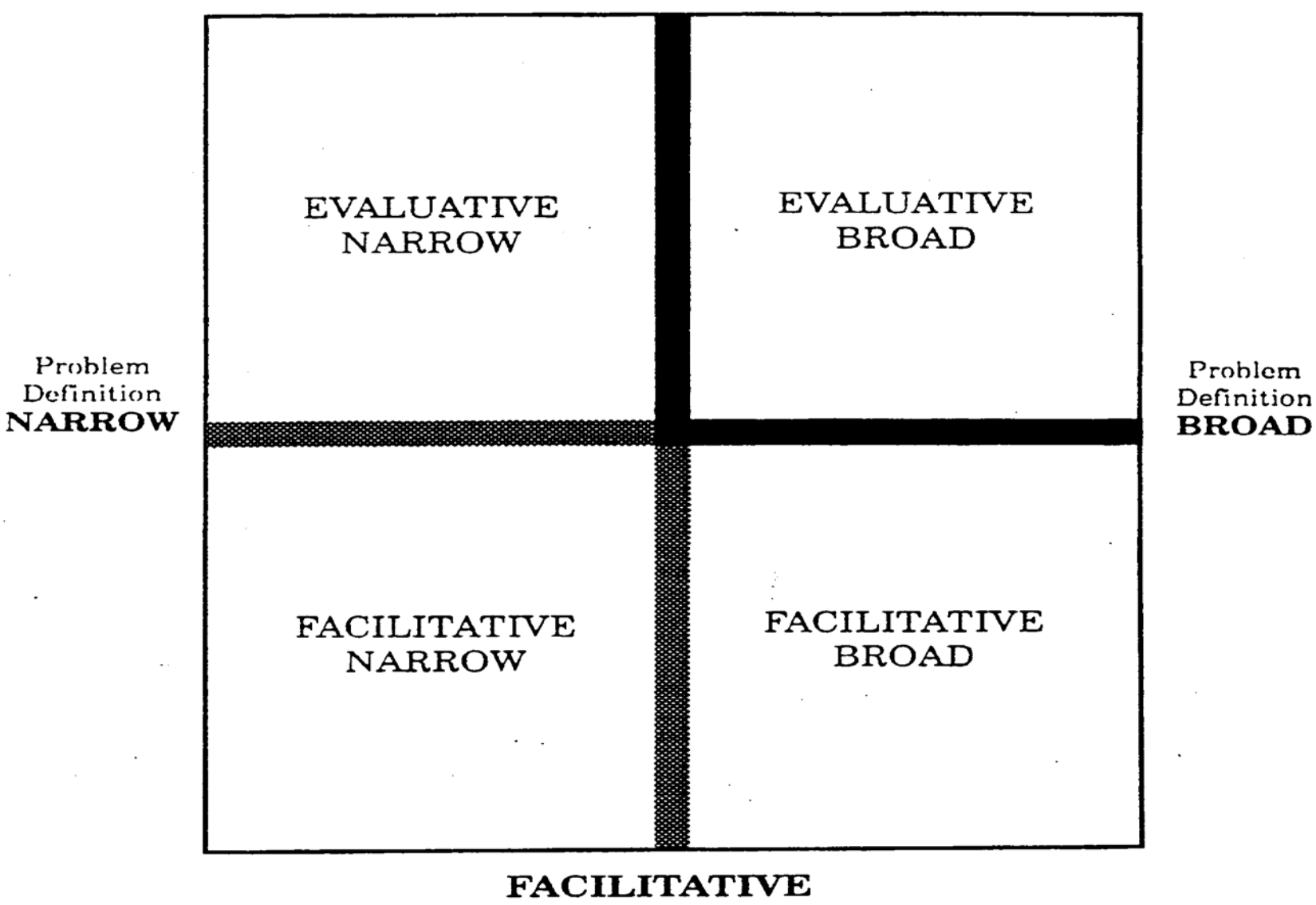


FIGURE 3

MEDIATOR TECHNIQUES

Role of Mediator

EVALUATIVE

Problem Definition **NARROW**

Urges/pushes parties to accept narrow (position-based settlement **Proposes** narrow (position-based) agreement **Predicts** court or other outcomes **Assesses** strengths and weaknesses of each side's case	**Urges/pushes parties** to accept broad (interest-based) settlement **Develops and proposes** broad (interest-based) agreement **Predicts** impact (on interests) of not settling **Educates self** about parties' interests
Helps parties evaluate proposals **Helps parties** develop & exchange narrow (position-based) proposals **Asks** about consequences of not settling **Asks** about likely court or other outcomes **Asks** about strengths and weaknesses of each side's case	**Helps parties** evaluate proposals **Helps parties** develop & exchange broad (interest-based) proposals **Helps parties** develop options that respond to interests **Helps parties** understand interests

Problem Definition **BROAD**

FACILITATIVE

Mediator Functions

Facilitating:

- Communication
- Identification of Interests
- Generation by Parties of Options to meet Interests of All Concerned
- Recognition and Validation of Emotions, Values, Perceptions, & Principles of Parties
- Consideration of Alternatives to Proposals

Various Views of the Mediator

Mediator Roles

- Facilitative
- Transformative
- Evaluative
- Understanding Based
- Protean
- Services View

Negotiation Coach

- Timing
- Impact
- Managing Expectations
- Tone
- Framing / Messages
- Bracketing
- End Games

THE BALANCED NEGOTIATOR

IF I AM NOT FOR MYSELF, WHO WILL BE?

IF I AM ONLY FOR MYSELF, WHAT AM I?

IF NOT NOW, WHEN?*

THE EFFECTIVE COOPERATIVE NEGOTIATOR MAINTAINS:

1. **AWARENESS AND ASSERTION OF HIS/HER OWN INTERESTS, NEEDS, EMOTIONS, BELIEFS & VALUES**

&

2. **AWARENESS AND RESPECTFUL RECOGNITION OF THE INTERESTS, NEEDS, EMOTIONS, BELIEFS & VALUES OF THE OTHER PARTY.**

Eem ayn ani li mi li; ook'sh'ani l'atzmi ma ani; v'im lo achshav ematai? (Rabbi Hillel; *Pirke Avoth*, 1, 14).

FISHER/URY MODEL OF COOPERATIVE NEGOTIATION

1. SEPARATE PEOPLE FROM PROBLEM
2. FOCUS ON INTERESTS, NOT POSITIONS
3. DEVELOP OPTIONS FOR MUTUAL GAIN
4. APPLY STANDARDS
5. CONSIDER "BATNA", "WATNA", "MLATNA" (BEST, WORST AND MOST LIKELY ALTERNATIVES TO A NEGOTIATED AGREEMENT)

(Derived from Fisher, R., URY, W., AND Patton, B. Getting to Yes – Negotiating Agreement Without Giving In. Penguin Books (2nd ed. 1991)

Effective Communication

"Why am I talking this LOUD? Because I'm WRONG!"

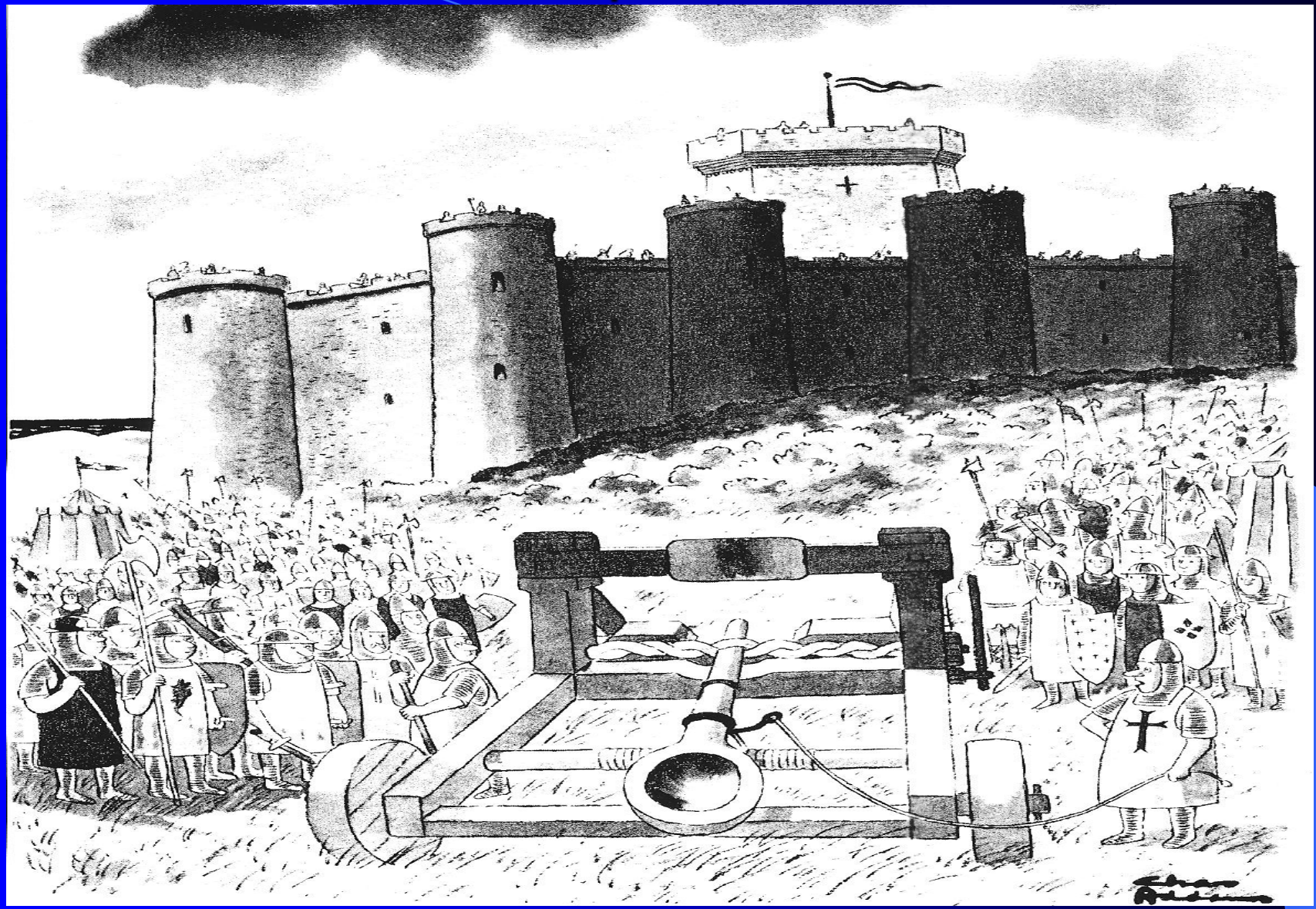
COMMUNICATION

FACILITATORS (ADD HARMONY)	INHIBITORS (AD HOMINA)
EMPATHY	UNCARING IGNORANCE
NON JUDGMENTAL ACCEPTANCE	REJECTION
COMPLIMENTS	INSULTS
REWARDS (GAINS)	THREATS

ACTIVE LISTENING

1. LISTEN!
2. FOLLOW, RATHER THAN CONTROL, THE COMMUNICATION.
3. LEAVE PLENTY OF ROOM FOR EXPRESSION.
4. USE BODY LANGUAGE CONSISTENT WITH GOOD LISTENING.
5. VALIDATE THE SPEAKER'S ENTITLEMENT TO HIS/HER PERSPECTIVE.
6. SHOW EMPATHY – RECOGNIZE THE EMOTIONS AND MEANINGS THAT HAVE BEEN COMMUNICATED.
7. SEEK CLARIFICATION WITH APPROPRIATE, OPEN-ENDED FOLLOW-UP QUESTIONS.
8. GIVE REFLECTIVE FEEDBACK SUMMARIZING YOUR UNDERSTANDING OF THE PARTY'S STATEMENTS.

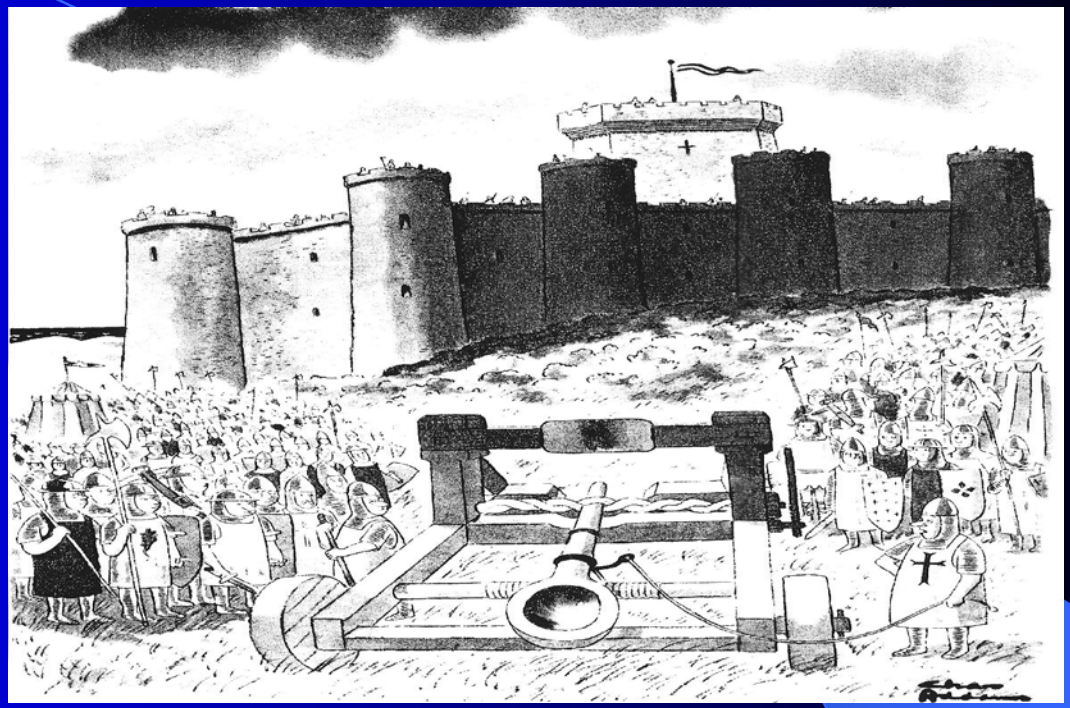
Preparation



"You mean no one remembered to bring a rock?"

Preparation

- Client
- BATNA, Info & Game Plan
- Pre-Mediation Conferences
- Pre-Mediation Statement – can include:



Pertinent Facts

Party Dynamics

Thoughts for Resolution

Legal Analysis

Settlement History

Annex Key Documents

Get the Right Parties to the Table

"I don't have to be a team player, Crawford. I'm the team owner."

Get Cellphone for Absent Participant

"I'll check to see if he's available."

