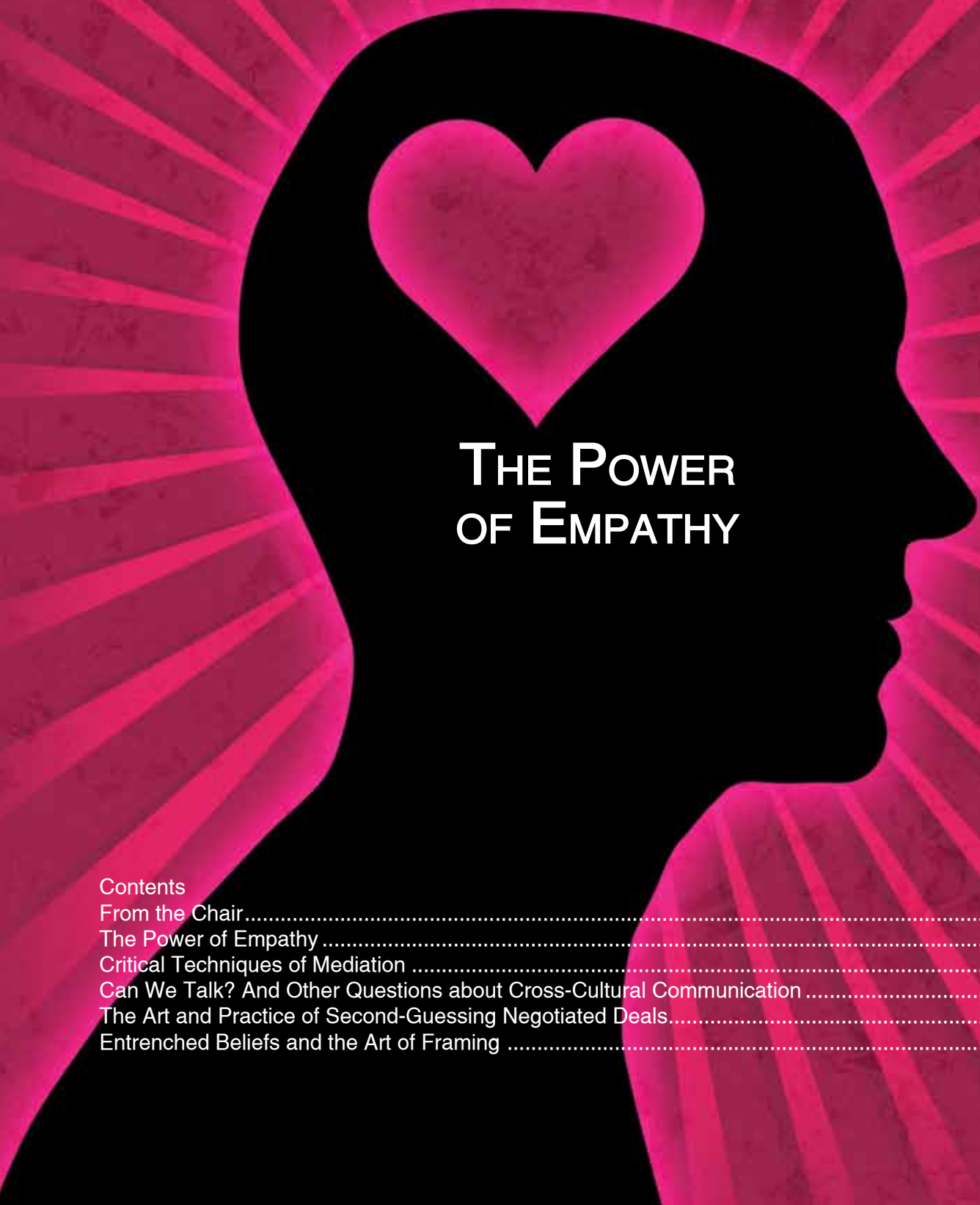
DR Currents

A Publication of the Dispute Resolution Section of the State Bar of Georgia Winter 2015



The Power of Empathy

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From the Chair

by Joan Grafstein

It has been an honor to serve as the 2014 Chair of the Dispute Resolution Section of the State Bar of Georgia. Judging by the enthusiastic comments from those who attended the 21st Annual Alternative Dispute Resolution Institute on Dec. 12, at the Bar Center in Atlanta and by teleconference in Savannah and Tifton, the program was a terrific success. There were thought-provoking, cutting edge topics and very practical topics, all presented by superb speakers. Personally, the conference met one of my main goals for the Section this year—diversity. While the Section and the dispute resolution field still have much work to do, it was heartening to see the gender and racial diversity among our speakers and a wide diversity of perspectives and topics.

David Joseph, our keynote speaker, thoughtfully addressed cross-cultural communications and bridging cross-cultural divides through questions. Our luncheon speaker, David Anderson Hooker, raised extremely important issues in his presentation, "Neither Truth Nor Reconciliation: A Narrative Reconsideration of the 'Justice for Harmony' Trade." The conference also included sessions on ethics with Timothy Hedeen's "The (In)Appropriate Role of Mediator Pressure" and on court actions involving mediation where Timothy Hedeen was joined by Raytheon M. Rawls. Superb panels tackled the interplay between mediation and arbitration, and innovations in managing unrepresented or pro se parties, moderated by John Sherrill and Wendy Williamson respectively. The program concluded with a timely and expert update on online dispute resolution by Susan S. Raines. We owe a great debt to all of the talented speakers who shared their expertise and experience with us. If you were unable to attend, please consider viewing an ICLE video replay of the program. Finally, I wish to thank Shinji Morokuma, director of the Georgia Office of Dispute Resolution, and the Program Planning Committee for all of their work on the program.

As Chair this past year, I have been helped tremendously by the Section's Board, the State Bar of Georgia, especially Derrick Stanley the Section Liaison, and of course Bob Berlin and Carolyn Raines who put together DR Currents, an invaluable resource for our members. And a special thanks to Adam Sutton and Bonnie Powell, who served with me as Chair-Elect and Secretary/Treasurer and who provided support throughout the year. I am delighted to present the gavel, crown, and most important, my predecessor Taylor Daly's invaluable resource manual, to Adam as the 2015 Section Chair. Taylor and I are excited that a new generation will lead the Section and send our best wishes to Adam and Bonnie. But like the soup commercial, know that we "will be watching you, Section people!" And we remain available to offer sage (old) advice. I wish Adam, Bonnie, and all Section members a wonderful 2015!

