

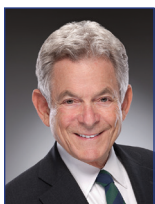


DR Currents

A Publication of the Dispute Resolution Section of the State Bar of Georgia Summer 2016

FROM THE EDITOR

by David Zacks



Key Question:

A Girl Scout was taking a First Aid test and the instructor asked:
“What would you do if your little sister swallowed the key to the house?”

“I’d climb through the window,” was her quick reply.

Some months ago I was asked a key question from colleagues of mine in the Bar:

“David, now that you’re a full-time mediator and arbitrator with Henning, would you be willing to be the editor of DR Currents for the Dispute Resolution Section of the State Bar?”

I guess in a moment of weakness I climbed through the window!

This Summer edition of DR Currents features our Past Editor’s article. I want to take this opportunity to thank Bob Berlin for his excellent efforts at being your editor last year and you will enjoy his article titled, “The Barrister’s Tale.”

I have also included some practical tips on mediation from my former partner, Ray Chadwick, who resides in Augusta. I know you will find his advice useful in your practice.

I had a number of suggestions for articles from members of the Bar. I encourage any of you who are interested to submit them to me and they will be considered for future editions.

Wishing you all continued success and an enjoyable Summer season.

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THE FIVE STAGES OF NEGOTIATION AT A MEDIATION

by Ray Chadwick

Recently, at a Georgia Institute of Continuing Legal Education program, I made a presentation on negotiating at mediation entitled, “Negotiation – The Philosophy of Yogi Berra.” In it I used a number of the quirky things Yogi said (which actually contain grains of wisdom) as lead-ins for discussing approaches to negotiating, both helpful and harmful, and how mediation negotiations frequently involve stages until “success” is achieved – that being a result decided to be in the best interests of all involved.

One of Yogi’s quotes used was “*He’s learning me all his experience.*” Observations on five common stages of negotiation at a mediation followed. Here they are:

“Take it with a grain of salt.”

Stage 1: The initial stage begins in the first private caucuses with the parties. More often than not it includes knowingly presenting unrealistic, meaningless and unacceptable numbers/positions. Those experienced in mediations expect these and ignore them. This stage may last for two to three caucuses or even more in large or complex cases or disputes.

“You’ve got to be very careful if you don’t know where you are going because you might not get there.”

Stage 2: During the second stage parties begin to send signals as to where they might be going. But there is not clarity on that and there may be some voicing of impatience and frustration. This stage involves “testing” the other side while not losing sight of the original goal(s). Again, the number of caucuses this may last depends on the size and/or complexity of the case or dispute.

“It’s not too far, it just seems like it is.”

Stage 3: During the third stage clearer signals begin to be sent on what each side’s goals are. There is an effort to shape the other side’s belief as to what it will take to settle the case or dispute. Increasing impatience and frustration are not uncommon but the mediator will ask everyone to hang-in-there so long as it appears that a settlement may be possible. At the same time realism often begins to set in on what reaching a settlement will take. This stage may last several caucuses. Where money is involved brackets may be proposed to send signals on acceptable settlement ranges.

“The other team could make trouble for us if they win.”

Stage 4: During the fourth stage the parties begin to move toward “willing” numbers/positions when it becomes apparent “want” numbers/positions will not be achieved. Advocacy and certainty biases dissipate and more realistic risk assessments are made. As with all earlier stages, the number of caucuses will vary.

“It ain’t over till it’s over.”

Stage 5: In Stage 5 reality firmly sets in and there is the final push to reach a settlement based on “willing” numbers/positions. The case or dispute either settles or not. Again, the number of caucuses it takes for this to happen will vary.

It is in Stage 5 that another of Yogi’s sayings comes into play: “*When you come to a fork in the road, take it.*” In mediations the first fork is “What I Want Street.” The second fork is “Willing To Do Avenue.” To succeed at a mediation, more often than not, the second fork is the one taken.

Finally, one last quote pertinent to defining success at mediation. This one is not Yogi’s but comes from two other famous philosophers, Mick Jagger and Keith Richards:

*“You can’t always get what you want;
You can’t always get what you want;
You can’t always get what you want;
But if you try sometimes,
You just might find,
You get what you need.”*



Ray Chadwick, the principal of Chadwick Mediation & Arbitration, LLC, is the author of the recently published book, *SUCCESS AT MEDIATION, How to Define and Accomplish It*, available on Amazon in paperback and Kindle editions.

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THE BARRISTER'S TALE

by Bob Berlin and Virginia Long Berlin



Many years ago in a faraway land a wise King ruled. Every day, crowds of peasants came before the King wanting his judgments. So the King appointed a young man to help the commoners and represent them. The young man, to be called a barrister, was knowledgeable of the law, and he felt obligated to represent the common man and his King. At his commissioning, the King commanded the barrister to help the peasants solve their problems using the most effective and least expensive methods and, only as a last resort, bring them to court. “Foremost,” he said, “Your success determines the fate of my court and the future of our Kingdom.”