Power in Numbers

Opening Statement

Welcoming Dialogue & Peacemaking

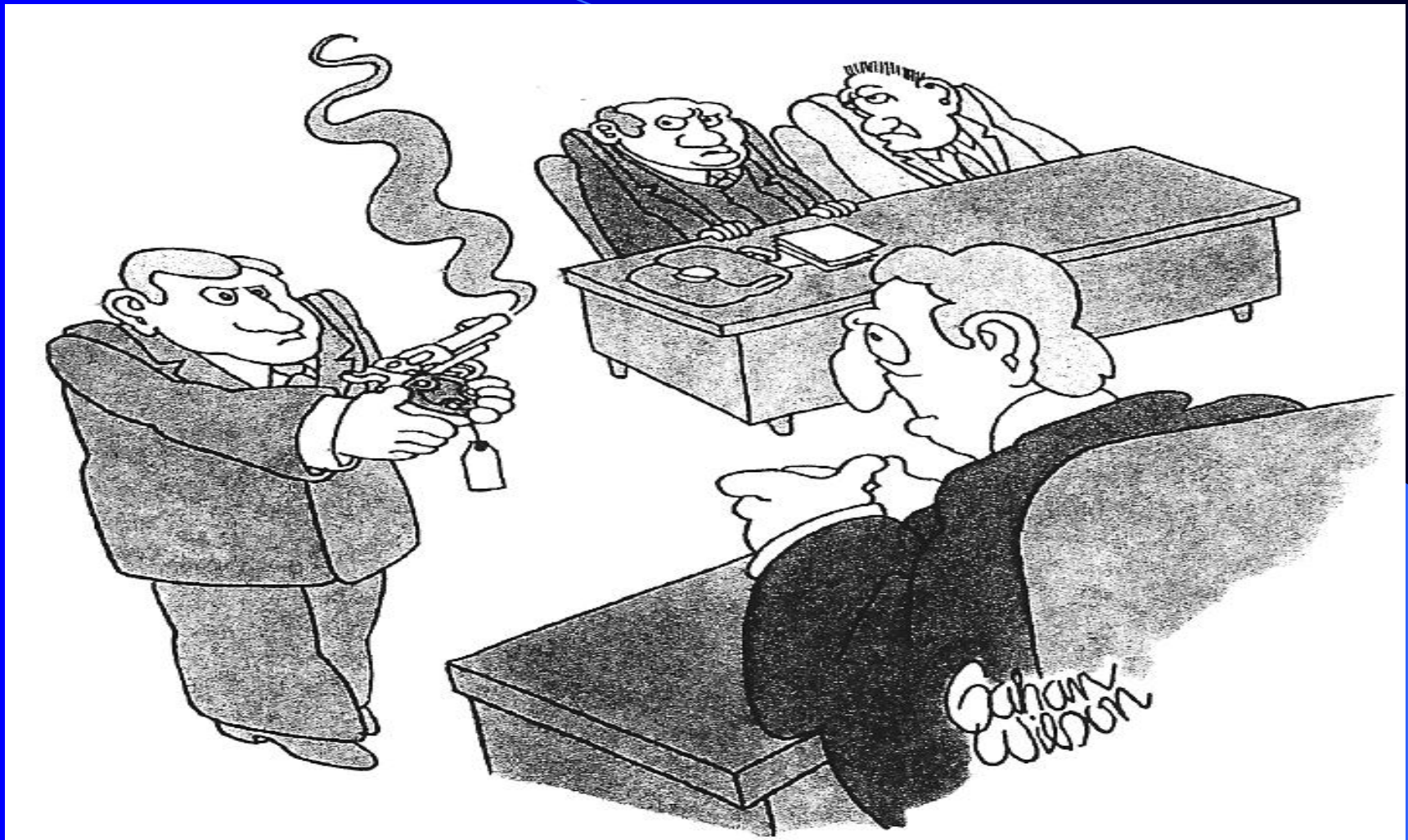
Earnest Inquiry

Iron Fist in a Velvet Glove

Give & Get Information

"I still don't have all the answers. But I'm beginning to ask the right questions."

How do you Handle the Smoking Gun?



"Oh–oh, we're in trouble!"

LISTENING
BE ALERT TO:

1. INTERESTS
2. ISSUES
3. PROPOSALS
4. FEELINGS
5. PRINCIPLES
6. VALUES
7. RULES
8. VISIONS
9. STORIES
10. BATNAs

Derived from Lela P. Love, *Training Mediators to Listen – Deconstructing Dialogue and Constructing Understanding, Agendas and Agreements,* Pre-publication draft.

Deal Effectively with Emotional Triggers:

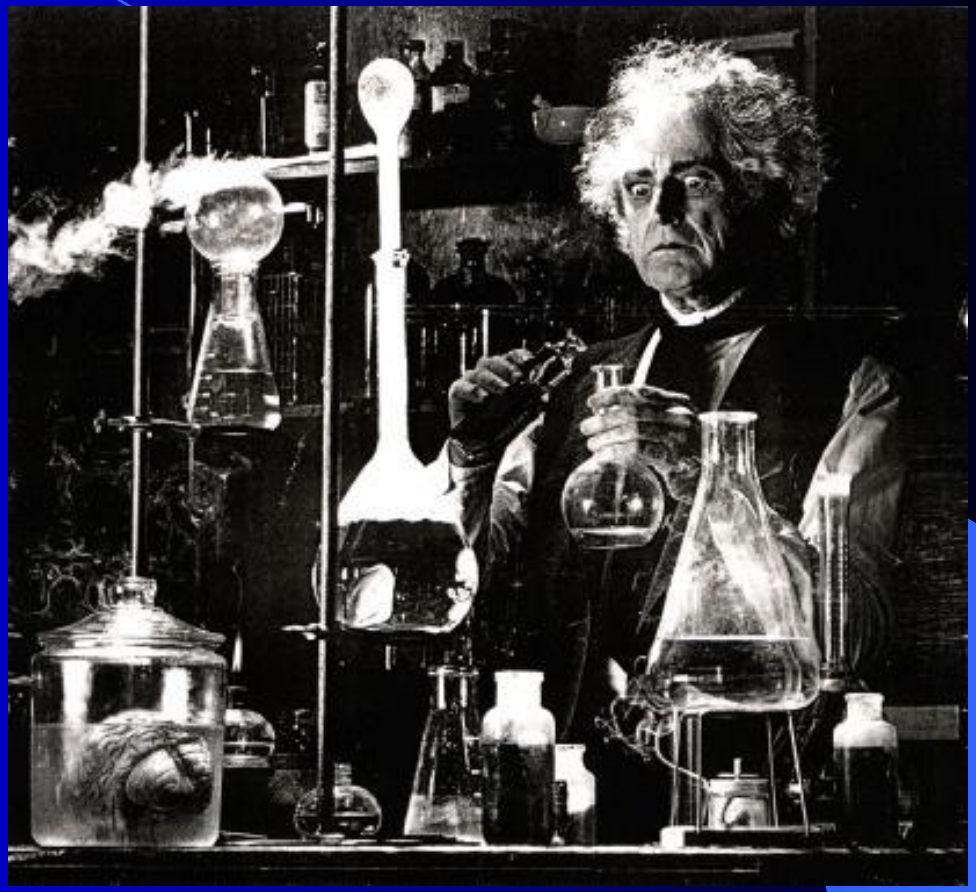
Fisher/Shapiro 5 Core Concerns

- Appreciation
- Affiliation
- Autonomy
- Status
- Role

Fisher & Shapiro, *Beyond Reason – Using Emotions As You Negotiate* (Viking 2005)

Reality Testing

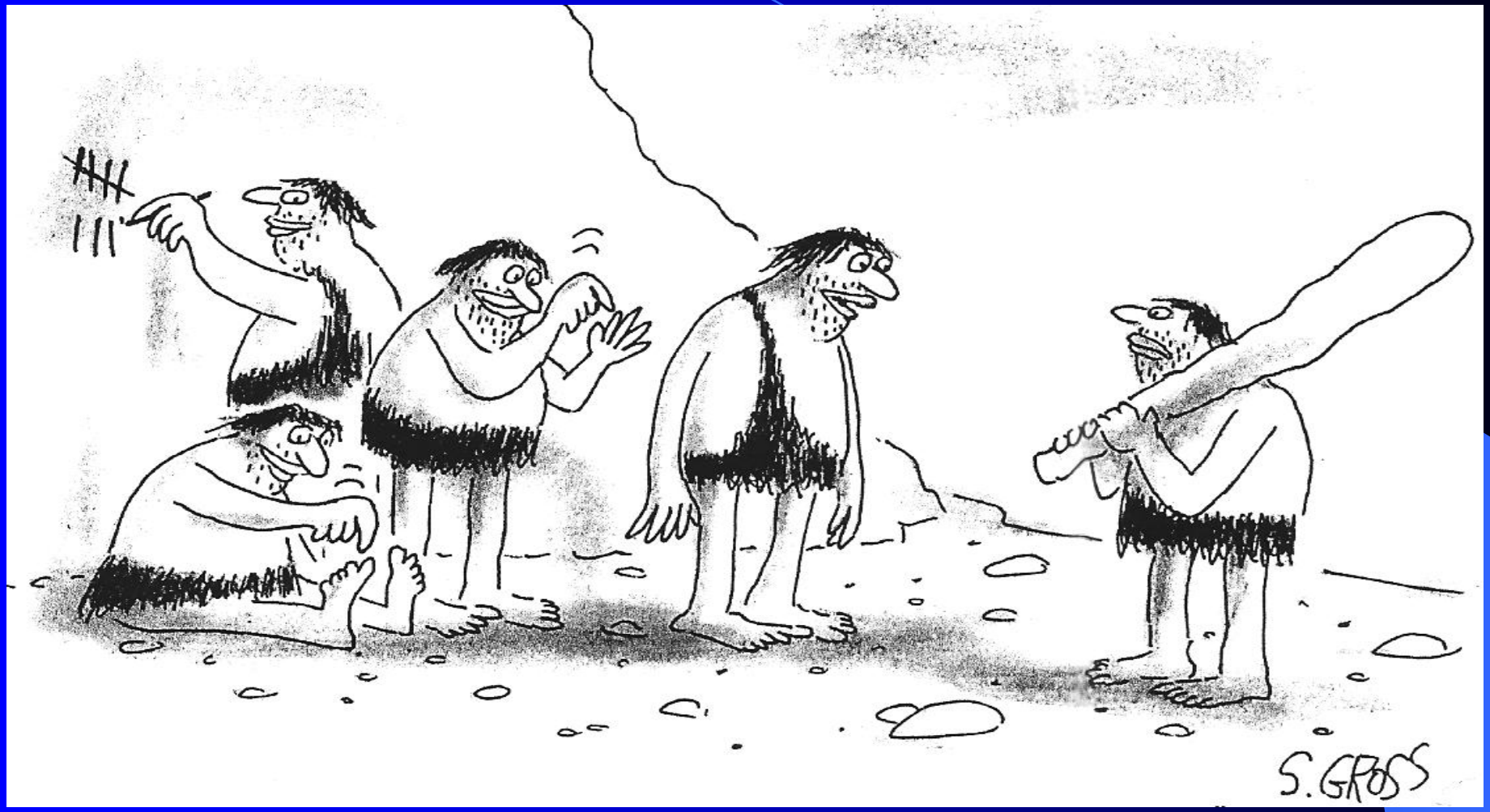
- BATNAs
- Risk Assessment
- Transaction Cost
- Assertion Credibility
- Deal Doability
- Move's Viability
- Projected Impact



Settle Now or Wait Until Trial?

"Curiosity."

The Higher Math of Risk Analysis



"We are neither hunters nor gatherers. We are accountants."

FIGURE 1

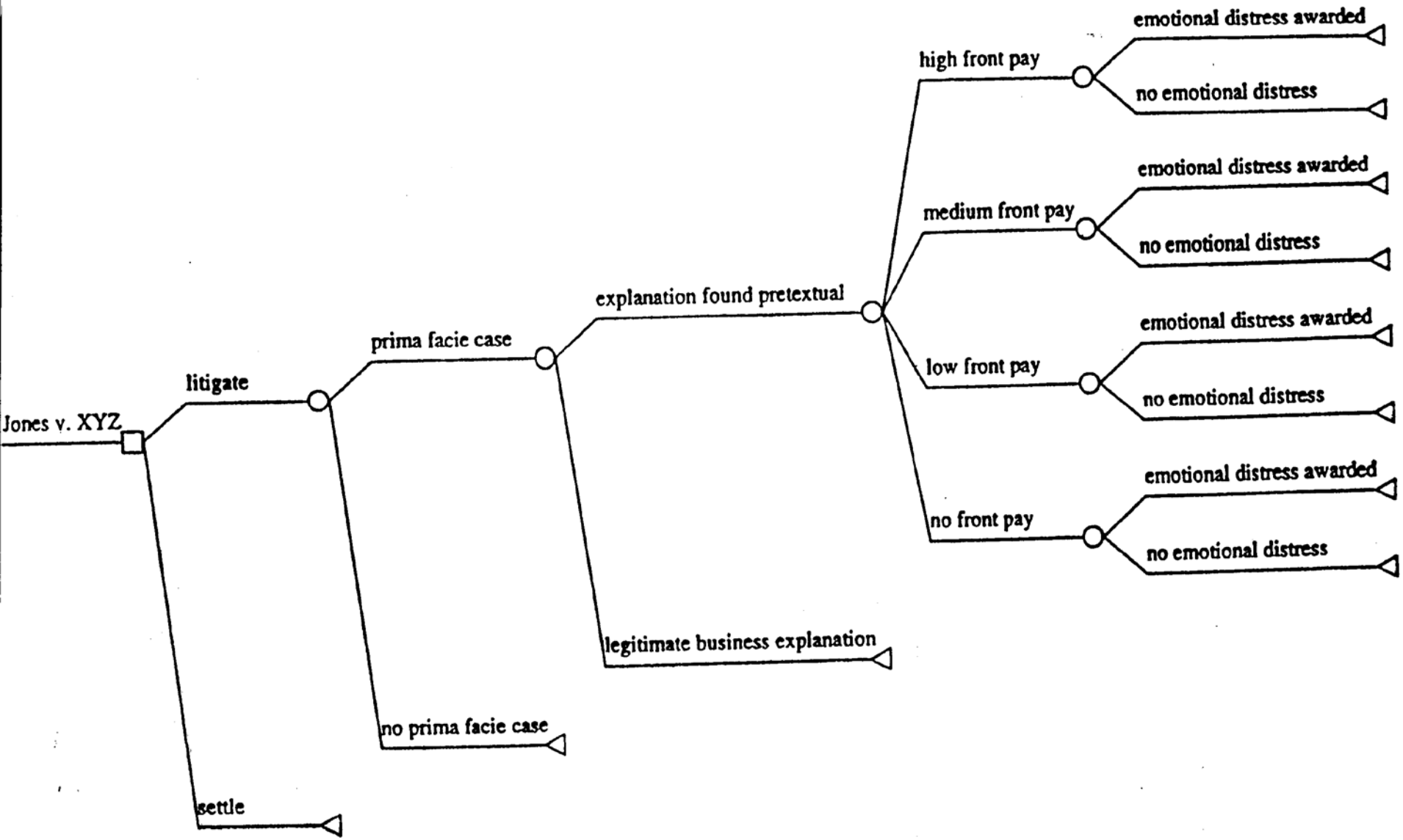
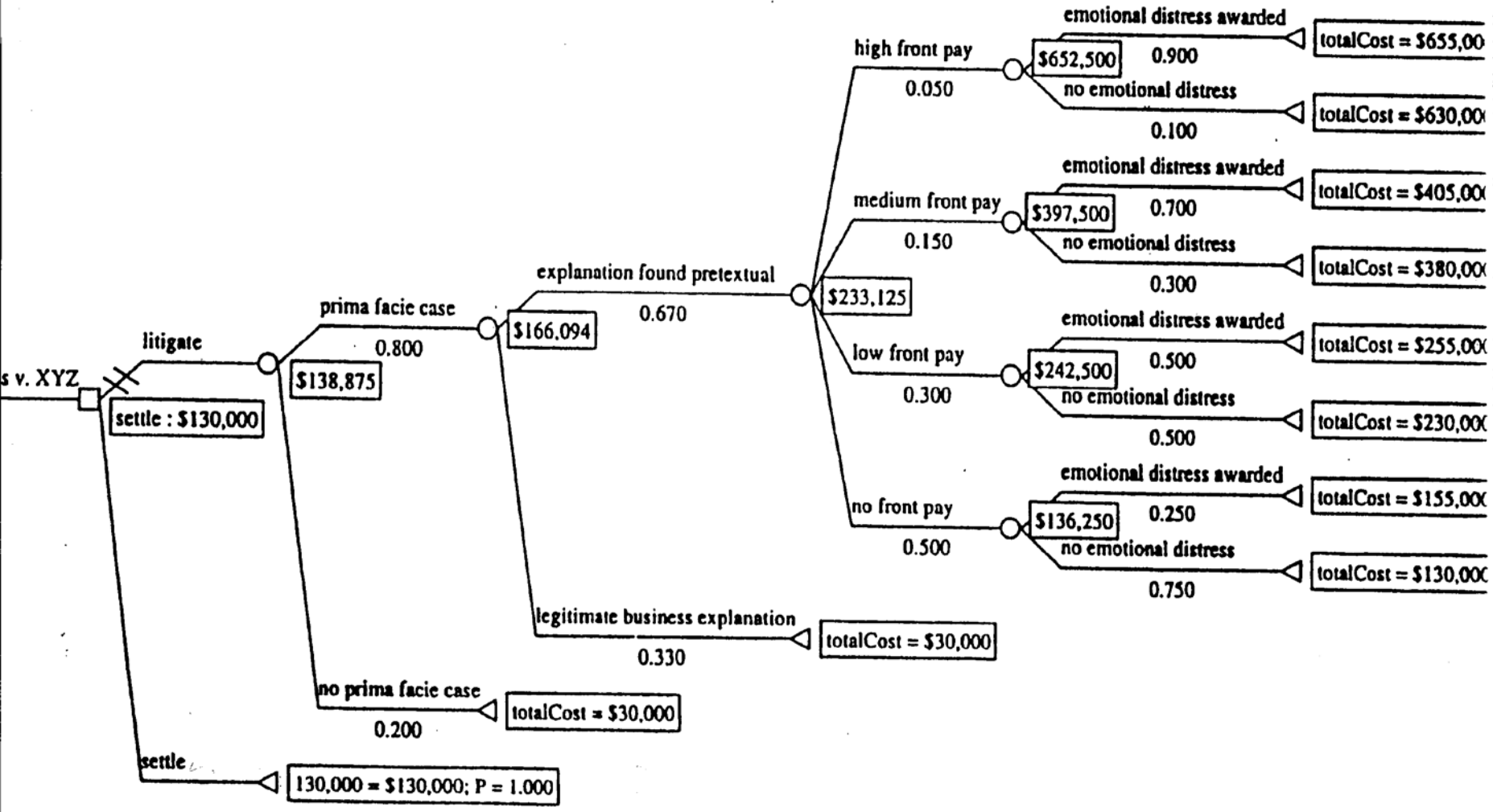