Joan Grafstein is a full-time mediator, arbitrator and special master with JAMS in Atlanta, where she concentrates on complex high stakes disputes in the business/commercial, class action, employment, ERISA, financial, healthcare systems, higher education, personal injury, real property, securities and software development areas. She joined JAMS in 2003 after more than 20 years as in-house counsel for large public and private research universities where she managed litigation and mediation and handled a wide variety of claims and business disputes. Grafstein is a Fellow of the Chartered Institute of Arbitrators, secretary of the Atlanta International Arbitration Society, a member of the National Academy of Distinguished Neutrals, past Chair of the Women in the Profession Section of the Atlanta Bar Association, and was Program co-chair for the American Bar Association Section of Dispute Resolution Spring Annual Conferences from 2010 through 2012. She speaks and writes frequently on dispute resolution topics including e-discovery in arbitration, cost effective commercial arbitration, women in negotiation and mediation, arbitration and mediation/ conciliation in China, and recently co-authored the chapter on Arbitration in Georgia Business Litigation (Robert C. Port, Ed.) ALM Media Properties (2014.)

The Power of Empathy

by Mark Baer

I recently read an article by Dr. Patricia Fitzgerald titled "The Groundbreaking Study Proving Dogs Can Help Us to Be More Fully Human." The study was based upon the results of mentoring at-risk teens serving time in juvenile correctional facilities in providing obedience training to sheltered dogs in order to increase the likelihood that they would be adopted. Fitzgerald explained that such teens don't tend to possess the emotional skills needed to live within a civilized society. Children typically learn such skills through healthy attachments in childhood and they can impact how children see themselves, discern the world, and interact with others. The study found that those who completed the program demonstrated "increased emotional intelligence, decreased self-serving/anti-social behavior, and increased empathy. [Since] empathy is what makes us human, dogs are teaching us to be human."

Despite the fact that it has long-been known that empathy is a learned skill, the results of this study are incredibly meaningful and important. This is especially true, considering the information contained within Harvard University's Making Caring Common Project's report titled "The Children We Mean to Raise: The Real Messages Adults Are Sending About Values" that was published in 2014. The report stated in pertinent part as follows:

> *Selfishness and indifference to others among both children and adults are commonplace. Too often, students who are different are mocked or bullied, too many children are disrespectful to both other children and adults, and too few children and adults feel responsibility for their communities ... Our findings suggest that youth's fundamental values are awry ... Youth appear to value caring for others less as they age ... When children don't prioritize caring, they're also less motivated to develop the social and emotional skills, such as empathy, needed to treat people well day to day ... [Instead,] they are at greater risk of many forms of harmful behavior, including being cruel, disrespectful, and dishonest. These forms of harm are far too commonplace...*
>
> *Any healthy society depends not only on developing in youth the urge and ability to care for others but also on instilling in them other ethical values. Perhaps especially, a civil and just society depends on developing in youth a strong commitment to fairness ... Our research suggests that we are not preparing children to create this kind of society ...*

In other words, at-risk teens are by no means alone with regard to their lack of emotional skills needed to live within a civilized society.

> *At the root of this problem may be a rhetoric/reality gap, a gap between what parents and other adults say are their top priorities and the real messages they convey in their behavior day to day ... Can we as adults 'walk our talk' about child-raising? After all, almost all of us believe that raising caring, ethical children is crucial. It's also no small matter that adults' basic credibility is at stake if young people, with razor sharp alertness to hypocrisy view us as saying one thing while consistently prioritizing something else. Moreover, the costs of inaction are high, given not only the risks to both our children's social, emotional, and ethical capacities and happiness but other threats, including increasing political factionalism and incivility at a time when we face huge problems that need to be addressed collectively ...*
>
> *The solution is straightforward, but not easy. To begin, we'll have to stop passing the buck. While Americans worry a great deal about children's moral state, no one seems to think that they're part of the problem. As adults, we all need to take a hard look at the messages we send to children and youth daily.*

Empathic skills are the key to solving this problem. Empathy involves understanding another person's situation from their perspective. As such, you must be able to place yourself in someone else's shoes and feel what they are feeling and without judging them. According to Dr. Brene Brown, Ph.D., LMSW, "empathy moves us to a place of courage and compassion. Through it, we come to realize that our perspective is not the perspective."

Usage of the word "empathy" appears to have increased significantly in recent history. In fact, people tend to throw that term around quite a bit and insist that they are empathic themselves. Unfortunately, most people are not self-aware and thus tend to see themselves differently than how others see them. In actuality, empathy predominantly involves learning about someone else's worldview. Furthermore, that learning process is shaped to a very great degree by one's personal relationships. In fact, a University of Virginia study conducted in 2013:

> *... strongly suggests that we are hardwired to empathize because we closely associate people who are close to us -- friends, spouses, lovers -- with*

our very selves. 'With familiarity, other people become part of ourselves,' said James Coan, a U.Va. psychology professor in the College of Arts & Sciences. 'Our self comes to include the people we feel close to,' Coan said. In other words, our self-identity is largely based on whom we know and empathize with.

The amazing and true story of Claiborne Paul Ellis is about the tremendous power of empathy that develops through our relationships with "people who are close to us." Mr. Ellis was a leader in the Ku Klux Klan who renounced his Klan membership in 1971 to become a civil rights activist. This unlikely transformation occurred because of a friendship that developed between he and Ann Atwater, an African-American grass-roots civil rights activist, while they served together on a steering committee to deal with court-ordered desegregation in Durham, North Carolina. Mr. Ellis died in 2005 and Ms. Atwater spoke at his funeral.

This is consistent with what we have seen play out in national politics with regard to issues pertaining to the LGBT community. For example, it took having a gay son for conservative Ohio Sen. Rob Portman to reverse his hardline position against gay marriage. When announcing his change of opinion, Portman said the following:

I've come to the conclusion that for me, personally, I think this is something that we should allow people to do, to get married, and to have the joy and stability of marriage that I've had for over 26 years. That I want all of my children to have, including our son, who is gay. My son came to Jane, my wife, and I, told us that he was gay, and that it was not a choice, and that it's just part of who he is, and that's who he'd been that way for as long as he could remember.