The young barrister, humbled by his task, set out to meet the citizens and tell them of the King’s command. He went into the marketplace and talked to the shopkeepers. He stopped the ox-driven carts and talked to the farmers. He held classes under the old oak tree at the edge of town. At first, the people were suspicious; they listened and watched, but didn’t say much. Finally, someone in the village had a problem with his neighbor and needed to ask the King for a solution. The King summoned his newly-appointed barrister to take care of the matter.

The barrister listened carefully and asked many questions about the circumstances. He told the peasant about the law and explained how it worked. He drew word-pictures of what to expect if he went before the King. He suggested alternative methods for resolving his difficulty. The barrister explained how his fee, which the King told the barrister he could charge for his services, was set, what it covered, and ways it could be paid. The peasant followed all of his advice and told his friends. Soon the number of peasants appearing before the King declined.

The barrister liked his work, and he particularly liked the way the people looked up to him and sought his counsel. Whenever he traveled the village roads, the blacksmith, basket weavers, chimney sweeps, and scullery maidens waved at him. Children danced and cheered as he passed. His business was blooming like a field in early springtime.

The young man began to reason that he must dress like the lords and act more like a person with an important position, so he bought fine satin clothes and hired a coachman for his shiny new carriage drawn by a snow-white stallion. He thought, “Now, I look as important as I am. And, it all mine.”

As in all small towns and rural countryside, word traveled fast. Soon the peasants began coming to see the young man, telling their stories and asking for advice and representation. Everywhere he went there were more people to see, problems to solve, conflicts to settle and tears to wipe. The peasants learned that many problems could be settled without going before the King. Satisfied townspeople brought the barrister more clients, and soon he was busy every day. By this time, he was an experienced barrister who had heard all the stories and all the problems. He was making more money than he had ever dreamed.

He began to see himself as a member of the royalty. He dressed in his elegant clothes for all social occasions. He enjoyed hunting and fishing with the noblemen. The aging barrister decided that only the Kings’ court counted. He spent many enjoyable hours there. Here, the King began asking the barrister for advice. The barrister began swapping stories with the nobles about hunting game in the forest and fishing along the riverbank. Sometimes, and out of earshot of the King, the nobles even kidded the barrister about his clients and told him how lazy and dishonest the peasants were, how they had to be cajoled and forced to work and pay their taxes. “A worthless lot, they are,” one lord said.

By now, his was convinced he had all the answers. The lawyer thought to himself, I do not need to spend my valuable time with each and every person. The King makes quick decisions; why should I spend so much time coaching and representing these commoners?

He employed an assistant to talk to his new clients, get the information, check the written law of the land, and draw up the court petitions. The peasants were told how much they owed and when to report before the King. The lawyer stopped giving the people lessons on citizenship and how to save money by solving their own difficulties. More and more villages headed for the King’s court and less and less time was spent on advice and counsel.

As time passed, he began losing interest in helping the peasants. He was no longer interested in the farmer’s case over loss of his pigs or a storekeeper’s evidence of having been cheated.

Instead, he took the short way and considered what the King would prefer. When an especially scruffy peasant appeared at his door, the barrister thought, “Why can’t these people live their lives in such a way that they

stay out of trouble? Peasant problems and conflicts are consuming all of my time. Why can't they solve their own problems and leave me alone?"

Returning to his country estate one evening, exhausted after a particularly long and hard day in court, the barrister sought refuge in a bottle of wine. Falling asleep, he dreamed that a large, muscle-bound, hairy, and sweaty blacksmith, in a panic knocked on his polished mahogany door. The man's beautiful daughter had been taken by the landlord, in lieu of unpaid taxes. The man was shouting, "Help me! You must go before the King!"

The barrister became furious than an ignorant, worthless peasant would have the audacity to wake him in the middle of the night. He began shouting, "Get out! Do you really expect me to talk with your landlord or go to the King? You broke the law. What do you expect? Someone to hold your hand? Show you how to solve your own problem?" Suddenly, the lawyer was awakened by his own shrieking.

After a while, he dropped back into a fitful and restless sleep. This time he dreamed he was standing in the King's court which was crowded with rowdy commoners on one side and fashionably dressed noblemen on the other. Each group was tugging at him, taunting him with demands, accusations, and disparaging

remarks. The King was standing in front, scowling, pointing, and shaking his finger.

Frightened, the barrister cried out, "Why? What have I done?"

He was caught between two opposing forces; each with its own sense of justice. Sweating and shaking, he started to run from the court, the King, the shouting crowd. He stopped suddenly when he came face to face with his own image – the image of the young man— commissioned by the King.

Looking into his own eyes, he cried, "What happened? I am a good lawyer. I served the King. What am I to do now?"

Through the roar of the shouting commoners and noblemen, the barrister heard his younger image whisper, "the answers lie within you."

As he awoke and opened his eyes, he heard the King's charge, perhaps for the first time:

"You are to help the peasants solve their problems using the most effective and least expensive method and, only as a last resort, bring them to my court. Your success determines the fate of my court and the future of our Kingdom!"

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