Jones v. XYZ
litigate
settle
prima facie case
no prima facie case
explanation found pretextual
legitimate business explanation
high front pay
emotional distress awarded
no emotional distress
medium front pay
emotional distress awarded
no emotional distress
low front pay
emotional distress awarded
no emotional distress
no front pay
emotional distress awarded
no emotional distress

FIGURE 2


s v. XYZ
litigate
settle : $130,000
settle
130,000 = $130,000; P = 1.000
prima facie case
0.800
$138,875
no prima facie case
0.200
totalCost = $30,000
explanation found pretextual
0.670
$166,094
legitimate business explanation
0.330
totalCost = $30,000
$233,125
high front pay
0.050
$652,500
emotional distress awarded
0.900
totalCost = $655,00
no emotional distress
0.100
totalCost = $630,00
medium front pay
0.150
$397,500
emotional distress awarded
0.700
totalCost = $405,00
no emotional distress
0.300
totalCost = $380,00
low front pay
0.300
$242,500
emotional distress awarded
0.500
totalCost = $255,00
no emotional distress
0.500
totalCost = $230,00
no front pay
0.500
$136,250
emotional distress awarded
0.250
totalCost = $155,00
no emotional distress
0.750
totalCost = $130,00

When to Walk Away?

"My people will get back to your people."

The Light at the End of the Tunnel

DO NOT RUSH
(Go Slow to Go Fast)

Prevent trouble before it arises.
Put things in order before they exist.
The giant pine tree
Grows from a tiny sprout.
The journey of a thousand miles
Starts from beneath your feet.

Rushing into action, you fail.
Trying to grasp things, you lose them.
Forcing a project to completion,
You ruin what was almost ripe.

Therefore the Master takes action
By letting things take their course.
He remains as calm
At the end as at the beginning.
He has nothing,
Thus has nothing to lose.

Quotations from Mitchell, S. (trans.) (1991). Tao te Ching. New York, Harper & Row.

BE FLEXIBLE

Men are born soft and supple;
Dead, they are stiff and hard.
Plants are born tender and pliant;
Dead, they are brittle and dry.

Thus whoever is stiff and inflexible
Is a disciple of death.
Whoever is soft and yielding
Is a disciple of life.

The hard and stiff will be broken.
The soft and supple will prevail.

Quotations from Mitchell, S. (trans.) (1991). Tao te Ching. New York, Harper & Row.

TWELVE TOOLS FOR CREATING MOVEMENT

1. Reframing
2. Hearing Proposals
3. Stroking
4. Silence
5. Caucuses
6. Role Reversal
7. Option Generating
8. Normalizing
9. Taking Advantage of Opportunities for Empowerment and Recognition
10. Focusing on Future
11. Reality Testing
12. Asking Problem Solving Questions

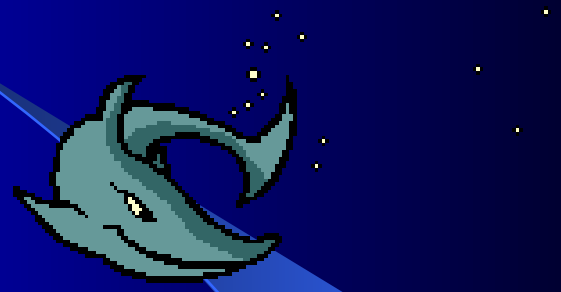
GAMBITS FOR CLOSURE

(Caution: To Be Avoided if Risks Shift to Evaluative Mode)

1. CONDITIONAL OFFER
2. TWO-STEP TECHNIQUE
3. BEST OFFER (alleged BOTTOM LINE)
4. “MEDIATOR’S SOLUTION”
5. ONE TEXT APPROACH
6. BASEBALL ARBITRATION
7. SECRET POLL
8. DEADLINE
9. ADJOURNMENT
10. EXPERT OPINION
11. CHOOSE ANOTHER PROCESS

ATTORNEY ROLE IN MEDIATION

1. Process Guide
2. Mediator Selection
3. Case Analysis; BATNA Analysis
4. Pre-Mediation Communications with Mediator
5. The Written Submission
6. Bringing the Right Parties to the Table
7. Bringing Necessary Information to the Table
8. Roadblock Anticipation & Strategies
9. Opening Statement



ATTORNEY ROLE IN MEDIATION (cont'd)

11. Organized Presentation of Information
12. Guardian & Guide
13. Communicating Risks & Possibilities
14. Assisting in Communications
15. Negotiation Consultant
16. Brainstormer; Option Generator
17. Crafting Settlements

TEN THINGS NOT TO DO IN MEDIATION

1. Tell Party she is a liar.
2. Give up.
3. Stay on $ only, missing integrative possibilities.
4. Gag the client.
5. Balk at emotion.

TEN THINGS NOT TO DO IN MEDIATION

6. Misread late high/low demand/offer.
7. Do not have person with authority.
8. Do not anticipate need of other party for information.
9. Give ultimatum.
10. Misunderstand role of mediator.

Mediation – that Many Headed Beast

Mediation—Alchemical Crucible for Transforming Conflict to Resolution

By Simeon H. Baum

Mediation in Context—Negotiation and 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 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 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, 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 and 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 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

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 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 decisionmaking 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.

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 rep-

resenting 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 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.

"It [mediation] supports compassion, creativity and realism as parties work together to understand each other and their needs, constraints, and context."

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.

Endnotes

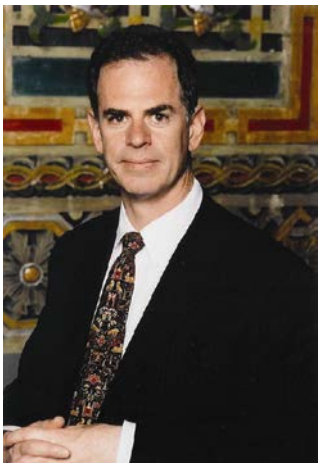
1. As discussed *infra*, proponents of transformative mediation do not see the mediator's role as assisting in problem solving or in settlement of a dispute. Rather, the role is to foster empowerment and recognition. Similarly in Himmelstein and Friedman's model, understanding is the key. Accordingly, 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. 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.
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, 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.
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).
7. I first heard this term used by Lori Matles.
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.

Simeon H. Baum, Esq., litigator, and President of Resolve Mediation Services, Inc. (www.mediators.com), was first Chair of the NYSBA's Dispute Resolution Section. Mr. Baum has broad experience as a neutral—mediator, arbitrator and evaluator—in over 900 disputes. He was selected for *New York Magazine*'s 2005–2010 "Best Lawyers" and "New York Super Lawyers" listings for ADR. He teaches on the ADR faculty at Benjamin N. Cardozo School of Law and is a frequent speaker and trainer on ADR.

FALL MEETING 2009
NEW YORK STATE BAR ASSOCIATION
DISPUTE RESOLUTION SECTION
IN CONJUNCTION WITH
LABOR & EMPLOYMENT LAW SECTION

(The Sagamore Resort, Bolton Landing, New York
October 3, 2009)

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?

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

---

[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.

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]

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.

---

[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.

[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.*

ALTERNATIVE

Top 10 Things

LITOMYSKY/NYLJ

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

DISPUTE RESOLUTION

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).

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.

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.

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

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

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. 85.) 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)

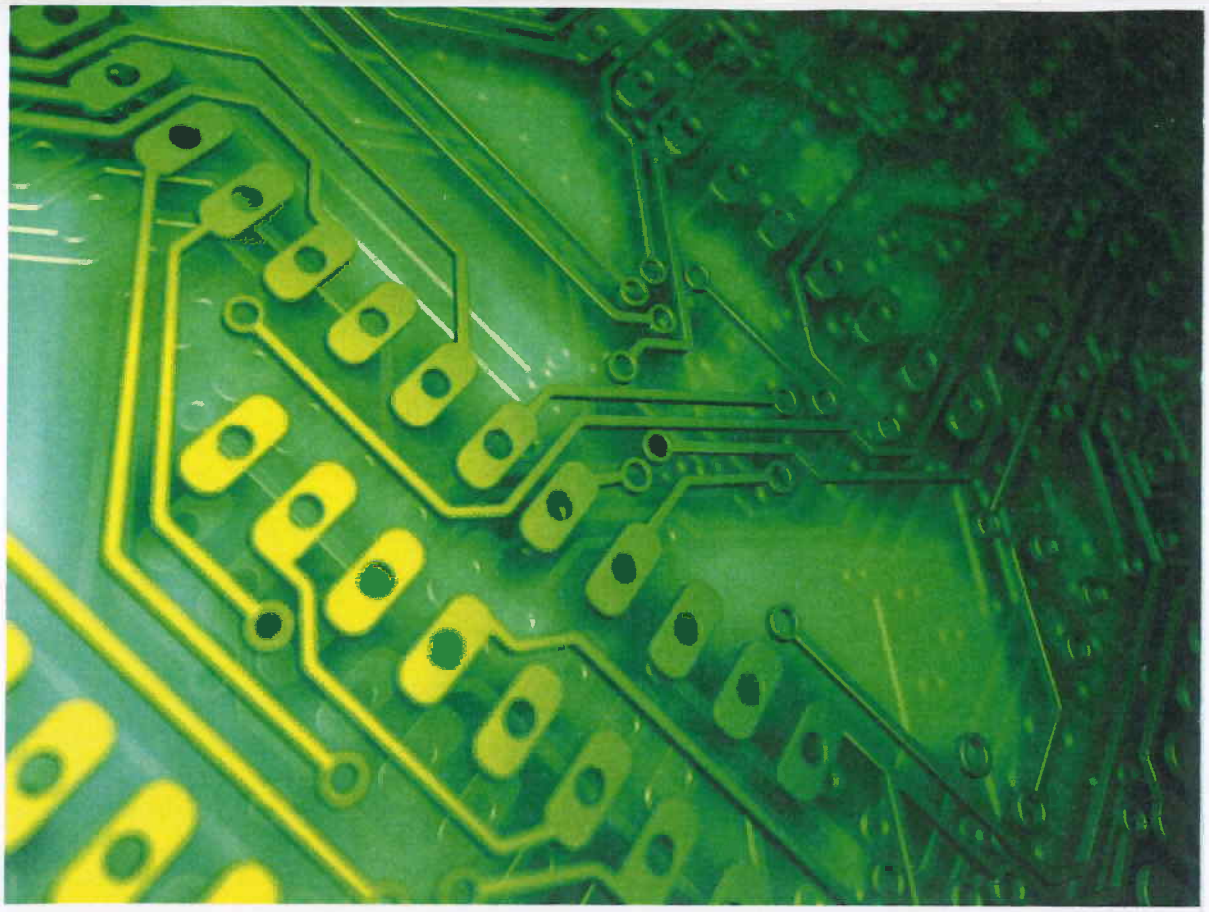
will eventually settle if the gap between the last demand and offer is sufficiently narrow at the conclusion of the session for parties to keep negotiating.

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



Dispute Resolution and e-Discovery

2012 Edition

Daniel B. Garrie
Yoav M. Griver

THOMSON REUTERS
WESTLAW

Chapter 3

Mediation and Discovery

by Simeon H. Baum[*]

---

[*]Simeon H. Baum, litigator, and President of Resolve Mediation Services, Inc. (www.mediators.com), has successfully mediated roughly 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, and Trump's $ 1 billion suit over the West Side Hudson River development. For two decades, he has played a leadership role in the Bar relating to ADR, including service as founding Chair of the Dispute Resolution Section of the New York State Bar Association, and chairing the ADR Section of the Federal Bar Association and ADR Committee of the New York County Lawyers Association. He has served on ADR Advisory Groups to the New York Court system and is President of the SDNY Chapter of the Federal Bar Association. He was selected for the 2005–2012 "Best Lawyers" and "New York Super Lawyers" listings for ADR, and as the Best Lawyers' "Lawyer of the Year" for ADR in New York for 2011. He teaches on the ADR faculty at Benjamin N. Cardozo School of Law and is a frequent speaker and trainer on ADR.

§ 3:1 Introduction

There is nothing like a book focused on e-discovery to give the reader a sense of the complexity and expense of litigation. Over the last two decades, as cases have grown increasingly complex and expensive, there has been growing interest in alternative dispute resolution ("ADR") mechanisms, like arbitration and mediation, as a possible means of reducing the cost, formality, complexity and disruption of litigation. Arbitration is a process in which one or more neutral experts make factual findings and determinations, under legal and other norms, that are binding on the parties. Historically, it was seen as fair, fast, flexible, final and, if not free, then inexpensive. Over the last decade or more, increased complexity, forum, satellite litigation, the use of U.S. litigation style discovery[1] in that forum have magnified costs and delays in arbitration. Nevertheless, arbitration has continued to thrive, particularly on the international scene, where parties seek a neutral forum offering no "home court" advantage.