The impact of empathy in judicial decisions was addressed in an article by Adam N. Glynn of Harvard University and Maya Sen of University of Rochester published in 2014 and titled "Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?" In that article, the authors stated the following: "Judges with daughters consistently vote in a more feminist fashion on gender issues than judges who have only sons. More broadly, this result demonstrates that personal experiences influence how judges make decisions." The authors mentioned that this was consistent with most public opinion scholarship literature, which reflects that individuals who have daughters tend to be more liberal with regard to political and social issues.

When Tim Cook, CEO of Apple, announced that he was gay, he said, "Being gay has given me a deeper understanding of what it means to be in the minority and provided a window into the challenges that people in other minority groups deal with every day. It's made me more empathetic, which has led to a richer life." What Mr. Cook expressed was in compete accord with the findings of the University of Virginia study. If a person happens to be a member of a minority group that is discriminated against, how much more familiar can a person be than with themselves?

The first sentence in Martin Golder's article titled "The Journey to Empathy" is "In conflict resolution empathy is a central tool and way of being."

I will be the first to admit that when Sen. Rob Portman reversed his stance on same-sex marriage because of his own son's sexual orientation, I viewed him as nothing but a self-serving hypocrite. In the past, I have had that very same reaction each time a politician has reversed their stance on an issue only after understanding the harm it will cause someone dear to them. I now realize that those politicians were not self-serving hypocrites at all; rather, they developed empathy through learning about someone else's worldview. This actually explains why the more

liberal states are those with a more diverse and integrated populace. The more insular the group, the more limited its worldview.

Having a limited worldview affects outcomes and tends to damage those who fall outside of that perspective. This has very broad implications. For example, Scott Page, a professor at the University of Michigan who studies diversity in complex systems, says:

> *What we think of as 'science problems' affect everyone -- children, women, and men. What science decides to solve and for whom things are designed have a lot to do with who's doing the scientific inquiry ... Amid growing signs that gender bias has affected research outcomes and damaged women's health, there's a new push to make science more relevant to them ... Analysts say that more women are needed in research to increase the range of inventions and breakthroughs that come from looking at problems differently than men typically do ... Involving more qualified women, as well as additional 'social identities' -- gay people, African Americans and Latinos, those with physical disabilities, and others -- can enrich the creativity and insight of research projects and increase the chances for true innovation.*

If a mediator, a judge, a politician, a scientist, or anyone else for that matter, has a limited worldview as a result of their personal background and life experiences, how does that impact their assumptions and ultimately the decisions they make both personally and professionally? Unless a person has become more empathic by being a member of a minority group that is discriminated against, what personal relationships shaped their learning process? In a diverse society, how do limited or otherwise sheltered worldviews affect the level of civility and commitment to fairness?

Mark B. Baer is recognized as a 'thought leader' in many areas of Family Law for his provocative and forward-thinking ideas on improving how Family Law is handled. As a former litigator who advocates the use of mediation and collaborative law whenever possible, he points out the inherent flaws that exist in litigating Family Law matters, then reveals more creative and less destructive approaches. Utilizing his vast array of information and knowledge, well beyond the law itself, Baer provides insight on how the dissolution of familial relationships, as typically practiced, leads to less-than-optimal results, both financially and emotionally. He also highlights the difference between 'dispute resolution' and 'conflict resolution' to offer simple ways of achieving a better result for all parties involved, including the children.
Baer was recognized as Southern California Super Lawyer in the family law category in 2012 and 2013, and included as a Top Attorney by Pasadena Magazine from 2010-13.

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Critical Techniques of Mediation

by Nicholas C. Moraitakis

I. CONTEMPLATING MEDIATION

It was not so long ago that alternative dispute resolution did not exist as an option in the minds of litigation attorneys. In those days, my practice was principally spent representing insurance companies and corporate clients in defense of tort claims. When the call came in for representation in a new case, it was essential to make a preliminary evaluation as to whether or not the case would be one that would be headed to trial or headed toward settlement. The opportunity to consider and evaluate that option early on is the advantage that a defense lawyer had and still has.

Contemplating Mediation

Preparing for Mediation

Choosing the Mediator

The Mediation Process

Plaintiffs and Defendants Are Different

In this day and time, given the prevalent role that mediation and arbitration play in the litigation process, whether one represents the plaintiff or defendant, it makes sense to begin early to steer the case toward alternative dispute resolution in most instances. Each side should begin by accomplishing the tasks necessary to ready the case for evaluation by their client and their adversary, while at the same time not necessarily going to the full extent necessary to present the case before a jury. Obviously, there is an economic advantage to pursuing mediation at a point prior to trial when enough work has been done so that everyone knows where each side stands. The finishing touches may not be necessary because the level of education needed for mediation may not be as high as the level necessary to educate a jury.

For instance, it very well may not be necessary to spend the time, energy and money necessary to produce medical testimony for trial by videotaped depositions. Lawyers and the parties involved in evaluating the case are generally sophisticated enough to evaluate medical issues based on medical charts and diagnostic studies. However, if lawyers and parties are going before a jury, actual testimony from doctors can be instructive and informative for lay decision makers.

II. PREPARING FOR MEDIATION

There are a number of things that have to be done in order to ready a case for mediation and obviously that will vary depending on the nature of the case. Some cases can be mediated pre-suit, and I have been involved in such cases both as a litigant and as a mediator with some success. Assuming suit has been filed, there obviously are certain essentials that should be performed prior to declaring a case ripe for mediation. Liability needs to be pinned down, and any witnesses should give either sworn statements or depositions under oath. Information relative to insurance coverage, including primary and excess policies, needs to be known by all parties. The insured also needs to understand this, as he or she may have exposure beyond the level of insurance coverage. The parties obviously need to be deposed. The manner in which the plaintiff comes across during deposition is an important element in the evaluation of a defense lawyer and defendant insurance carrier.