Mediation has emerged as another available process for resolving disputes to the satisfaction of the parties. At its best, media-

---

[Section 3:1]

[1]In 2008, Bernice Leber, then chair of the New York State Bar Association ("NYSBA") charged this author, who then served as Chair of NYSBA's newly formed Dispute Resolution Section, with addressing the problem of uncertainty, lack of control, rising costs, and conversely the risk of unfairness through arbitrary limits on discovery in the arbitration forum. Ms. Leber posed the problem with two scenarios: (1) the arbitrator who permits wide open discovery way beyond party or counsel's initial expectations or preferences; and (2) the arbitrator who bars necessary discovery adversely impacting the fairness of the proceeding or outcome. Recognizing that norms might vary depending on the arbitral context, the Section broke this challenge down into different types of arbitration and the forum involved. In 2009, 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 proposed 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.

tion enables parties to focus on the core issues, interests and information needed, cutting time and cost and leading to an expedited resolution of the matter tailored to the parties' needs and circumstances. Mediation offers truncated disclosure in a confidential setting that can cut through many of litigation's tangles. This chapter will explore the nature and uses of mediation, consider its benefits and limitations, and investigate the relationship of mediation and discovery.

Discovery in the litigation context serves two core purposes: developing the strengths and weaknesses of one's own case and developing the strengths and weaknesses of the adverse party's case.[2] Mediation, as will be more fully discussed below, is essentially a facilitated negotiation. Information has a broader use in negotiation and mediation than litigation. In negotiation and mediation, information is developed not only for case assessment, but also to understand and address the underlying causes of a dispute, to understand and modulate the parties relationship, and to arrive at and judge the value, feasibility and durability of a deal. Information is the currency of mediation. One of the unique features of the mediation process is the freedom and creativity that infuses it. Litigation follows established rules of evidence and civil practice and procedure. Mediation by contrast is informal and an extension of party choice. In mediation, parties and the mediator can adjust to develop information in a flexible way, for disclosure in a confidential setting. Freedom of process creation enables parties and the mediator directly to address some of the secondary aspects of information development that attend litigation. While the ostensible reason for discovery in litigation is case development, the cost and burden of discovery can often become a problem by itself, and can be used by one party as leverage against the other. Mediation permits parties to pare down information sought and disclosed to that which is essential to reach a deal. Thus, in mediation, not only outcome and information, but even the process itself can be considered, crafted and negotiated. We can ask the questions: Is this working? Is this information, and the process of obtaining information, worth the cost? What is the best way for us to proceed? This chapter will

[2]While it might seem counterintuitive, litigators know that it is important to understand the weaknesses of one's own case and the strengths of the adversary's case as well. Knowledge of this information can help the advocate think ahead to develop the best spin for his weaknesses, to introduce the weaknesses himself in order to draw its poison, to work to find ways to exclude that information from introduction into evidence, to dig deeper and find flaws with the weakness itself, and to find legal arguments that make the weakness immaterial or irrelevant.

take a closer look at how information and the process of information gathering, assessment, use and disclosure is handled in mediation.

§ 3:2 Nature of mediation

General Definitions

Over the last 20 years, the mediation field has generated divergent views on the nature of mediation and the role and purpose of the mediator. A classic definition of mediation is found in the ABA/AAA/SPIDR Standards of Conduct for Mediators:

> Mediation is a process in which an impartial third party—a mediator—facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute. A mediator facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own agreement.[1]

In addition to focusing parties on their own interests, the mediator can also encourage parties to consider the alternatives to deal proposals that are under consideration. Among these alternatives can be economic and non-economic costs, risks, and probable outcomes of litigation

Riskin's Grid and the Evaluative-Directive/Facilitative Debate

Over the last two decades, particularly in the 1990s, there was lively discussion concerning the scope, function and purpose of the mediator's role. In his seminal article, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed,* Professor Len Riskin mapped out what he saw to be a variety of approaches and orientations demonstrated by mediators,[2] using contrasting concepts of "broad/narrow," and "evaluative-and-directive/facilitative" to create spectrums fram-

---

[Section 3:2]

[1]Standards of Conduct for Mediators (Joint Committee of Delegates from the American Arbitration Association, American Bar Association Sections of Dispute Resolution and Litigation, and the Society of Professionals in Dispute Resolution 1994); cited in KK Kovach & LP Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 Harv. Neg. L. Rev. 71 (hereinafter "*Riskin's Risks*"), at 74, n. 23.

[2]*See*, Leonard L. Riskin, Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 HARV. NEG. L. REV. 7, 25 (1996) hereinafter Riskin, Grid]. The Grid was first published in 1994. *See also* Leonard L. Riskin, Mediator Orientations, Strategies and Techniques, 12 Alternatives to High Cost Litig. 111 (1994).

ing the map. Some mediators, for example, might see themselves as mini-judges, holding a discussion in which the chief focus is legal issues. Toward the end of this discussion, the mediator might provide an evaluation of the case and strongly urge the parties to come to a settlement under terms that this mediator proposed. This extreme example would be deemed "narrowly focused, evaluative and directive" in the Riskin Grid.

Other mediators might see their job as facilitating the parties' own decision making. These mediators would use elicitive means—through questioning, reflecting back the parties own communications and meanings, and encouragement—to help the parties through their own decision making process, offering assistance in keeping communications effective and constructive, and helping parties seek clarity and maintain stability throughout this process. In this example, the mediators would foster discussion on any topic the parties find meaningful. This could include business interests, personal and community values, emotions generated by the conflict, principles, economic limitations, hierarchical pressures, the negotiation process itself, goals, visions, aspirations,[3] and a wide range of other topics, as well as strengths and weaknesses of the legal case. This latter approach to mediation would fit in the "broadly focused, facilitative" quadrant of the Riskin Grid.

Riskin's Grid sparked passionate and thoughtful discussion in the field. Professors Lela Love and Kim Kovach, both now past Chairs of the ABA Dispute Resolution Section, declared "evaluative mediation" to be an oxymoron.[4] To them, and many others in the field, the mediator's role is purely facilitative. While there might be a separate and legitimate role for a neutral evaluator or arbitrator, Love and Kovach assert that labels, transparency and consumer choice matter and that mediators should be clear on their own role; they are not a practice "rent-a-judge." This is not to say that the mediator is simply a "message bearer." Love and Kovach point out a variety of actions a mediator might perform which are far more active, such as shifting the agenda, prodding parties to reconsider a position and, perhaps in caucus, challeng-

---

[3]*See,* Love, L, *Training Mediators to Listen—Deconstructing Dialogue and Constructing Understanding, Agendas and Agreements*, 38 Fam. & Concil. Cts. Rev. 27 (Jan. 2000 Sage Publications, Inc.), reprinted in LEXIS/NEXIS.

[4]*See*, *Riskin's Risks, supra;* Kovach & Love*, Evaluative Mediation is an Oxymoron*, 14 Alternatives to High Cost Litig. 31 (1996).

ing an unworkable or misleading proposal.[5] There are many tasks performed by a facilitative style mediator to activate the parties' own reflection, enhance the quality of their communication, and engage and keep them in a process that leads to change and resolution. Love and Kovach's central point is that it is up to the parties to arrive at their own decision and evaluation, and it is the mediator's role simply to help them do that, not to tell the parties what is fair, the likely legal outcome, or the right deal for them.

It should be noted that nothing prevents the broadly focused, facilitative mediator from also engaging the parties and their counsel in a thoughtful consideration of the strengths and weaknesses of their own case and the other party's case. The difference is that it is the parties and their counsel, rather than the mediator who openly engage in this evaluation.

Mediation as Facilitated Negotiation & the Problem Solving Model

While case analysis is thus not alien to the process, a hallmark of the broad, facilitative mediation approach is joint, mutual gains problem solving. A centrist view of mediation casts the process as a facilitated negotiation. To be effective, mediators must understand the negotiation process and grease the wheels of negotiation to enable all parties to be most effective in arriving at a deal that resolves their dispute. The Harvard Negotiation project and other literature in the field has informed the mediation process. Fisher and Ury's "Getting to Yes"[6] popularized the recognition that greater gains can be achieved for all negotiators through cooperation than through competition. This notion was captured by the Italian economist, Vilfredo Pareto, who posited the optimal deal as one that maximizes achievement of the interests of all parties.[7] Fisher and Ury advise negotiators on how best to achieve the Pareto optimum, or the "*win/win*" result in five essential points.

First, they recommend that negotiators "separate the people from the problem." They observe that where relationships become part of the negotiation, or even drive the negotiation, conflict and inefficiencies can arise. One example given is that of the negotia-

---

[5]*Riskin's Risks, supra*, n. 37, citing Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985 (1997).

[6]Fisher, Roger and Ury, William, Getting to Yes: Negotiating Agreement Without Giving In (New York, NY: Penguin Books, 1983).

[7]Pareto, Vilfredo, *Cours d'Economie Politique* (1896–97).

tor in the *shuk* or Arab marketplace. If the lamp merchant knows the purchaser's family and is seen as overcharging, he may be perceived as having no care for that family. Similarly if the purchaser is seen as offering too little, he might be showing a lack of concern for the wellbeing of the merchant's family. A lowball offer might offend the integrity of the merchant, the value of his wares, and his status in society. Offers or demands that do not reflect the "real" or "objective" value of the item might be seen as an insult to the intelligence of the party on the other side. Perceived slights can escalate into use of mutually insulting or threatening language. Before parties know it, *ad homina* are being launched and their relationship is not simply part of the issue, it is seriously at risk.

Fisher and Ury therefore advise negotiators to be "soft on the people and hard on the problem." Casting negotiation as problem solving, they recommend that negotiators use their tough analytic skills to identify the issues and find solutions to the problem. By being "soft" on the people, using encouraging forms of communication, active listening skills, and acknowledgment, negotiators cultivate a smoother, richer, and more complete flow of the information that is needed to perform this problem solving.

The next step in this problem solving model is to move from "positions to interests." Returning to the *shuk*, we can imagine a negotiation in which the seller makes an absurdly high demand and the buyer makes an equally implausibly low offer. Each party takes a "position" and holds firm. The seller swears that the lamp is worth every penny demanded and stakes his honor on not taking a penny less, and *vice versa*. In litigation, this can be seen in lawyer-negotiators insisting on the complete validity of their claims or defenses and the certainty of a favorable outcome, and, accordingly, demanding 100% payment or insisting on not paying a dime or making any other concession. What Fisher and Ury observe is that positional bargaining, like relationship based bargaining, generates inefficiencies and conflict. Where each party holds firm to a position, no deal can be done. Once strong positions have been staked out, with claims of truth and moral superiority attached, the only way to arrive at a deal is for the parties to prove themselves to be liars or reprobates. Loss of face is inevitable with positional approaches to bargaining.

Fisher and Ury suggest another way. Each party candidly describes his own interests and learns the interests of the other. There is no risk of apparent dishonesty when the lamp seller states that he needs to make a profit, feed his family and maintain his business—or any other need he might have. Similarly, there is no harm in the buyer's expressing his need for

light, quality interior design, love of antiques, need to preserve the family fortune, financial limitations, or any other set of needs or interests.

Indeed, by identifying interests, the parties prepare themselves for step three in this problem solving model: developing options for mutual gain, to maximize satisfaction of the interests of all parties—*i.e.*, the Pareto optimum. In a classic example, two sisters are described as fighting over a dozen oranges. Each girl takes the *position* that she is entitled to the full dozen. A distributive approach to solving this problem might be to split the oranges, giving each girl six. Along comes their Uncle Sol, who wisely asks the sisters why they want the oranges. He discovers that Susie wants to make orange cake and Sally wants to make orange juice. Thus, Susie needs the rinds and Sally needs the pulp. Armed with this knowledge of *interests*, Uncle Sol can give each girl 100% of what she wants. One sister gets all rinds and the other gets all pulp. Critical to solving this problem is using the word "why" to learn the interests of each party. By learning their interests, Uncle Sol can arrive at an integrative approach generating greater potential gains than that available with a distributive approach.

Fisher and Ury's fourth piece of advice is to use standards in negotiation. By finding a standard that all parties might find acceptable, the negotiations shift from a battle of wills to an objective dimension. Standards might be that which is objectively verifiable, a common principle, or a shared or recognized value, method or approach. One frequently cited example is using the "Kelly Blue Book" as a standard for arriving at the value of a used car in a negotiation with one's automobile insurer. Standards can be of great help in distributive as well as integrative approaches in allocating value in a negotiation.

Finally, in their appendix, Fisher and Ury coin the now much used acronym, BATNA: the "best alternative to a negotiated agreement." By considering what will happen if one chooses not to take a given deal, one is put in a better position for evaluating that proposal. Say, for example, one is making $150,000 as an associate in a law firm. One has been there for several years, has a good likelihood of making partner, but is not very interested in the firm's specialty—insurance coverage litigation. Along comes an offer from an entertainment law firm, at $140,000. The offer is $10,000 lower than one's BATNA, *i.e.,* one's existing salary. Nevertheless, applying non-economic factors, one might choose to take a $10,000 hit on the theory that greater job satisfaction is worth more than $10,000; let us say for this example that one attended Julliard before law school and has always hoped to work

in a job associated with the arts. Other factors could be comparing chances of partnership at each firm and comparing firm culture and lifestyle. The BATNA offers a point of comparison on all fronts, enabling one to develop a standard by which to judge the proposed deal. In negotiations concerning cases that are in, or might go to, court, the probable court outcome and associated transaction costs[8]—including noneconomic factors like adverse publicity and disruption—are often seen as the legal BATNA against which the value of a given settlement proposal might be judged.

Other Models of Mediation—Transformative, Understanding Based, and Protean (or 360 Degree) Mediation

Mediators who adopt the problem solving model of negotiation see their chief job as helping the parties engage constructively in a problem solving process. The view of mediator as problem-solver was challenged in the mid 1990s, by the ultra-facilitative "Transformative" school of mediation popularized by Baruch Bush and Joseph Folger in a book entitled "The Promise of Mediation."[9] The electrifying premise of transformative mediation is that the mediator's purpose is not to solve a problem or settle a case. Rather, the mediator has the dual purpose of fostering empowerment and recognition. The focus of the mediator is not so much on the parties' deal as it is on the quality of their relationship and their mode of communication. Moreover, the transformative mediator does not seek to see the big picture, figuring out the core issues, identifying interests, generating options to meet interests, using standards to help with valuation, distribution or decision making, or even comparing deals to alternatives. Rather, the mediator applies a moment to moment microfocus, reflecting back what each party does or says, following the parties as a passenger in the back seat of a car is driven where the driver takes him.

This approach is rooted in the transformatives' understanding

---

[8]Transaction costs include fees that will be spent on lawyers and experts, as well as the associated costs and disbursements that make their way into the typical retainer agreement. One of the greatest transaction costs can be those associated with the activity that is the subject of this book: e-discovery. Related factors can include present value of the proposed deal and possible interest. Collectability of a judgment is another factor to be considered in this type of analysis.