Legal issues need to be flushed out. There may be legal issues that may be a stumbling block to a plaintiff getting to a jury. Each adversary needs to make a decision as to whether or not mediation prior or subsequent to ruling on motions for summary judgment is the best approach. I was involved in a very large detailed and significant case in which motions for summary judgment were filed by both plaintiff and defendant in front of a federal judge. Pending a ruling on those motions, the judge ordered the parties to mediation, which ended up being successful. One of the elements in the success of that mediation was the concern by both parties of what the case would look like depending upon the Court's rulings on the pending motions. While certainty on legal issues may seem to be the best recipe for success in proceeding to mediation, the fear of the unknown may provide leverage which can result in a case being resolved.

III. CHOOSING THE MEDIATOR

Once the lawyers have gotten the case to a position where mediation is appropriate, there are a number of things that need to be considered and certainly communicated to the client. Most of my work has been in personal injury litigation, so I tend to use that fact pattern

as a basis for discussion. The first issue which must be addressed is choosing a mediator. From a plaintiff's standpoint, I generally prefer to let the defendant choose the mediator. After all, the defendant is the one with the money, and it seems paramount that the defendant be comfortable with the person we are relying on to assist in resolution of the case.

That said, we all know mediators who have different styles in their approach to mediation. In my experience, some mediators tend to be more quantitative and intellectual in their approach while others tend to be more sympathetic and compassionate in their approach. Depending on the nature of my plaintiff and the extent that I want to influence the choice, these factors can play an important role. For instance, in a case where the plaintiff is the family of a child who has died or someone with very serious injuries and a great deal of emotional distress, one may seek a more compassionate mediator who will best be able to deal with this human emotion. In the case of a particularly intelligent plaintiff, who over time had proved to be inquisitive and perhaps more rational than emotional, a more analytical mediator might be a better fit. These are some of the things that need to be considered when addressing the choice of a mediator.

A mediator's role is to assist the parties in taking a more objective look at the strengths and weaknesses of their case. Part of what the mediator does during the course of a mediation is engage in reality checking to assist the parties in evaluating weaknesses in their case that they may not have adequately considered.

Generally speaking, there are two types of mediators. One type of mediator is referred to as a facilitative mediator. The facilitative mediator tends to engage the parties in problem solving and reality testing by asking questions to help the parties better understand the risks confronting them in pursuit of their case t o trial.

The second type of mediator is referred to as an evaluative mediator who may more readily express opinions about a likely outcome in the case. Mediators are trained to ask questions to make people think. Therefore, when questions are asked, by all means think!

IV. THE MEDIATION PROCESS

Often times, mediators will ask questions of the lawyers in individual caucuses which may address the likely outcome of the trial, the time it will take to get to trial or appeal, the costs and a verdict range. Therefore, it is essential that the advocate come prepared to answer those questions and that those answers not be heard by the client for the first time in the caucus with the mediator.

There are some basic considerations which need to be addressed:

1. Make sure everyone understands who will be present at the mediation and that those present can really seal the deal.
2. Determine how you wish to approach preparation for the mediation. Preparation may be different for a plaintiff and defendant. The plaintiff needs to determine to whom he or she is addressing their case. It should be addressed obviously to the person with the money and to the mediator. Sometimes it is important for the person with the money (insurance representative perhaps) to eyeball the plaintiff's lawyer and be convinced that those representing the plaintiff will do whatever it takes to achieve the best outcome at the end of the day.
3. The mediator needs to be armed with information, so be prepared to provide that information at the mediation or prior thereto.
4. The client needs to be prepared, and decisions need to be made about how much the client is going to say in the opening session of the mediation.
5. Thought needs to be given as to the level of initial offers and demands that are going to be made. It is my experience both as an adversary and as a mediator that the initial moves in mediation are oftentimes somewhat meaningless on behalf of both parties. There is a downside to that approach. First of all, this tends to make mediations last longer. Secondly, unrealistic initial numbers may have a rather chilling effect on negotiations.

V. PLAINTIFFS AND DEFENDANTS ARE DIFFERENT

In the personal injury environment, there is a significant difference between plaintiffs and defendants which needs to be addressed either by the lawyers or the mediator. This is particularly true when the case is one which deals with a serious injury that may be life changing for the plaintiff or the plaintiff's family. In those instances, the plaintiff comes to the mediation with the weight of the emotion of the loss. To them, an appearance at mediation may as well be their first day in court. They come with the expectation that somehow, at the end of the day, they will receive compensation for their loss.

On the other side of the table are the defendants, who are professionals. While for the plaintiff what is happening during the mediation session is a matter which will affect their lives, for the defendants (insurance carriers), it is just business. For the plaintiff, the loss that is being dealt with on this day of mediation is their only loss. For the defendant, on the other hand, this is simply one of a large number of files in their inventory. It is imperative the plaintiff be made aware that the mediation process is not one which will bring them full compensation. Instead, it is a process of analyzing risk. In that process, the defendant has the advantage.

Some mediators are very good about making that point, and some do not focus on it. Therefore, as an effective advocate, it is very important that the different places from which the two parties come be explained in depth to the plaintiff prior to the beginning of the mediation.

Mediation is an exercise in patience, creativity and compromise. The need to act politely and professionally toward adversaries is supremely important leading into the mediation process, during the mediation process and coming out of the mediation process in the event the matter is not resolved. Often times cases are not settled at the mediation conference itself. Most mediators are willing to keep the file open and follow up with telephone calls and e-mails in an effort to bring the parties to a close, when the positions of each party warrant further thought and debate. Therefore it is a good idea to request the mediator's assistance and welcome any opportunities for the mediator's help in the days, weeks and sometimes months immediately following the mediation in an effort to get the case settled.

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Can We Talk? And Other Questions about Cross-Cultural Communication

As the U.S. becomes more diverse and progresses toward minority-majority status, the importance of effective cross-cultural communication is increasingly apparent. In the face of debates over Ferguson, immigration and Ebola, the skills to create safe and respectful conversational spaces are ever more highly valued and needed. Because we are living in a time of escalating polarization in terms of how our society engages differences and controversial issues, civility and community are crumbling.

Every human interaction is a cross-cultural interaction, whether we recognize it or not. We need to develop a deeper understanding of why the "ugliest four letter word in the English language" presents such challenges and dangers. That word is "them," as photographer Dick Simon suggests, and it contributes to divisions, stereotyping, polarization and despair. Unfortunately, we are hardwired to respond to such perceived threats in ways that diminish our capacity to connect across cultural and identity-based divisions.

Bridging cultural divides begins with the awareness that we, as well as "they" are products of culture and reflect cultural traditions in all our speech and actions. The ability to better understand one's own cultural background can be paired with the power of observation to increase awareness, an essential first step in spanning cultural divides. Also important is the ability to begin to recognize one's own cultural assumptions and to test these out. The art of using questions to deepen understanding and build bridges across divides of culture and identity can help us to address such challenging cross-cultural issues as immigration, racial divides and potential pandemics.

The keynote speech will address the building blocks for effective cross-cultural communication; the workshop will provide participants the opportunity to utilize questions that promote connection and community across-cultural differences.

The Art and Practice of Second-Guessing Negotiated Deals

by Robert Benjamin

Among all known species, human beings appear to have the most developed sense of consciousness, which cognitive neuroscientists understand to be "a subjective awareness of the world around us and ourselves as actors in it." While the sources of this awareness remains deeply puzzling, it is manifested every time a person criticizes and second guesses his or her own, or another's, actions and decisions. Second guessing others, not surprising, appears to be far more frequent and publicly expressed. Second guessing can take varying forms ranging from the commonplace commentary of the "woulda, shoulda, coulda" kind practiced by largely uninformed observers, to the more rigorous and elevated styles of historians who strain to re-examine and reappraise history, and scientists who challenge prevailing scientific understandings. The hall of fame of second-guessing, therefore, must include incidental armchair quarterbacks and television color commentators, alongside with the best minds of human kind like Galileo, Darwin and Einstein. The space for political pundits would fall somewhere in between.

Negotiated deals, most obviously in the political realm, but in a friends divorce, or a high profile business merger as well, draw a disproportionate share of second guessers, about the fairness, although not highlighted in history like wars have been, negotiation is always been in the shadows. People tend not to second-guess wars as much, maybe because of the cognitive dissonance that comes about when there is a suggestion that soldiers died for no good reason. But, there are many histories written of warfare and decidedly few histories of negotiation.

In my yet to be crafted graphic, *The Illustrated Short History Of Mankind*, outlining the deliberations of social and political events, there will be a series of frames following the format of an extended cartoon strip, depicting the five basic recurring stages. The first will concern how the compulsion of the first two humans to make laws and rules to control the behavior of the third person and others who follow. As it has become complexified, legions of symbiotic advisors and lobbyists have gotten into the act. And governments are not alone; most every organization, religion, and business or corporation is a prolific rule maker. The second section will illustrate the many and varied forms of adjudication and punishment for transgressions of the laws or rules, from "an eye for an eye," death sentences and banishment to imprisonment.

Third will be the wars and insurrections that invariably occur when people feel they have been aggrieved by the laws and rules. And on the other side, the "righteous use of force" has always been the traditional means by which to maintain law and order and social and political control Force has always had the allure of being the most simple, direct and final means of resolving real or perceived problems. The fourth frame will illustrate negotiation. Largely overlooked, this is the means people use to re-establish some semblance of normalcy between victors and victims after the use of force has been exhausted. Forget trust and good will, negotiation is the means by which people survive; every war necessarily ends with a negotiation. Finally, the fifth screen will depict the ever-present varieties of second-guessing of any negotiated deal. As regular as breathing in and out, and made all the easier by a "Twitter" or "Facebook" account, not just pundits, but most people enjoy the feeling of control offered by making a comment, be it informed or uninformed, on the logic, validity, and fairness of the resulting agreement and the motives, biases, ethics and morality of the negotiators or mediators involved.

Second-guessing can continue to occur regarding a negotiated deal for centuries in a historical and evolutionary dialectic worthy of Hegel and Darwin. If the second-guessing gains sufficient momentum, it may generate a "tipping point" that becomes, at least for some,

an axiomatic lesson of history. For example, even British Prime Minister Neville Chamberlain's negotiations with Nazi Germany's Adolph Hitler, which resulted in the Munich Accord of 1938, designed to avoid the Second World War and has been widely regarded as a failed act of appeasement and proof of the limits of negotiating with tyrants, is currently being second guessed and reappraised 75 years later. (*Baumann, Nick, "Neville Chamberlain Was Right, Slate.com, Sept. 28, 2013*)

Although I am mindful that my *History* risks being second-guessed and panned as overly simplistic, few can deny the pervasive practice of second guessing. There are two axioms of the second-guessing of negotiated agreements that are firmly implanted. First, no negotiated agreement, concluded in any context, be it a divorce settlement, business deal, or geopolitical treaty, escapes being second-guessed. A second corollary axiom holds that the more difficult and complex the issue or controversy being negotiated, the greater and more intense will be the nature of resulting second-guessing.

The strength and value of the negotiation -- one of the most basic and effective processes humans have developed to manage difficult controversies -- lies in the core emphasis on flexible, candid, improvisational and creative thinking. Those strengths are also the greatest weakness of the process making it an especially vulnerable and a likely target of second-guessing. Although negotiation is a pragmatic and eminently sensible means of resolving differences, it is not an entirely rational or logical one. What goes on in most negotiations is often circuitous and not easily explained. Human beings are seldom the rational actors who make reasoned decisions out of their calculated self-interest that many would like to presume them to be. Not infrequently, their decisions are predictably irrational.

Negotiation can be likened to the makeshift use of duct tape to stem a leak in the pipes of an old plumbing system; it is a means of imperfectly patching together peoples' different understandings and interpretations of events until such time as they might be more comprehensively addressed. Negotiation is not about finding right answers or the truth, and seldom leads to elegant solutions where everyone is satisfied with the final agreement. Generally, it results in a workable agreement people can live with. For this reason, idealists and ideologues are especially suspicious, resistant and dismissive of participating in negotiation for fear of being viewed as sell outs to their principles. Even under the best of circumstances the process is difficult; people must muddle through a thicket of questions and concerns in making the decisions necessary to manage the risks presented by complex situations where uncertainty and ambiguity hold sway. The combination of the complexity of the matters in controversy and the long standing ingrained historical suspicion of negotiation makes for a fertile terrain for doubters and second guessers.

Second-guessing has become an art form in its' own right and worthy of study. At the very least, it is revealing of the lack of understanding of the negotiation process by people in general and not a few professionals as well.