[9]Bush, Robert A. Baruch and Folger, Joseph P., The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (Jossey-Bass Publishers, San Francisco 1994) ("Promise of Mediation"). A good synopsis of this book is found at: http://www.colorado.edu/conflict/transform/bushbook.htm.

of the nature of conflict and of the self. Transformatives see people as being uncomfortable in conflict. We can even feel ugly in that role, and urgently want to be out of it. We lash out and become defensive, shoring up protective walls around ourselves and focusing on our own feelings, views, interests, rights and entitlements. In this state, we have difficulty seeing the other's perspective. When parties see that they have some control over themselves and the situation, they can relax a bit and open up to the perspective of the other. In short, empowerment leads to the growth of empathy, and empathy is the moral transformation that gives "Transformative" mediation its name. Resolution is more a natural outgrowth of this change than the goal of the mediator. In turn, empowerment is fostered by the mediator's raising up for parties opportunities to make choices concerning not only the deal terms but also the host of available process choices, including, *inter alia*, whether to speak or not, what to say, how to respond, and whether or not to make a deal. Bush and Folger adopt a view of self that is neither individualistic nor organic (collectivist), but rather a "both/and" view that focuses on relationship[10] and the choice of how and in which mode one relates to the other. Conflict is seen as a crisis in relationship and, thus, transformative focus is on the quality of relationship.[11]

Mediators Jack Himmelstein and Gary Friedman have for years promoted an "understanding based" approach to mediation.[12] For them, conflict is based on misunderstanding and unwillingness to accept reality. As parties come to a better understanding of each other and of their compelling contexts and circumstances, they can dig beneath the "v." in a litigation or dispute and come to a resolution through understanding. The understanding based approach posits that the parties are already in relationship in the broader world. The mediator's job is to bring peace, not conflict, into the room. Accordingly Himmelstein

---

[10]*See,* Promise of Mediation, Ch. 9. While Bush cites to the work of a mid-20th century social scientist in connection with this work, the modern Jewish existentialist thinker, Martin Buber, sets for a groundbreaking work on relationship as essential to one's true self in I and Thou (Kaufman, W. trans., Charles Scribner's Sons 1970).

[11]From a transformative vantage point, Fisher and Ury's advice to be soft on people, and to separate the people from the problem, can be seen as an instrumental approach to relationships from an individualistic sense of self. Transformatives, by contrast, give high value to the quality of relationship as essential to the nature of being fully human. In their defense, Fisher and Ury could argue that their first injunction simply liberates relationship from entanglement in an independently solvable problem.

[12]*See,* Friedman, G, Himmelstein, J., Challenging Conflict: Mediation Through Understanding (ABA Dispute Resolution Section 2009).

and Friedman train mediators to use joint session only. Private, confidential meetings between mediator and fewer than all parties—known as caucuses—are rarely, if ever, held in this model of mediation.

Development of mediation theory and schools over the last two decades has been good for the field. It creates greater clarity, promotes discipline and enables practitioners and users to make sharper choices in mediator selection, process design, and use of opportunities in the mediation process itself. Distinctions increase recognition of possibilities. Yet, for many mediators, what Peter Adler says about negotiators in his piece "Protean Negotiation"[13] can apply to mediators themselves. Many mediators do not fit a particular mold or school and do not necessarily limit themselves by being purely facilitative, or evaluative, directive, transformative or understanding based. A phrase used by mediator Lori Matles—"the 360 mediator"—might apply to the mediator who, while generally seeking to fulfill the central role of facilitating the parties negotiation or dialogue, will also do what seems appropriate under the circumstances. Whether these choices to depart from the facilitative role are error or highly effective is what makes mediation an art. Tact, appropriateness, knowing when rapport has been developed, understanding when humor will help or offend, and a host of subtle interpersonal skills that come with emotional intelligence can guide the mediator's choices of variation from the common theme.

§ 3:3 Uses of mediation

Court-Annexed, Public and Private Mediation

The use of mediation has grown extensively over the last two decades and is now being used to resolve disputes in nearly every conceivable substantive area. In the early 1990s, the federal district courts began pilot programs utilizing mediation. Those programs have grown into regular panels of mediators applied to nearly every type of civil case found in those courts.[1] Similarly, state courts around the country have developed mediation

[13]Adler, P.S., *Protean Negotiation,* in The Negotiator's Fieldbook, The Desk Reference for the Experienced Negotiator, Kupfer Schneider, A., Honeyman, C., editors (ABA Section of Dispute Resolution 2006).

[Section 3:3]

[1]The Alternative Dispute Resolution Act of 1998 formalized these pilot programs, directed all district courts to devise and implement some form of ADR program, and empowered federal courts to mandate arty participation in mediation or neutral evaluation. 28 U.S.C. §§ 651 to 658 (1998).

programs for a variety of case types. California, Texas, Florida, New Jersey, and Maryland feature widely used mandatory mediation programs, or multi-door ADR approaches. In New York, for example, mediation programs began at the community dispute level with referrals to Community Dispute Resolution Centers ("CDRCs") from family courts, Civil Court, and criminal courts. Mediation and neutral evaluation programs next appeared in New York's matrimonial courts. In the late 1990s, New York's Commercial Division, which handles its large, complex business cases, formed panels of neutrals offering a broad array of ADR options, including mediation.

Mediation has been embraced by the federal government as well.[2] Congress passed the Administrative Dispute Resolution Act of 1990,[3] which was renewed without a sunset provision in 1996.[4] Implementation of these ADR Acts gained strength in 1996, when President Clinton issued an Executive Order directing federal agencies to develop ADR programs for intra-agency, interagency, and even agency-public disputes. Today, a wide array of ADR, and in particular mediation, programs exist within the federal government. Quasi public organizations, like the U.S. Postal Service, have implemented mediation programs, like the USPS's REDRESS. Similarly Self Regulating Organizations (SROs), like the National Association of Securities Dealers (NASD), now called the Financial Industry Regulatory Association (FINRA), have mediation programs. FINRA, which manages approximately 85% of all customer-broker disputes nationwide,[5] in addition to broker-broker dealer disputes, handles nearly 1,000 mediations a year.[6]

In the private sector, acceptance of mediation is also widespread. The Center for Public Resources ("CPR"), now known as the International Center for Conflict Prevention and Resolution (still "CPR"), promoted a "pledge," adopted by many Fortune 500 corporations, in which corporations commit to utilizing ADR

---

[2]A helpful synopsis of the expansion of the use of ADR in the federal government can be found at http://www.dot.gov/ost/ogc/CADR/policy.htm#__edn23.

[3]Pub. L. No. 101-552, 104 Stat. 2736 (codified at 5 U.S.C. § 571).

[4]Pub. L. No. 104-320, 110 Stat. 3870 (codified at 5 U.S.C. § 571).

[5]FINRA's annual intake of arbitrations pursuant to mandatory arbitration clauses numbers in excess of 8,000.

[6]Statistics on FINRA arbitration and mediation filings and resolutions can be found at: http://www.finra.org/ArbitrationMediation/AboutFINRADR/Statistics/. During one of its more busy years, the NASD (FINRA's precursor) had 1,300 mediations pending.

mechanisms before resorting to litigation. Mediation or other ADR clauses can be found in many tailored and garden variety agreements across the board. Some particularly favored areas[7] include insurance[8] and reinsurance[9]—both first party and third party claims[10]—employment discrimination, securities, general business, family and matrimonial, and the commercial matrimonial (partnership or other business form dissolutions or general disputes), franchising, intellectual property, and real estate.[11]

Matching the Mediator to the Mess

As demonstrated above, mediation is a flexible process that can address a variety of different concerns. Depending on the participants' needs and the posture of a particular dispute or case, one mode of mediation might be more suitable than another.

Let us imagine, for example, an embedded employment dispute, where the parties have an ongoing workplace relationship and where the greatest source of conflict is less a monetary issue than the manner in which an employee is being treated or a manager is being perceived. For that dispute, a transformative model might be the most appropriate. The transformative mediator will focus on the quality of the parties' relationship and their communication. If effective in fostering empowerment and recognition, the transformative approach might repair, restore or enhance the relationship, making for a better tone in the workplace after completion of the mediation session.

Now, let us imagine an accounting proceeding between busi-

---

[7]The Dispute Resolution Section of the New York State Bar Association has published a series of White Papers elaborating on mediation in a variety of substantive areas. See 13 White Papers displayed at: http://www.nysba.org/AM/Template.cfm?Section=Section__Reports__and__White__Papers=/TaggedPage/TaggedPageDisplay.cfm=55=47287.

[8]Policies offering coverage in areas where the use of mediation has grown include disability, life, and health, as well as the more typical property and casualty policies. Directors and Officers ("D&O") or Errors and Omissions ("E&O") coverage, Employment Practices Liability Insurance ("EPLI"), and even Title Insurance policies generate disputes that are commonly being mediated today. For further details on Insurance and Reinsurance industry mediation, *see,* Platto, C., Scarpatto, P., and Baum, S., White Paper on Insurance and Reinsurance Industry Mediation (New York State Bar Association Dispute Resolution Section 2011).

[9]One well regarded panel of reinsurance industry neutrals is ARIAS.

[10]Both coverage issues and underlying claims are excellent areas for mediation.

[11]The Dispute Resolution Section of the New York State Bar Association has published a series of White Papers elaborating on mediation in a variety of substantive areas.

ness partners, now pending in a state court's Commercial Division or its equivalent. Perhaps there, a facilitative style mediator with a broad focus might be ideal. That mediator could address the parties' relationship, elicit their interests and creatively explore options to meet the parties' interests. This mediation might commence with a view that the plaintiff is in the dark on bookkeeping and needs information to determine just how much additional money he is owed. The cost of a full blown accounting proceeding might be monumental, and, if there are serious bookkeeping deficiencies, the outcome might still be inconclusive. A dissolution of the partnership might kill the proverbial goose that lays the golden egg. It is quite possible that, in this scenario, interest development might reveal that one partner is domestically focused and would like to run the retail operation and the other partner would like to go global, exploiting the brand on the international market. This discovery could lead to a restructuring of the business and licensing arrangements that separates out the partners' functions and domains, preserves, or even augments, value for both parties, and obviates the original need for an accounting.

Imagine a third, insurance oriented scenario, say a personal injury matter between strangers. The bulk of key discovery has been completed, but development of experts, not to mention a lengthy trial and possible appeal, have not yet occurred. There is thus no ongoing relationship. Here a facilitative mediator who is capable of running the parties through an effective risk and transaction cost analysis might be optimal. Comprehending the strengths and weaknesses of a case might make it easier for the parties, including the insurance claims representative, to come to a monetary deal that makes sense in light of the possible court outcome and its ancillary costs. Effective management of the negotiation can help parties, counsel and experienced claims representatives as they approach the last phase of negotiations. In this phase emotions even among professionals can hit higher valences as people test each other's commitment level, seek to ascertain that value is not being left behind or overpaid, and offer concessions beyond their original goals for the endgame. This mediator can foster, or in caucus engage in, empathetic discussion with the injured party, providing understanding and acknowledgement which provides satisfaction beyond mere monetary relief.

In sum, it pays for counsel to be alert to the various modes of, and possibilities available in, mediation to maximize client satisfaction. Counsel should use the process in a way that takes full advantage of what it has to offer, not only for outcome but

also for the route to that end and management of the people involved.

§ 3:4 Preparation for mediation

In some forums, little, if any, preparation is undertaken prior to participating in the mediation session. This is a mistake. For most substantial matters going into mediation—whether it is an employment, insurance, securities, business, intellectual property, or any other matter that might make its way into Court—it makes a significant difference to prepare for mediation. While an entire chapter could be written on preparation, for purposes of this chapter, where our focus is discovery and mediation, we will give a brief overview of preliminary considerations and preparation for the mediation session.

The first steps in mediation preparation are the threshold questions of whether and when to mediate, and selection of the mediator. While much can be said about this, for purposes of this Chapter, we would urge that the sooner one mediates, the better. As will be discussed further, to the extent there is a concern that certain information is needed before a party can make a rational decision to settle a case, that information can be obtained in a much more direct and speedy manner through mediation. The sooner resources are committed to resolving the matter the greater the resources that will be available for the settlement pot.

On mediator selection, sophisticated counsel should consider the process needs, client needs, relationship issues (including relationship with adverse counsel), case assessment needs, and other factors referenced in the above discussion of the nature of mediation and matching the mediator to the mess. Mediators tend to be selected based on prior experience of counsel or parties with that mediator, or on reputation—essentially the prior experience of others. Counsel might ask colleagues, reach out to Court ADR Administrators, or inquire from other known mediators or ADR experts about the reputation, style and approach of a given mediator; or generally, seek a mediator who fits the particular bill. It is not out of the norm for experienced counsel to contact a potential mediator to learn of that mediator's availability and experience with mediating matters of the type in question. It is entirely appropriate for counsel during the mediator selection phase to ask not only about substantive background, but also about the mediator's style. This is a chance to learn if the mediator is facilitative, gives evaluative feedback, shares process choices with parties and counsel or is more directive, follows an

understanding based model—including the degree to which the mediator uses joint session or caucuses—whether the mediator is transformative, or whether he or she takes a protean, or 360 degree approach. Not only are these questions appropriate, but they send a positive message to the mediator about counsel's familiarity with, and support of, the mediation process.

Counsel might go further still in this initial interview and seek the mediator's views on what approach might work best from a holistic perspective to satisfy the parties' needs—ranging from case risk and transaction cost analysis, through party dynamics, emotional issues, business issues, economic limitations, reputational and public relations issues, discovery and other informational needs, or any other process issue that might exist. Of course, this is also an opportunity to learn whether the mediator has any conflicts. Unlike binding evaluative processes like arbitration or litigation, prior experience or even relationships with the parties or counsel does not preclude the mediator's participation. Rather, those relationships should be disclosed, and the parties are free to waive any perceived conflicts. Indeed, some sophisticated counsel actually prefer finding a mediator who has worked with, and has a good relationship with the counterparty, on the theory that feedback from this mediator will be very credible to the party that already knows and trusts him or her.

After mediator selection, three general areas for preparation include (a) further communications with the mediator and with the other parties or their counsel, (b) preparation of pre-mediation statements, and (c) communications with one's own client.

Pre-Mediation Conference Calls

In advance of mediation, particularly in matters that merit counsel's retention, once the mediator has been selected or appointed, it is advisable to participate in a pre-mediation conference call with the mediator. This can be done as a joint call, with all counsel (or parties) participating, or in separate calls that are essentially equivalent to confidential pre-mediation caucuses. Since the mediator is not a decision-maker, there is not the same bar against "*ex parte*" communications with the neutral third party as one finds in arbitration or litigation.[1]

One key point to cover during this call is who will be attending

---

[Section 3:4]

[1]*See* ABA/ABA/SPIDR Standards of Conduct for Mediators (1994), revised 2005, Standard 2 on "Impartiality" (requiring that a mediator decline an appointment if that mediator cannot act with impartiality—a subjective standard

the mediation—both from one's own group as well as from the counterparties. It is important to establish that people with full authority will attend the mediation, and, where applicable, that there will not be hierarchical imbalances that will create interparty issues. It can be awkward and time consuming to begin a mediation with one party's feeling insulted that he or she chose to put down other business to prepare for and attend the mediation, while the other party's equivalent level representative did not deign to do the same.

Most pertinent to the focus of this chapter, the most central task of the first pre-mediation conference call, is to provide the mediator with a "nutshell" overview of the dispute and associated case for the purpose of clarifying what, if anything, needs to be done before the first mediation session, so that when the parties do get together they have a fully productive session. This is the opportunity for all concerned—mediator, counsel, and any participating parties—to be sure that they will have pertinent information in hand to discuss and consider during their mediated negotiation. In this regard, the mediator might check whether formal discovery is outstanding, whether document production or interrogatory responses are needed, whether depositions need to be conducted, damages need to be developed, or expert reports exist or need to be exchanged or provided. A pivotal balance here is whether core information that will be needed for a productive negotiation has already been made available to all concerned parties or can be provided at less cost and expense than might be required by full blown, pretrial discovery. This balance of cost, effectiveness and need is a major advantage of the pragmatic and flexible approach that may be taken in mediation.

The first pre-mediation conference call is also a good opportunity to be clear on what the mediator can use in, and attached to, the pre-mediation statement.

Pre-Mediation Statements

Pre-mediation statements are very helpful in bringing the

---

determined by the mediator); and Standard 3 on Conflicts of Interest (requiring the mediator to determine whether a conflict or the appearance of a conflict exists and to disclose this, but permitting the mediator to continue with the mediation if there has been disclosure and waiver. Standard 3.C.). A limitation to this disclose and waive rule is expressed in Standard 3.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." *Id.* The 2005 revision was adopted by SPIDR's successor, ACR, *i.e.,* the Association for Conflict Resolution, which is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR).

mediator up to speed with parties and counsel. Advance review of these statements enables the mediator to concentrate at the mediation session on interparty dynamics and facilitating the parties' negotiation, rather than playing informational "catch up" at that session. To encourage candor, these statements are typically presented to the mediator in confidence. Some counsel, parties and mediators might prefer an exchange of these statements between the parties, to begin the process of bringing all parties onto the same page. Some recommend a hybrid approach, in which statements are exchanged, but additional confidential submissions are made exclusively to the mediator, for information that the parties would prefer not to share. Confidential information in this latter scenario might include, *inter alia*, thoughts on settlement proposals; observations about interparty dynamics; information on a party's economic limitations; insurance coverage limits or concerns; strategic thoughts for structuring the mediation process, including the use of caucus or joint session, settlement history, and even case weaknesses.

Pre-mediation statements are typically presented in letter form, rather than as formal briefs. They generally include the core facts, information on inter-party dynamics and the history of the dispute, settlement posture, settlement challenges, thoughts for settlement, thoughts for the mediation process, and identification of the parties who will be attending the mediation. Law is not typically included in great detail, except to the extent it involves a point of law that is likely to be pivotal in the negotiations or in the parties' assessment of the strength and value of their legal BATNA (*i.e.,* their case). Law is also included where there is a sense that the mediator needs to be brought up to speed on a legal schema or framework with which he or she might not be familiar.

Counsel are encouraged to attach key documents to pre-mediation statements, such as contracts, invoices, insurance policies, documents that relate to damages, or any other document that the mediator should see in order to be up to speed with counsel and the parties on the pivotal issues and background. Expert reports, medicals, tax returns, deposition transcripts, key correspondence, invoices, change orders, and summary spreadsheets are some of the wide range of documents that might be useful for a mediator to review in advance of the first mediation session.

Client Preparation

In advance of the mediation, it is wise for counsel to spend time preparing the client. This includes describing the mediation

process and developing a clear understanding of the roles of parties and counsel in that process. Because it is the parties' dispute and an excellent opportunity for the party to obtain non-economic satisfaction through expression and understanding, or to develop business solutions, parties are encouraged to talk in the mediation process. Counsel may work out in advance a system in which the party might comfortably talk until counsel signals that the discussion is entering rough waters or that counsel would like to take the floor.

Counsel should learn not only the facts from the client, but also what the client's needs and interests are. Together, counsel and client can develop a set of goals. This can be an aspirational best deal, then a reasonable deal, and finally the "walk away," *i.e.*, the proposal below (or above) which that party is not willing to go. Of course, it is wise for attorneys to advise their parties to keep an open mind, and to note that these provisional goals might change as more information is developed over the course of the mediation. To aid in the development of these goals, counsel might discuss with the client the strengths and weaknesses of the case and the transaction costs in going forward. This can include a disciplined risk and transaction cost analysis.[2]

§ 3:5 Benefits and limitations of mediation

In considering, recommending or suggesting mediation, sophisticated counsel should know its benefits and limitations.

Time Savings

Mediation saves time. The typical litigation takes years, from commencement through trial or appeal. Preparation for trial takes years, if one includes the discovery phase. By contrast, some mediations are held with virtually no preparation or communication in advance with the mediator, and resolved in sessions lasting one day or less. The REDRESS transformative mediation program, dealing with embedded US Postal Service claims of employment discrimination, is an example of this approach. The majority of REDRESS mediations are resolved in several hours.[1] Commercial mediations, like those associated

---

[2]*See,* www.treeage.com for a useful downloadable software program for carrying out a formal decision tree analysis for consideration of probable case outcomes, risks, costs, and values.

[Section 3:5]

[1]See results of study performed by Lisa Bingham on the USPS REDRESS Program, Nabatchi, T. and Bingham, L. B., *From Postal to Peaceful: Dispute*

with federal district court or a Commercial Division or held privately with a professional mediation services provider, generally do involve some limited preparation by the mediator and the parties. Indeed, preparation is essential to effective representation of clients in many mediations.[2] That said, time savings remains a benefit in all mediations.

Cost Savings

Where attorneys are paid on an hourly basis, savings in time generate savings in cost. Many cases that might take years in litigation can be resolved in a single mediation session. That session might last a few hours or go into the wee hours of the morning. In other instances, if the matter is not resolved in the first session, the mediator can follow up by conducting telephone conferences—effectively continuing telephonic caucuses with parties or counsel—and bring the matter to closure through this route. There might also be multiple mediation sessions. Sometimes, despite best efforts to prepare and bring all necessary party representatives to the table, some parties might need to discuss what has been learned at the first mediation session with people who did not attend. Particularly in matters involving municipalities that need board approval, large corporations, and out of state or overseas insurers, there might be a need to seek greater settlement authority from those who were not present at the first session.

In addition, there are times when, despite initial efforts to have all information present at the mediation session, new information is learned for the first time in mediation or it becomes apparent that further information is needed. The mediator can help create a forum where the needed information can be developed as expeditiously as possible, even without formal discovery. Nevertheless, time might be required to obtain certain documents, conduct a deposition, develop numbers for a damages assessment, or consider the viability of a proposed deal. The mediator can follow up during interstitial time as parties process information to maintain momentum and assist in moving the parties to resolution.

Systems Design in the USPS REDRESS(R) Program DOI: 10.1177/0734371X09360187, available online at: http://pubget.com/search?q=authors%3A%22Lisa%20Bingham%22; Bingham, L., *Mediation at Work: Transforming Workplace Conflict at the United States Postal Service*; Report to the IBM Center for The Business of Government (2003); Nabatchi, T., and Bingham, L. *Transformative Mediation in the USPS Redress Program: Observations of ADR Specialists,* Vol. 18 Hofstra Labor and Employment Law Journal, p. 399 (2001).

[2]Preparation for mediation could be the subject of its own chapter.

Whether it is in a single session or after multiple mediation sessions, with or without pre-mediation or post-mediation conference calls, the time spent in mediation and the consequent cost is a fraction of that spent by parties and counsel in full blown litigation, with fulsome discovery; procedural, substantive, pretrial and post trial motions; pre-trial preparation; jury selection; trial; and appeal.

Party Control of Process

Litigation is governed by formal rules of civil procedure. The manner in which parties wend their way to closure is determined well in advance by the rules of the forum. This is true at all stages of the proceedings: pleadings, discovery, motions, trial, and appeal. Rules of evidence and procedure govern not only how information is developed but also how it is introduced at the adjudicative hearing. Any issue on how the parties must proceed at any given juncture is ultimately decided by the judge, magistrate or arbitrator. While counsel might seek an adjournment, it is up to the court whether the request will be granted.

Mediation is a very different process indeed. At critical junctures mediators will take the opportunity to learn what parties and counsel feel is the most constructive way to approach the problems posed by the dispute. A facilitative mediator will ask parties and counsel from the start whether they feel a particular procedural approach would be helpful. Parties and counsel have a say in whether and how to hold pre-mediation communications or provide pre-mediation statements, and whether to participate in joint sessions or caucuses. Parties and counsel are also actively involved in identifying issues and setting the agenda on the order and content of the parties' discussions. To the extent certain information is seen as confidential, beyond the general umbrella of confidentiality that covers the entire mediation process, parties are free to choose what, when and to whom they will make disclosure. They might choose to disclose information to the mediator only in caucus. They might withhold disclosure of certain information until it is obviously needed or until they have greater assurance that the other party is genuinely engaged in deal making. They might decide that it might be helpful to have a meeting of parties only—with or without the mediator—or of counsel only. They might decide it is time to take a break, whether for a brief respite or to adjourn or even terminate the mediation session itself. And, of course, parties have control of what proposals they will make or accept, in short, how to resolve their dispute.

Party Control of Outcome

Litigation or arbitration are binding adjudicative processes in

which a third party—judge, jury or arbitrator—decides the outcome. By contrast, in mediation, it is the parties who decide how their dispute is resolved. Decisions by third parties often please no one. At other times, they produce a winner and a loser, certainly leaving the losing party in far worse position than would have been achieved in a settlement.

In mediation, there is no binding outcome other than one to which the parties agree. Each party is able to avoid the risk of outright loss. Each party may work hard to design a deal that best meets that party's interests—of course, keeping in mind that there can be no deal unless all parties find it acceptable. If no deal is mutually acceptable, the parties are still free to resort to their BATNA, whether it is litigation or not.

Flexibility of Remedy

Many, if not most, civil cases involve claims for damages where no injunctive relief is possible, due to money damages being deemed an adequate remedy at law. Even in cases where injunctive relief is possible, courts tend to be constrained in the scope of the relief that may be had, or the range of factors that might be considered when fashioning this relief.

In mediation, the only limit to possible relief is the imagination, will and capacity of parties and counsel and the structure of reality. Courts do not typically issue damages awards payable over time. Structured settlements are a regular occurrence in mediation, where real economic circumstances may legitimately influence the parties' deal. Courts do not mandate apologies. Parties in mediation may apologize, give letters of reference or recommendation, and generally acknowledge the human consequences and emotional significance of circumstances surrounding or producing a dispute. Courts cannot typically restructure a business, but parties in mediation can.

Building Understanding

Court determinations do not tend to generate either great enthusiasm in the losing party or a sense of greater understanding between the parties. In mediation, by contrast, as Himmelstein and Friedman emphasize, there is a possibility of growth in understanding through dialogue.[3] Parties are able to come to a greater understanding of not only the other party's perspective but also their own interests, motivations and goals, of the legal and business risks and possibilities, and of the surrounding cir-

[3]*See* Friedman, G., Himmelstein, J., Challenging Conflict Mediation Through Understanding (ABA Dispute Resolution Section 2009).

cumstances and realities affecting all parties. Mediation offers a possibility of having all parties leave the room with the sense that "we are all in this together," in lieu of the isolating and alienating sense that there is a winner and a loser.

Relationship Preservation or Repair

The ink of a judgment can etch an indelible rift in the parties' relationship. The recognition and joint decision making possible in mediation can support restoration of interparty harmony.

Reducing Reputational Risk

Many a nasty allegation gets filed in pleadings and motions in court or is aired during trial or publicized with an appellate decision. These same allegations are available to the press, competitors, potential customers, family members, or any party who wishes to review the record.

Mediation, by contrast, is a confidential process. Mediated settlement agreements often contain confidentiality terms, as well.

It is not unusual for certain defendants to express concern that if they settle a case involving one employee or a single transaction, the settlement would set a precedent encouraging future litigation by other employees or in connection with other similar transactions. In fact, the converse is a greater risk: an adverse judgment might truly publicize exposure and encourage future litigation. Adverse judgments can affect entire industries. Confidential settlement in mediation can dramatically limit the risk of a bad, publicized precedent.

Limiting Disruption

Beyond eliminating or reducing public exposure of preferably private disputes, mediation offers the chance to limit other forms of disruption that attend litigation. Officers, employees, customers and vendors need not be served with subpoenas, forced to gather massive quantities of documents or electronic data, or pulled from their workplace to attend depositions or trial. As a consequence, a company's participation in mediation can still the water cooler chatter and lessen anxieties among peripherally interested parties. It can keep key personnel focused on productive work and constructive relations.

Confidentiality and Information Disclosure

There is one added benefit of the confidential character of mediation. As noted above, each party controls the flow of information it chooses to communicate to the mediator or the other

parties. In litigation, discovery obligations must be met, court orders must be obeyed, and opposing or rebuttal evidence must be adduced to avoid adverse consequences. Mediation permits much greater flexibility in the timing, content, and audience for disclosures. The insulting fact that might enrage the counterparty may be tactfully withheld rather than produced in discovery or raised in defense. Negative facts that might emerge later in discovery can be kept confidential through a reasonable settlement proposal. The existence of a business interest—*e.g.*, in exploiting a patent, tradename or brand, developing a territory, obtaining capital, or acquiring a new line, market, or business unit—can be disclosed only to the mediator until it grows clear that there is a deal to be made. Similarly, a settlement option or possibility might be raised first just with the mediator until it has been sufficiently analyzed or the time is right for its communication. That same proposal might be a damaging admission in court, but even when communicated to the counterparty remains entirely confidential.

Another unique benefit of mediation confidentiality is the ability to use the mediator as a double blind to protect trade secrets, customer lists or other information that would not typically be shared with a competitor. Where there is a concern over generating informational asymmetry by providing a disclosure without a corresponding disclosure from the other party, the mediator can be used to confirm to each party that information has been provided before the information is jointly shared.

Limitations of Mediation

Mediation is is no panacea. If a governmental unit or other party seeks to establish a legal precedent that will affect the social fabric or a given industry, some might prefer to do this through a published judgment or order, rather than by confidential agreement that will not have precedential impact on others.[4] In addition, while most matters are resolved in dramatically less

[4]Of course, if sufficient interested parties participate in the mediation, it can more effectively address ongoing problems comprehensively and in a manner that truly and flexibly addresses the interests of all stakeholders. For example, groups like the Environmental Protection Agency have initiated facilitated regulatory negotiations with a wide range of stakeholders to address a complex set of problems that affects a broad and diverse group. *See, e.g.,* Reg03, Encourage Consensus-Based Rulemaking, http://govinfo.library.unt.edu/npr/library/reports/reg03.html. For an interesting review of the question of whether regulatory negotiated rulemaking is effective and can be conducted more effectively, *see,* Fairman, D. *Evaluating Consensus Building Efforts: According To Whom? And Based On What?,* Jan. 1999 Consensus, a joint publication of the Consensus Building Institute and the MIT-Harvard Public Disputes

time in mediation than in litigation, there is no guaranty that mediation will produce a final and binding result. If the need for finality trumps concerns with cost, disruption and outcome, and if there is a strong sense that mediated settlement talks will be futile,[5] counsel and parties might opt to continue in litigation. The question of whether mediation is a preferred process for developing information, some of which might otherwise be sought through litigation discovery, is addressed later in this Chapter.

One misunderstanding that is occasionally raised is that mediation is best where the parties can "get past" emotions and move constructively into deal making. The notion that emotional parties need to be bound by the leash of litigation misapprehends mediation's potential for understanding, empowerment, and recognition. There is a special satisfaction in participating in a process where a party's emotion is not excluded as subjective and irrelevant. Indeed, while instrumental approaches may be disapproved by transformative mediation theorists, the observation still holds that highly emotional parties can find satisfaction in mediation discussions that do enable them to vent and then move on to constructive deal making.

§ 3:6 Discovery and information

There are a variety of reasons we seek discovery in litigation. Discovery develops information on the strengths and weaknesses of one's case, and the strengths and weaknesses of the adversary's case. It reveals what information exists, corrals evidence to present at trial, and, also critically, nails down the absence of evidence on any given point. As noted in the Introduction to this Chapter, the process of discovery itself is an independent force. It can be intrusive; can, through third party discovery, threaten to harm client, friend, or family relationships; can impose tremendous cost on both the party seeking and the party providing disclosure; and can be disruptive to the businesses and people involved.

All of the general reasons for obtaining information in litigation can apply to mediation as well, to the extent that participants

---

Program, *republished at* http://www.mediate.com/articles/evaluateconsensusC.cfm.

[5]One *caveat* is that most mediators have a number of stories—particularly in the court-mandated context—of parties or counsel initially expressing certainty that the matter cannot be resolved but ending the mediation with a deal.

in that process "bargain in the shadow of the law."[1] Transformative mediators might urge that the focus is on the parties, their communication and their relationship. Nevertheless, context—including the legal framework—matters in a problem solving approach, where the alternative to an unresolved mediation is litigation. In order to understand the legal BATNA, development of information can be critical.