President Obama, not unlike Neville Chamberlain before him, has been roundly criticized---and in some quarters applauded---for the deal that appears to, at least in part, resulted from his issued ultimatum of a "red line." An earlier article, "Obama's Red Line: The Uses of Ultimatums and Other Commitment Strategies in Negotiation," Sept. 2013) discussed the origins, purpose and value of such tactics in difficult circumstances like those presented by use of chemical weapons by Syrian President Assad in the ongoing civil disturbance in that country. The use of an ultimatum, a quasi-coercive negotiation tactic, in this case the not so veiled threat of a military strike if chemical weapons were used, is common in varying forms in all negotiations regardless of context and not just in political matters. The tactic appears to have worked; Syrian President Assad and Russian President Putin, a key Syrian ally, appear to have taken Obama's commitment to a military strike to be sufficiently serious and authentic so as to actively pursue the negotiated management of Syria's chemical weapon stockpile.

Nonetheless, as George Packer observed, "(I)n the dominant Washington view, President Obama has been outmaneuvered into complying with Syria and Russia by his own bumbling." Whether by sheer luck or canny strategizing, however, Obama bought about "the most auspicious moment to negotiate a political solution since the war began." In addition, there is further suggestion

that Obama's displayed resolve toward Syria served as a signal/warning to Iran, with whom the United States has long been at odds over their presumed pursuit of nuclear weapons, that has caused some measure of softening in that controversy. Packer observes, as Thomas Schelling had back in the Cold War days, "when diplomacy (read: negotiation), supported by sanctions and force, or the threat of it, persuades tyrants to back down they have a way of growing weaker, sometimes terminally." (Packer, George, "Negotiating Syria" The New Yorker, Sept. 30, 2013)

Notwithstanding the seemingly successful aversion of a military strike or war, however, Obama's actions have been "excoriated as bumbling." As Amy Davidson noted in a comment in the New Yorker, many view him to be "without credibility in pursuit of a rudderless diplomacy (that) has embarrassed America on the world stage. …(Every turn looks like an act of weakness." In this "version" of the negotiation, she notes, "(I) t would have been easier for the President to have stuck to his initial decision (to pursue a military strike) for the sake of credibility." In fact, for many of the hardliners, the negotiation was a "toothless" façade and that even a mere "pinprick" military strike would not be enough. (Davidson, Amy, "Comment: Harder Answers," The New Yorker, p41-42, Sept. 23, 2013) Historically, negotiation and negotiators have always been suspect; the process is viewed as "just a bunch of talk" that is ineffectual, and those who counsel negotiation are weak willed and morally questionable.

Davidson, not unlike a fair number of practitioners, especially those who approach negotiation from a rational perspective, was troubled by what appeared to be the same "careless certainty that drove George W. Bush in Iraq" Obama's willingness to improvise, made him appear indecisive." There is no question but that the use of an ultimatum risks closing down the negotiation process. Many viewed the President's assertion of a "red line" as an unnecessarily intemperate and simplistic "cowboy" approach. Again, Davidson suggests as much by observing "Obama's worst moments, … have come when he ignores complexity, not when he embraces it. …His performance …has had a fly-by-night quality that does not inspire confidence." She does not appear to appreciate that negotiation requires just such improvisation, if for no other reason than to "rearrange the board and shake things up." Raising the stakes by the use of a forceful ultimatum can incite different perspectives that in turn increase the number of possible outcomes. However, by definition, the results of such an improvisation are not entirely predictable.

Experienced negotiators and mediators recognize, as few others do, that effective practice requires the ability to convey authenticity as a serious, credible, and tenacious player. In addition, the ability to sense and take advantage of the rhythms of the process as they develop and which are often unplanned and unanticipated is critical in complex matters. These character traits are not sufficiently accounted for by most of the rational models of negotiation. Insisting on a firm and consistent foreign policy that is applied too firmly will constrain the negotiation process. And, that process will almost never unfold in a predictable straightforward manner most expect. The misapprehension of the process is only exacerbated by the complexity of the geopolitical affairs of Middle East. Even before the recent events of the "Arab Spring," the complex issues of the region took on many of the qualities of an especially wicked problem; the issues are constantly shifting between scarce resources and identity struggles giving rise to protracted conflicts between peoples with long standing enmities, histories and traditions that reach back to ancient times, at any given time there are multiple interrelated conflicts within and between countries, each of which are multi-variant, and the options to manage the conflict are not clear and carry considerable risks of unforeseen and unintended consequences, which are likely to radiate throughout the rest of the world. Given the level of complexity, the expectation of a consistent foreign policy is a naïve, if not an irrational, expectation. Negotiating and managing these matters require an especially high degree of improvisational flexibility and while certain basic principles might offer useful guidance, such as the greatest hesitancy to forcefully intervene in the affairs of those countries, a preset approach is simply not workable. In fact, especially in a world filled with contradictions and inconsistencies, "bumbling through," not unlike "muddling through," might well be the only valid approach, even if it does not comport with a traditionally rational thinking.

The same kind of second guessing offered by fans in the stands of a sporting, or for that matter, by any group of the bystanders that offer opinions of the "woulda, shoulda, coulda" variety, has been practiced since the beginning of time. Psychologically, such commentaries appear to serve the function of bolstering ones' sense of control and self-confidence: "if I were there, I'd know how to handle the situation." There is also a measure of self-righteousness involved: "I could have done it better, or handled it the right way." In addition, because second-guessing is not easily susceptible to empirical test or validation, the activity is given free rein. Pundits, lay or professional, are allowed free rein to expound without any requirement for effortful thinking.

Second-guessing can sometimes be constructive and useful, especially when it is turned inward by a negotiator or mediator in the form of reflective practice. Debriefing a process and considering what might have been done differently, what cues or opportunities might

have been missed and why, and were the issues framed effectively and all options considered? However, reflective practice unlike second guessing, requires abandoning the certainty that one knows the right answer, straining to become aware of the heuristic biases and habits that unwittingly influence a practitioners negotiation approach and style.