§ 3:7 The mediation discovery paradox: more information in less time

Information development in mediation presents a paradox. A much wider range of categories of information are developed and significant in mediation than in litigation. We consider more than the legal BATNA and the legal "story" that is woven into the dispute. In addition to the legal shadow, other significant areas for development of information include the parties' interests—business, familial, relational; the business context; economic constraints; emotional issues; principle, goals, aspirations, visions; even deeper questions of identity. All of these can influence whether, how, and in what form a resolution might emerge. The seeming paradox is that, despite this richly varied and nuanced cloud of information, which includes the legal BATNA, much less time and cost is typically spent in mediation than in litigation, not only on trial and appeal, but especially on discovery.

Bypassing Entanglement—Informational Aikido

There is more than one reason that a greater range of information can be developed in a shorter period of time through mediation. One explanation comes from an analogy to martial arts. Litigants can identify a single issue over which counsel might spend months developing competing information and arguments. In a construction case, for example, expert opinions might vary widely on whether work on a neighboring building now requires a multimillion dollar foundation reconstruction, or

---

[Section 3:6]

[1]*See,* Mnookin, R.H. and Kornhauser, L., *Bargaining in the Shadow of the Law: The Case of Divorce*, The Yale Law Journal, Vol. 88, No. 5, Dispute Resolution (Apr., 1979), pp. 950–997, published by: The Yale Law Journal Company, Inc.; Stable URL: http://www.jstor.org/stable/795824; Mnookin, R.H., Cooter, R. & Marks, S. *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 Journal of Legal Studies 225 (1982). For a critical review of the question of whether law frames, overshadows, is subject to, or need have no meaningful bearing on parties' bargaining, *see, e.g.,* Jacob, H., *The Elusive Shadow of the Law*, Law & Society Review, Vol. 26, No. 3, 1992.

simply a several thousand dollar repair to cracks in the building's façade. This question can lead to multiple depositions, review of extensive documents, including daily logs, job records, plans and blueprints, Building Department filings, approvals and inspection records, photographs and sketches, not to mention extensive expert reports.

For court, all of this information would be mustered and, to the extent the jury remains awake, the information will be presented to make one or the other of the competing points. During mediation, the same case might be developed through pre-mediation statements, during the initial joint session, and through subsequent caucuses. The form of presentation, however, permits parties more quickly to get to the essence of the matter. Beyond this, there might come a point when parties, claims representatives, and counsel might—with or without the mediator's prodding—wake up. They might conclude that each group could spend hours, if not days, developing, demonstrating, and arguing its point without getting the other group materially to change its perspective or demand. They then might change the game to developing settlement proposals that meet the parties' interests of reducing cost, risk and disruption and finding resolution.

The martial arts analogy here can be to Aikido,[1] and the moves known as *iriminage*[2] or *tenkan*.[3] The gist of these moves is that, instead of directly confronting force with equal or greater opposing force, the practitioner (a) sidesteps the aggressive force and

---

[Section 3:7]

[1]Aikido is the most recently developed classical Japanese martial art. It is derived from judo, jujitsu and Iaido (the live sword technique). Its founder, Morihei Ueshiba chose the term "Ai" for its association with love and harmony. "Ki," ("chi" in Chinese) is seen as universal life force and is related to breath. "Do" means "Way." Both spiritual path and martial practice, Aikido fundamentally seeks unification of the practitioner with the universe, non-opposition. Aikido posture is a stable equilateral tetrahedron (like a pyramid) when stationary, and circular movements when in action. In lieu of the sword hilt of *Iaido* is the attacker's hand and wrist. Philosophically and functionally similar to *Tai Chi*, the basic approach of this defensive, non-competitive art is the use of circular movements to go with, and then redirect, the attacker's force, leading to a throw or pin. Ueshiba's view was that an orientation of great love or unity with the universe meant that not speed or force was needed, but that the attacker—whose hostility departs from harmony with the universal—was defeated from the time he initiated hostilities. *See,* Ueshiba, K., Aikido (Hozansha Pub. distributed by Kodansha America, Inc. through Oxford University Press 1985); Ueshiba, M, and Stevens, J. (trans. and compiler), The Essence of Aikido: Spiritual Teachings of Morihei Ueshiba (Kodansha Int'l 1999).

[2]This is also known as the "entering move" or the "twenty year move," due to the time needed for mastery of this fundamentally simple movement.

then enters (*irimi*) or (b) permits the force to stay where it is by pivoting from the point of confrontation to face the same direction as the aggressor (*tenkan*) and then leads the aggressor even slightly further forward in his path of aggression before redirecting the aggressive movement into a more constructive path—one which brings the aggressor under the practitioner's control. The lesson from Aikido is that there are times when it is better to avoid direct engagement with an issue. Many a mediation has been resolved by changing topics. Thinking about damages and transaction costs in a case such as the above construction example can obviate the need to spend a day developing the liability picture. Similarly, where one party cannot pay the bill that a judgment might represent, focusing on that party's economic condition and developing a workable deal for some form of payment, with time terms and security, might be far more productive than discussing either liability or damages. Facts, theories, arguments, legal imbroglios, and discovery battles can pile up around an issue like myriad metal filings drawn to a magnet. Mediation utilizes a neutral professional who can spot this, or encourage parties and counsel to consider this and shift the agenda to the most productive discussion.[4]

Hashing it Out—Directly or with Experts

Another discovery shortcut available in mediation is holding discussions during joint session or even through caucuses. Using the construction example again, in lieu of lengthy discovery, parties could appear at the mediation with their architect, engineer or construction professional, together with pertinent plans, specifications, drawings, photos and contract documents. In short order, under the umbrella of confidentiality provided by mediation, the Owner's architect might hash out with the general contractor, subcontractor or professional engineer associated with another party, what was or was not included in the contract,

---

[3]A snapshot demonstration of *irimi* and *tenkan* can be found online at: http://www.youtube.com/watch?v=N7Euz2MFg9U&feature=related.

[4]This is akin to the classic Buddhist tale of a student, Malunkyaputta, who refused to find relief from psychic pain until he had answers to all of life's metaphysical and ontological questions. The Buddha compared this student to a man on a battlefield dying from a poison arrow, refusing to take medicine or permit the arrow's removal until he had learned all details of the shooter, the arrow, and the manner in which he had been shot. By the time he could obtain answers, he would be dead. *Culamalunkya Sutta* of the *Majjhima Nikaya*, Discourse 63, *see* Warren, H. C. (trans.) Buddhism in Translation, Henry C. Warren, ed. (Cambridge; Harvard Univ., 1896) pp. 117–122, passim. Reprinted in Andrea, A. J. and Overfield, J. H. eds., The Human Record: Sources of Global History, 3rd ed., Vol. 1, (New York; Houghton Mifflin, 1998) pp. 77–79.

whether the work conformed to the specifications, or whether a particular installation met code or was reasonable under applicable quality standards.

While working on this problem, parties from both sides of the litigation "v" might sit or stand by the same side of the table, poring over plans or drawings. As one party's expert takes one view, immediately it can be questioned by the other party's expert. Through an iterative process a great deal of information can emerge quickly, potentially and literally ensuring that parties are on the same page. The differences from litigation are apparent with this approach. Rather than conduct an information tug of war, the parties in this scenario take a collaborative approach. This significantly reduces the time, cost and form of information development. In addition, as detailed below, this approach levels informational asymmetry.[5]

Reducing Information Asymmetry

Negotiation theorists make much of the impact informational asymmetry might have on the ability of parties to arrive at a deal. As parties share information in mediation, the domain of their common knowledge increases. The more knowledge they share, the less likely they will disagree over facts relating to the commonly shared knowledge. In addition, lack of knowledge might keep a party from seeing ways to satisfy that party's own interests or to meet the interests of the other party. A more common understanding of the deal or legal BATNA can also reduce the spread in what options for resolution will satisfy all parties.

One clear opportunity for reducing informational asymmetry involves expert reports. There are differences in the degree to which expert reports are required to be produced, depending on whether one is in state or federal court, and depending on whether the expert will testify or not. In addition, some expert reports are more revealing than others. Putting aside cynical interpretations of experts as professionals hired to say what furthers the hiring party's case, it is common for each party, guided by its experts, to have a different view of the science associated with a particular proposition. Having experts speak at a

[5]Asymmetry of information in the bargaining context has been a significant area of study in game theory and is of interest to negotiators in general. *See, generally,* Nash, J., *The Bargaining Problem,* 18 Econometrica 155 (1950); Camerer, C., *Behavioral Studies of Strategic Thinking in Games,* 7 Trends in Cognitive Science 225, 227 (2003); Sally, D.F. & Jones, G.T., *Game Theory Behaves*, The Negotiator's Fieldbook: The Desk Reference for the Experienced Negotiator (Kupfer Schneider, A., and Honeyman, C. editors, ABA Section of Dispute Resolution 2006) pp. 87–94.

mediation can dramatically reduce the knowledge gap between parties. Where parties have legitimately differing views of the risk in a case, it undoubtedly increases the likelihood of a deal to have them close that information gap through the discussions that can be had in mediation.

Going for the Gold: Efficiently Selecting Key Discovery

A repeated theme in studying mediation is that mediation is pragmatic, flexible and holistic. At any given phase, the process can involve meticulous reflection on a single consideration or, conversely, can jump past an isolated entanglement and consider the fundamental questions of what the parties need and how to get the matter comprehensively and finally resolved. With the mediator primarily acting as facilitator, there is no need conclusively to prove a case to anyone. Case assessment must simply satisfy the parties themselves, to the extent they choose to have that satisfaction. There might be times in mediation when it pays to go step by step in the consideration of facts and issues until each party comprehends where all parties stand on a given set of facts and issues and their implications, with the hope that thereafter values might be attributed to each group of facts and issues and a bargain might be struck. At any time, however, the parties are free to agree on an issue without going through the time, burden, and cost of amassing each piece of reliable evidence in admissible form. They have no one to prove it to other than themselves. With the gist of an issue, sophisticated parties can often predict how it will be factually developed and its likely outcome.

Accordingly, parties can shortcut discovery and information development in mediation through focusing on the essential message of a point of fact or issue. They can also identify a core piece of evidence that is likely to be pivotal and focus on obtaining that core evidence. If commercial trial evidence is a mosaic art, established tile by tile, mediation disclosure can, at times, be a Zen drawing—an instantly summoned image that captures the whole.

Plain Inquiry, Plain Talk

Just as the contents of disclosures can be abbreviated, so too the forms by which they are obtained and produced can be simplified in mediation. During a pre-mediation conference call with all counsel, the mediator might seek to get a read of the parties' discovery status, primarily to learn whether the parties have sufficient information to conduct a meaningful negotiation. It is not unusual for a mediator to ask whether, in lieu of formal discovery,

the parties might save time and cost by simply listing the core information needed in a letter, and encouraging the parties to produce the core documents and information needed to put the parties in a position to assess the case and negotiate. Dotting of "i"s and crossing of "t"s might not be essential where the task is getting to the nitty gritty heart of a case.

Greasing the Wheels of Discovery

The mediator is not typically a Special Master appointed by the Court to resolve discovery disputes. Nevertheless, the atmosphere created by the mediation process—which includes not only the mediator but also the attitude and expectation of parties and counsel—tends to be conducive to resolving discovery issues. There is little point in proving the other counsel to be obstructionist where the mediator has no power, will make no ultimate decision (let alone a sanctions decision), and is not tasked with stacking up merits and demerits to be assessed against counsel and their respective parties. Indeed, the mediator's job is to smooth the path to getting to the core point. To the extent parties or counsel think there is benefit in currying favor with this neutral, all indicators suggest that any favor would be found in speeding the plow, candor, collaboration and pragmatism.[6] Thus, the unstated social influence, as well, supports collaborative and efficient sharing of information in mediation.

During the pre-mediation conference call, or at any time during the mediation process, it might develop that counsel believe the matter unripe for mediation. They might, for example, conclude that certain information should be nailed down before a meaningful negotiation can be held. There might be concern that the free ranging and open discussions in joint session, or even through the "telephone" game of inter-caucus communications—where messages are conveyed by the mediator from one room to the next—could empower the other party and counsel with insight into case strategy that might influence future deposition or trial testimony if the case does not settle. Alternatively, counsel might need to consult with management, a Board, or an insurance representative, prior to the mediation, to assess the "BATNA," set a

[6]Of course, the central ethical principle in mediation is party self-determination. *See* ABA/ABA/SPIDR Standards of Conduct for Mediators (1994), revised 2005, Standard 1 (Self-Determination). Particularly when coupled with Standard 2 (Impartiality), a mediator should not be susceptible to favoring any party regardless of whether that party chooses to make greater or lesser disclosure or prefers more or less formality in the means and manner by which information is exchanged. The point above goes to the parties' and counsel's own perceptions and tendencies in the mediation "atmosphere."

reserve, or arrive at a plan of action for the mediation. Counsel might understand the decision makers will be unable to arrive at a meaningful assessment without certain discovery and information in place.

Whatever the reason, the mediator's initial inquiry will likely be whether the information is really seen as necessary or whether from a cost/benefit analysis counsel or the party might prefer to dispense with it. Once it becomes apparent that counsel perceives a need for this information as a threshold matter before mediating, the mediator may facilitate a discussion on timing and logistics. At this juncture, the mediator can help speed the discovery process through setting dates, encouraging effective disclosure by underscoring its utility for reaching a deal, and by keying the discovery schedule to the date of pre-mediation statements and the mediation session. Likewise, even during or after a first mediation session, it might appear that further discovery will enable parties to move past a point of contention. The mediator can similarly help with discussions to arrange for the conduct and swift completion of this discovery.

Forgiveness and Accepting the Unknown

Worthy of brief mention is a topic that has gained traction in the mediation community. Justice based resolutions tend to require information—and hence disclosure—in order to produce assessments that support judgments, either by the parties or to anticipate the outcome of the legal shadow. An alternative solution that can obviate the need for information is forgiveness.[7] It is true that some information can be required to generate the

[7]*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.

apology[8] that might prompt forgiveness. Yet, for other information, we might apply the old adage: to forgive is to forget.

Similarly, even without forgiveness, negotiators can reach a point where they accept the fact that they will not or cannot know every detail pertinent to an assessment of a case, to understanding the root causes and circumstances pertaining to a dispute, or to the value or feasibility of a deal. Nevertheless, they take a deep breath and accept a deal despite a recognized lack of information. Thus, as a corollary to reducing informational asymmetry, simple acceptance of the unknown, and acceptance of the attendant risk, permits many parties to reap the reward of a resolution. This, too, ends the need for further discovery.

§ 3:8 Developing information in mediation

While we have focused on the way in which mediation expedites and truncates the process of obtaining discovery, there are circumstances when more time is afforded to a particular informational need. Take our earlier example of the construction mediation and a dialogue of experts. During the course of discussions, a question might arise concerning the roof of the building in question. It can be quite constructive to take a break to schedule a site visit by the experts, with the understanding that the mediation will reconvene soon thereafter with discussions clarified as a result of the visit. There is any number of good reasons to adjourn a mediation session in order to permit the development of information. These can include: retaining an expert who might or might not attend the next mediation session; taking the deposition of a key witness; impleading and obtaining discovery from another potentially liable party; obtaining tax or other financial information relating to an economically challenged party; developing further information on liability or damages; and developing information on the value or feasibility of a proposed deal. The decision to adjourn and seek further information is typically preceded with some type of cost/benefit analysis. We have stressed that there are times when it pays to accept the unknown or to overlook an issue. Nevertheless, mediation is not a

[8]*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.

one note Johnny. As an expression of party self-determination and to promote understanding, the mediation process should be held at the ready to serve the parties' legitimate needs for further information.