Negotiation is, perhaps the fullest expression and reflection of the messy operation of the human brain. Unlike other disciplines, for example, law, medicine, counseling, or science, where the practitioners have the presumptive luxury of limiting their focus on traditionally rational principles and methodologies, the practice of negotiation cannot. In fact, an effective negotiator is obligated to recognize that their own and other peoples effortful, rational and analytical thinking processes are forever embedded in the emotional functioning of the brain which do not just allow for errors or mistakes in thinking but encourage ongoing shorthand intuitive judgments that serve a purpose but are frequently invalid. (Kahneman, Daniel, *Thinking Fast and Slow*, 2011) Negotiators must attune themselves to not only their own heuristic biases, but also the dynamics and unexpressed fears and concerns of those involved in the negotiation of any issue. This essential layer of the process is ever-present and contributes to the perception of negotiation as a confused, circuitous, and sometimes unwieldy one, which is always susceptible to second-guessing.

A negotiator or mediator entering into a complex, dynamic, and ever-shifting conflict terrain should, therefore, be prepared that most negotiations are not likely to end cleanly and without some loose ends. Only observers have the luxury of knowing the right moves and are allowed the unfettered pleasure of making unequivocal pronouncements about how the negotiation should have ended or if the matter should have even been negotiated.

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Entrenched Beliefs and the Art of Framing

by Douglas E. Noll

Introduction

Hypothetical mediation:

On Oct. 12, 2012, Melody was stopped at a red light at the Willow/Nees intersection in Anyville, Calif. Her car was in a proper lane and stopped in full compliance with the law. Lucas, driving on a suspended license, intoxicated on narcotic medication, and traveling at a high rate of speed, rear-ended Melody. The impact drove Melody's Toyota Forerunner into a Silverado truck a car length in front of her. Lucas was driving an 11,000 lb. H3 Hummer. His car suffered $8,000 in damage. Melody's Forerunner was totaled. The 6,000 lb. Silverado suffered $12,000 in damage.

Melody suffered significant to moderately severe soft tissue damages. After two years, she still suffers fatigue and headaches. She is a full time college student with a 3.9 GPA. She is a pre-med student.

- Total economic damages were $26,000. Liability is not disputed. Punitive damages are possible because of Lucas' intoxication.
- The policy limit is $500,000.
- The insurance company requested a mediation, which occurred on Oct. 12, 2014, exactly two years after the collision.

During caucus with Melody and her attorney, the mediator learned that Melody is an attractive 24 year-old woman. She is a full time college student studying pre-med. She presents well and will be well-liked by a jury. She appears honest and has clearly suffered because of the collision.

During the caucus with defense counsel and two adjusters, the mediator learned that the defense believes Melody to be not credible because she cried during her deposition. They believe she was over-wrought for the severity of the collision and soft tissue nature of the injuries. They also do not believe that the economic damages support a large general damage claim. They believe they can destroy Melody's credibility because they think she is overreaching. The insurance company indicated that it valued the case at significantly under $50,000.

At the mediation, Melody demanded the policy limits less the automobile repair costs and the amounts paid to the occupants of the Silverado.

The insurance company walked out after being presented with that demand by the mediator.

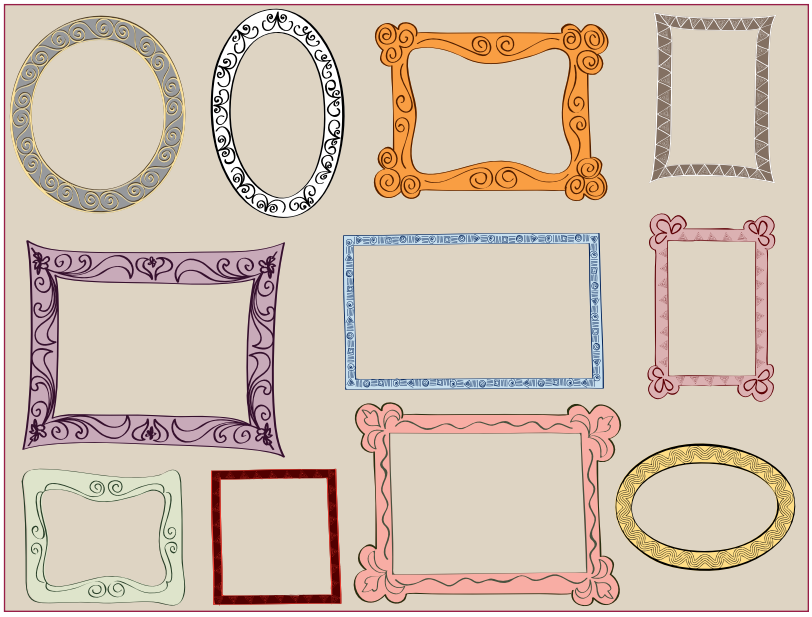
What is going on?

This case presents a classic case of mis-matched frames, leading to the impasse. Unfortunately, the frames were so deeply embedded by the time of the mediation, there was no room for reframing. The fast impasse was therefore predictable and unavoidable.

The aphorism "perceptions are everything" is more true than we imagine, especially in mediation. How lawyers, adjusters, and parties frame the case in their minds largely determines whether the matter will settle or not. A principal role of the mediator is to reframe the case. Reframing is usually necessary because of the operation of cognitive biases that distort party decision-making. Understanding how and why we create frames is an essential foundation to any mediator's practice.

What is a Frame?

A frame is nothing more than a reality constructed by our brains to make sense of the world around us. Frames are completely subjective in nature. The subjective reality created by a frame may be close to objective reality or may be radically different. To each of us, however, our frames



tell us what is real or not, regardless of any empirical facts to the contrary.

The frames we create define what is important to us. This is called framing salience. We use memory, emotions and environmental cues to create frames that work for us. Frames are generally created pre-consciously, which means that they arise outside of conscious awareness and before we know they have been created. The speed at which frames are created helps us make snap decisions without effort, a decision-making process Daniel Kahneman calls System 1 thinking. Without System 1, we would have to ponderously think about everything. In all likelihood, our hominid predecessor of 200,000 years ago would become a Happy Meal for a saber- toothed tiger while he considered whether he was in danger or not. Framing allows us to almost instantaneously judge a situation, make sense out of, and react. It has a strong evolutionary benefit in a dangerous, uncertain environment.

Of particular significance to mediators and negotiators, framing defines what is perceptible and what is ignored. This is called selective perception. What is important to us is within our frame; what is not important does not exist. Selective perception was uncovered in a classic experiment in 1998 by Dan Simons and Chris Chabris. Their experiment, called the Invisible Gorilla, has been listed as one of the top 10 psychological studies of the 20th century. Their book, *The Invisible Gorilla*, provides useful reading for every mediator and trial lawyer.

Because framing is a System 1 function and excludes information not salient to the frame, framing makes it easier to find information that confirms the frame. Consequently, we are subject to the confirmation bias. The confirmation bias is our tendency to look only at confirming evidence and to reject contradictory, but true, evidence. This is a fundamental nature of System 1 processing. Looking for information that contradicts or is outside the frame is a System 2 process. System 2 thinking is painful, effortful, willful, and conscious. Unless one has a well-developed System 2, which we call critical thinking, System 1 will be the default method of decision-making.

The confirmation bias works this way:

We will win this case at trial.

Our frame excludes all evidence that is inconsistent with this statement. Furthermore, System 1 can only search for information that supports the truth of this statement. It is incapable of searching for information that disproves this statement. Only System 2 has the ability to disprove the statement.

Now consider this statement:

We will defend this case at trial.

Again, System 1 will ignore all information that contradicts this statement and look only at information that confirms the statement. We have to engage System 2 if we want to disprove this statement.

Because of the informality of mediation and the general lack of preparation for negotiation, we often see competing frames offered by the parties. Furthermore, we often face stiff resistance to any information that is inconsistent with the dominant frame. Sometimes, the resistance rises to indignation and anger. Lawyers often leave their System 2 thinking in their offices when they attend mediations. Thus, they become enslaved to System 1, which may lead to poor decisions.

Our job as mediators is to figure out how to reframe the problem so that thoughtful decisions become possible.

How was this mediation framed?

The plaintiff framed the case from a perspective of injustice. She suffered significant soft-tissue injuries that were painful and slow to heal. Because of the litigation delays, she has been hounded by bill collectors for the medical bills she has incurred. In addition, her education was delayed for months as she recovered. She is also incensed that Lucas was intoxicated on a prescription narcotic when he crashed into her. His irresponsibility is being defended by an insurance company that so far refuses to settle her claim. In her mind, the insurance company is just as culpable as Lucas for her suffering.

The defense framed the case from the perspective of the over-reaching plaintiff. In the defense frame, the relatively small amount of economic damages, the absence of catastrophic physical injury, and the emotionality that Melody displayed at her deposition all suggest a greedy plaintiff syndrome. The defense frame sees this as a low damage case.

The mediator's frame saw this as a case with problems for both sides. On the plaintiff's side, the soft-tissue injury and the low economic damages decreased the settlement value of the case. While Lucas was intoxicated, he is insolvent. Therefore, pushing for punitive damages will be counterproductive. Not only would a punitive damage judgment be uncollectable, it would also negate coverage. On the positive side, Melody presents as an attractive, well-spoken young woman whom a jury will like and listen to. Her story of suffering is compelling. The problem is that her potential damages could range from $50,000 to $300,000, depending on the jury's decision.

On the defense side, the mediator saw that important, uncontested facts were being ignored. The force of the collision was undeniably powerful. A Hummer H3 slammed into Melody's Toyota Forerunner with enough kinetic energy to drive it, with brakes on, a car length ahead to slam into a Silverado truck. The Silverado suffered $12,000 in damages and Melody's Forerunner was totaled. That suggests that Melody's soft-tissue injuries were just as severe as she said they were. The mediator also observed that the defense portrayal of Melody was stereotyped and dehumanizing. While the stereotyping supported the defense frame, it ignored the strong likelihood that Melody would be well-liked by a jury. The defense bristled when the mediator recounted these inconvenient facts, demonstrating a classic System 1 framing problem.

Mediator Reframing

There are a number of ways to deal with framing problems. Here are some examples of mediator tactics when faced with a framing problem:

Create a contrasting frame around attributes, issues, responsibilities

Sometimes, the mediator can retell a story that creates a contrasting frame. If a party is locked into a frame, a parable or story can be useful in demonstrating the limits of the existing frame.

What is missing, being ignored, or is outside the frame?

Because frames are created pre-consciously, the mediator can attempt to invoke the parties' and counsel System 2 thinking by asking questions. What is your frame excluding? Why? What happens if you create a reality that more inclusive? What can both sides agree upon?

Why is one frame being emphasized and another ignored?

Frames arise in part from motivations for a certain reality to exist. Lawyers attempt to force their frames on a case out of a desire to win, look tough for a client, or game the mediator. Sometimes, the mediator can ask about motivations for holding a frame. If the mediator senses gaming going on, it can be called out in a way that ends the game. In those situations, the mediator must create a new frame that preserves the face and self-esteem of counsel or risk intense antagonism at the implied challenge to integrity.

Are there common values? Can a frame be created around agreed realities?

Sometimes, the mediator can reframe the case by using common values shared by the parties. For example, both sides desire a settlement. Both sides acknowledge that liability is uncontested. Both sides acknowledge that the intoxication has the potential for punitive damages. Both sides acknowledge that their view of the potential verdict is quite different. Both sides acknowledge that trial by jury is, in this case, likely to lead to an unpredictable and unknown result. With all of this in mind, does the desire for settlement outweigh the uncertainty of trial?

Pushback and Resistance

As every mediator has experienced, people resist changing frames. They do not want to imagine an alternative, more complex, difficult, challenging or threatening reality. Lawyers in particular resist alternative frames offered by the mediator, fearing that by doing so they will be "influenced" to give up more than they should. The best defense is a strong offense. Of course, carried to an extreme, this leads to impasse.

Frame changing means effortful, mental work. The understanding and acknowledging of the resistance with compassion often helps mediators to work patiently through the day.

Finally, if all else fails, frame the choices and consequences for each side. Let them decide for themselves the risk of trial or the certainty of settlement.

Conclusion

Understanding the nature of frames, how we create them, and why they can be pernicious is foundational to every mediator's toolbox. Framing is how we create our reality, whether objectively true or not. Studying how parties' and counsel frame a case and thinking about ways to reframe the case can be a useful expansion of a mediator's toolbox.

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