Collaborative Information Development

Furthering the previous observation, mediation ideally can foster the collaborative approach to negotiation lauded by Fisher and Ury.[1] Thus, in mediation, parties are encouraged to share information, while respecting their freedom to control their own acts of disclosure and their strategic assessments. Fuller disclosure means that parties are making decisions with their eyes wide open. This reduces anxiety and generates a greater sense of fair dealing. Some helpful approaches to reduce informational asymmetry, and to provide all parties with the ability to make clear choices, include: preparing and exchanging binders with key documents; preparing damages spreadsheets with backup; sharing videotapes or DVDs of key facts[2]; sharing key emails; and sharing mirrored hard drives with software rendering the data searchable.[3]

§ 3:9 Confidentiality and disclosure

One hallmark of mediation is that it is a confidential process.[1] The purpose of this protection is to encourage parties and counsel to speak freely and foster open discussions aimed at understanding, reconciliation, problem solving, and resolution. It is intended to diminish the chilling affect on candor and creativity that attends the fear that admissions will be used against a party in court if the matter is not resolved in mediation. Apart from these general benefits, confidentiality in mediation affords parties some unique opportunities for handling disclosure.

[Section 3:8]

[1]*See* Fisher, Roger and Ury, Willliam, Getting to Yes: Negotiating Agreement Without Giving In (New York, NY: Penguin Books, 1983).

[2]Videos could show: a plaintiff in a personal injury case performing tasks which he claims he is disabled to do; a detailed walk through of the building site in question in a construction case; a walk-through of a ship in an admiralty case; the scene of a fire or flood loss; any number of imaginable damaged or defective goods; etc.

[3]The parties can agree to share the cost of this discovery. They might also defer the question of cost sharing until later in negotiations, to be wrapped up in a comprehensive settlement.

[Section 3:9]

[1]*See* ABA/ABA/SPIDR Standards of Conduct for Mediators (1994), revised 2005, Standard 5 (Confidentiality).

Skimming Cream from the Milk: Using Confidentiality to Draw Benefit from Information without Risky Disclosure

There are times when parties are simply uncomfortable sharing information with the other party. A recurring case of this discomfort arises in unfair competition cases. One party might accuse the other of taking a customer list or of doing business with customers who are off limits under the terms of a non-compete agreement. While each competitor refuses to show its list of customers to the other, they might be willing to share their list with the mediator. The mediator can commit not to disclose the names of customers or other sensitive information, such as pricing, profit margins, or the size of a piece of business. Nevertheless, armed with this information, and subject to the disclosing party's approval, the mediator might, for instance, be able to share his or her observation that there are no, or just a limited number of, overlapping customers. This observation can work wonders in getting parties past a standoff in an unfair competition case. Another common use of this mechanism is financial disclosure. One party may share financial information with the mediator to demonstrate inability to pay, the uncollectiblity of a judgment, or lack of resources to support a hefty punitive damage award. At times, the mediator might be able generally to confirm that there is a difficulty without all of the confidential information making its way into the hands of the other party.

Disclosures Made Solely for the Purpose of Mediation

There might also be times when parties are willing to make disclosures in the resolution focused mediation context, but are unwilling to do so in litigation. The development of financial information concerning a debtor, discussed immediately above, provides a good example. Solvency information is typically not a part of discovery during the case in chief, but rather awaits entry of a judgment and supplementary proceedings to enforce that judgment. Nevertheless, some debtors might be willing to permit the creditor to jump the line within mediation and see this information, with the understanding that this information may not be used for any other purpose if the case is not resolved. The one caveat is that once this information has been disclosed, if the mediation terminates without resolution, nothing prevents a party from serving a discovery demand or asking questions in a deposition which are designed to elicit this information.

Far Broader Range of Information

The range, depth, texture, and type of information that is pertinent to the parties and can be developed legitimately in

mediation is far greater than that traditionally sought in discovery. Thus, it is good for counsel and party representatives to keep in mind that they are seeking to develop this wider assortment of information in mediation; mediation-based disclosure is not just an adjunct to litigation discovery.

Mediation is a facilitated negotiation. Therefore, the information sought is that which will help parties be effective in negotiation. Certainly, that information includes the legal BATNA. But beyond this, information should be developed, where possible, to help each party understand the other party's perspective, interests, feelings, values, goals, principles, sense of self (or identity) circumstances, position in impinging hierarchies, leverage, financial condition, and any other type of information that will aid one's party in making a deal. At its heart, the process involves a search for ways to meet the interests of all parties—to fashion options that might approximate the Pareto optimum, if possible.

Discussions in mediation will include brainstorming sessions to generate these options. During brainstorming, to enhance creativity, parties put aside judgment and willingly suspend disbelief. These sessions can be followed by more carefully evaluative sessions, where the various options are tested against reality for feasibility, and where their value is judged against legal or business alternatives. If a proposed deal involves a license grant, the feasibility of that license's being effectively and productively exploited can be tested. If it is a license to develop a certain territory, parties can seek market studies, can test the validity of the intellectual property rights, and can consider economic figures for any business unit that might be bought or sold in connection with the deal.

In short, a wealth of information other than what is typically developed in discovery may be uncovered in mediation.

§ 3:10 The spigot of disclosure

We have seen that information is the currency of mediation. The greater one's information, the greater one's power to find common ground, identify interests, see deal possibilities, understand the degree to which the other party might have flexibility, assess and apply leverage, and judge the value and feasibility of a proposed deal. The universal recognition that information is power tends to make parties wary when making disclosures, whether the disclosure is of case related information or of pure negotiation related elements. In short, people hesitate not only to disclose case weaknesses, but they also hesitate to

disclose their own wants and needs out of concern that these are personal weaknesses in the bargaining arena. Ironically, just as Uncle Sol could not have arrived at the Pareto optimal division of 12 orange rinds and 12 orange pulps for Susie and Sally, negotiators cannot generate options that meet the other party's needs if those needs are not disclosed.

Similarly, lawyers are often hesitant to reveal the "smoking gun"—that surprise fact which will dramatically advance the ball in support of their case. They fear that the other side will counteract this evidence more effectively if it is revealed in advance of trial. Yet, without sharing this piece of the other party's legal BATNA, the party whom this evidence favors loses the ability to demonstrate that a proposed deal is a good one in light of the negative impact this information has on the adverse party's legal alternative.

One further challenge in disclosure is the lack of knowledge of just how much value the other party is willing to concede in order to make a deal. The term "zone of possible agreement" (ZOPA)[1] can be used to represent the range of the greatest concession of each party to a potential deal. The risk that there is a large ZOPA, generates reluctance to be the first to communicate a proposal, for fear that one is cutting off the chance of reaching a higher level of concession from the other party. Conversely, if there is a narrow ZOPA, failure to make disclosure might lead to a standoff as each party rightly perceives that the proposed deals are falling outside that party's possible concession range.

The examples above demonstrate the challenges in determining whether, when, and to what degree a party should be willing to make a disclosure. It is a psychological truism that self-disclosure builds intimacy, and that disclosure by one party increases the likelihood of disclosure by the other party. Essentially, one must give to get. At each juncture negotiators can engage in a cost/benefit analyses to assess whether disclosure, or nondisclosure, is worth the risk.

§ 3:11 Mediating discovery disputes

The focus of this Chapter, consistent with the focus of mediation itself, has been on the development of information within the

---

[Section 3:10]

[1]This term, as "zone of potential agreement," was likely coined in Lewicki, R.J., Minton, J., and Saunders, J., in Negotiation (3rd Edition. Burr Ridge, IL: Irwin-McGraw Hill, 1999). *See, also,* http://www.beyondintractability.org/essay/zopa/.

mediation context, both of the litigation discovery type and of the broader range of information that is expressed and significant in negotiation. The pragmatic and holistic nature of mediation tends to recognize that each piece of a discussion is not simply compartmentalized, but can be related to a much larger whole. Therefore, if a discovery dispute arises, it is natural for a problem solving mediator to look at the broader picture and wonder whether this is really essential, or whether it also provides an opportunity for shifting focus to resolution of the overall dispute itself. A transformative mediator will be inclined to see not only the statement being made about the discovery, but also to recognize the tone and choice involved in the communication as indicative of the quality of the parties' relationship at that moment. An understanding based mediator will see opportunities for understanding of persons and context well beyond the confines of the particular discovery dispute. Essentially, to lift a pebble in mediation is to embrace, and be embraced by, the world.

Despite this wonderful quality of mediation, nothing prevents parties or a mediator from being able to mediate a narrow set of issues, such as a discovery dispute within the litigation context. The mediator may apply the same skills of facilitating dialogue, aiding the parties in communicating their interests in the discovery, or nondisclosure, in question, helping them work to find options that meet their interests, supporting them in applying standards to work through the choice of how to resolve the dispute, and aiding them in the consideration of alternatives to proposed deals. Consideration of the BATNA in the discovery dispute can range from asking about the costs of litigating the discovery battle, the costs of discovery itself, the way the trial judge or magistrate might be predicted to rule, the impact on the judge of being presented with this problem, risk of sanctions, and the consequences of getting more or less of the discovery sought.

Mediators can be used to help resolve discovery disputes at any juncture. They can be called in well in advance of the mediation, can be engaged in connection with preparation for the mediation, can address a discovery dispute during the course of a mediation session, and can even be brought in to help the parties work through a discovery dispute after a mediation has been adjourned or put into hiatus during a subsequent substantial period of discovery.

Fortunately, because of the holistic and pragmatic nature of mediation, at any point during any of these discovery disputes, the mediator can also test to see whether the parties are open to having broader and more end-game conclusive settlement discussions. As a function of party empowerment, if the answer is

that parties prefer to focus the discussion on the discovery dispute itself, the discovery dispute will be the focus of that mediation session.

§ 3:12 Use of evidence and proof in mediation

We can here underscore what has been said throughout this Chapter. Mediation is a flexible, informal process, in which it is not necessary meticulously to lay out a case with each properly introduced and admitted mosaic tile of evidence. By contrast, we have also seen that information, including discovery and even evidence, can play a very meaningful role in mediation. All participants in mediation seek quickly and directly to get to the point, to the heart of a matter. In this regard, there are a variety of ways in which evidence, and the use of evidence, comes into play.

Evidence can be found in virtually all stages of mediation. It can be annexed to the pre-mediation statement. It can be shared in the opening joint session. Throughout the balance of the mediation session—both in joint session and in caucus—evidence can be considered and reconsidered, and new evidence can be introduced.

At any juncture the parties might discuss and consider the weight, credibility, implications, and significance of a piece of evidence. Even though admissibility is not a bar to discussing evidence or information in mediation, it might be a very significant topic of its own concerning a certain piece of information in mediation. For instance, the question of whether a 30 year old bordereaux in a reinsurance liquidation case will be admissible at trial as a hearsay exception under the ancient documents rule might have tremendous significance in discussion of a multimillion dollar claim that will rise or fall on the strength of the bordereaux.

As mentioned earlier, where one party considers a piece of evidence to be a smoking gun, that evidence might be discussed with the mediator alone in caucus. This can place the mediator in the awkward position of being authorized to tell the other party, in separate caucus, that the mediator has seen evidence which has a negative impact on that party's case, but that the mediator is not at liberty to elaborate about the sum, substance or provenance of the evidence. Many a party or counsel might respond by saying that they can give this no weight without further detail. Therefore, the mediator's reality testing with the party who possesses the smoking gun might be critical to assessing whether and when that evidence can be used to advance the negotiation ball.

One pattern that can emerge is increasing disclosure and assessment of evidence as the mediation proceeds, followed in the latter portion of the mediation, with a greater focus on deal making. Where one party initially believes that the other party has not been forthcoming with evidence, that party might seek to hold certain evidence pending provision of evidence by the other party. A corollary phenomenon is the expression of concern by one party that the other party is simply using mediation as "free discovery." In each instance, one value the mediator brings is finding ways to encourage parties to take modest risks to get the disclosure ball rolling. Observing that disclosure breeds disclosure and supporting parties' engagement in cost/benefit analyses can be helpful here.

It is helpful to keep in mind that resolution in mediation is achieved by the parties themselves. Sharing significant evidence with the other party, and using it in a meaningful way to demonstrate that power of the shadow of the law, can be well worth the effort because it may create the impetus to bring the matter to closure.

§ 3:13 Conclusion

Mediation is a flexible, party driven process that enables participants to address problems of minor and major magnitude. Parties may use it to address a discovery dispute within a litigation; to handle the development of information—both related to the case and related to the parties, their circumstances and their deal; and to resolve the underlying dispute that prompts counsel's discovery efforts. Whether, and when, the parties and counsel choose to use a microscope or a telescope is entirely their own decision. Mediation not only helps with the use of these tools, but also helps parties recognize and reflect on the value of the choice of which tool to use.

NEW YORK STATE BAR ASSOCIATION

NYSBA

Dispute Resolution Section

White Paper Subcommittee

Insurance Disputes

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 has prepared a series of White Papers to set forth 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 PLATTO, 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. If that 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? In the 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 informed 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 formalities 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 information 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.

TWELVE TOOLS FOR CREATING MOVEMENT

1. Reframing
2. Hearing Proposals
3. Stroking
4. Silence
5. Caucuses
6. Role Reversal
7. Option Generating
8. Normalizing
9. Taking Advantage of Opportunities for Empowerment and Recognition
10. Focusing on Future
11. Reality Testing
12. Asking Problem Solving Questions

GAMBITS FOR CLOSURE

(Caution: To Be Avoided if Risks Shift to Evaluative Mode)

1. CONDITIONAL OFFER
2. TWO-STEP TECHNIQUE
3. BEST OFFER (alleged BOTTOM LINE)
4. "MEDIATOR'S SOLUTION"
5. ONE TEXT APPROACH
6. BASEBALL ARBITRATION
7. SECRET POLL
8. DEADLINE
9. ADJOURNMENT
10. EXPERT OPINION
11. CHOOSE ANOTHER PROCESS

ETHICAL CONUNDRUMS FOR THE 21ST CENTURY LAWYER/MEDIATOR "TOTO, I'VE GOT A FEELING WE' RE NOT IN KANSAS ANY MORE"

Melvin A. Rubin and Brian F. Spector

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.

---

[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.

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 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

[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.

merely hypothetical. To borrow a phrase used in other contexts, the lawyer/mediator is faced 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),

---

[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).

they also may be engaged in self-deception, believing the mediation side of the fence is greener 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

---

[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)).

Mediator Standards and the Model Lawyer Rules. These conflicts are recognized by the 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*

---

[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.

prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution. (footnotes, bold and italics added).

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).

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]

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).

[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.

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 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

---

[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.

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 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. . . .

---

[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).

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. **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

---

[19] *See* FLA.S TAT. § 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

(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. 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,

---

[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.*

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 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

---

[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*** 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."

appropriate to identify issues which we have not addressed above. We do so because these issues 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.--

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:

> (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.
> (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 confidential by applicable law, forum rules, regulations, or other professional 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!

MODEL STANDARDS OF CONDUCT FOR MEDIATORS

AMERICAN ARBITRATION ASSOCIATION
(ADOPTED SEPTEMBER 8, 2005)

AMERICAN BAR ASSOCIATION
(APPROVED BY THE ABA HOUSE OF DELEGATES AUGUST 9, 2005)

ASSOCIATION FOR CONFLICT RESOLUTION
(ADOPTED AUGUST 22, 2005)

SEPTEMBER 2005

The Model Standards of Conduct for Mediators
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.

---

[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] The 2005 version to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

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.

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.